CIV/APN/44/93

IN THE HIGH COURT OF LESOTHO

In the matter between:-

HAILLE SELLASSIE MOLEFI THINYANE	APPLICANT
and	
MPHO RATSATSINYANE	1ST RESPONDENT
NELSON	2ND RESPONDENT
NAPO MAJARA	3RD RESPONDENT
THE REGISTRAR GENERAL	4TH RESPONDENT
THE ATTORNEY GENERAL	5TH RESPONDENT

JUDGMENT

Delivered by the Honourable Mrs. Justice K. Guni on the 5th February 1996

On the 4th February 1993 an interim court order was granted to this applicant in this matter. This applicant approached this court by way of ex-parte on an urgent basis. The terms of the said interim court order will be shown at the later stage. The respondents were to appear before the court, according to the rule nisi issued, on 15th March 1993, to show

cause why such rule Nisi should not be confirmed. The parties continuously postponed this matter and extended the rule for over a period of two years, until finally on 15th December 1995 the court refused an application for further postponement and extension of the rule. The arguments were heard. The matter was adjourned to 5th February 1996 for judgment. This is the judgment.

It is the applicant's case before this court, as it appears from these papers filed of record, that he was lawfully allocated the unnumbered residential site at SEKAMANENG in the district of Berea. The site was allocated to him on 1st June 1978 as the date stamp on the "Form C" attached to his certificate of Tittle annexure "H S I", indicates. The applicant alleged in his affidavit that immediately after the allocation was made, with the assistance of his prospective neighbours, Messrs Mohapeloa and Mochochoko, who were allocated sites next to his, he fenced his site. At the period when this allocation was made, it would appear that the office of the chief of the area was occupied by chieftainess 'Manapo Majara the mother of 3rd respondent herein. The applicant proceeded to register his title in that piece of land almost immediately. By 12th August 1978 the title was registered. This state of affairs remained undisturbed until January 1993.

It was on 12th January 1993 when the applicant received a telephone call at Qacha'snek where he resided and worked. This

telephone call was from chieftainess 'Manapo Majara. By information received from chieftainess 'Manapo Majara this applicant became aware that there is a construction of a building going on, on his site at SEKAMANENG. This prompted this applicant to take certain steps. The first step the applicant took was to travel from Qacha'snek to Maseru from where he proceeded to SEKAMANENG to see for himself what was happening.

Need on arrival at SEKAMANENG he confirmed his worsed fears. He found builders at work on his unnumbered residential site. He enquired from the builders about the particulars of the person or persons responsible for the construction which was going on there. From those builders on the site this applicant came to know that they (builders) were employed by 2nd respondent to build a house for 1st respondent. The applicant there and then requested those builders to inform both the 1st and 2nd respondents to cease forthwith from constructing that building on his site.

Still endeavouring to put a definite stop to further interference with his site this applicant proceeded to seek a legal advise on the matter. He was required to produce his certificate of title to this piece of land by his legal advisor. Unfortunately the document was not on his person. He had to go and collect that document at Qacha'snek where he resided at the time, as he worked there. On 18th January 1993 while the applicant was back at work in Qacha'snek, he received another telephone call. This time it was from Napo Majara 3rd respondent herein. Napo Majara requested this applicant to relinguish his

claim of title to his unnumbered residential site at SEKAMANENG as he (Manapo Majara) has allocated that same site to someone else. Napo Majara offered to re-allocate the applicant another site. There is no mention of the time when such re-allocation was to be done. There is no mention of the name of the place where the new site was to be located. Not surprisingly this offer was refused by this applicant. On 29th January 1993 this applicant came back from Qacha'snek, to Maseru to see his Legal Practitioner and bring to him his certificate of title to the said site. Applicant went back to SEKAMANENG, while he was at Maseru, to check on his site.. He found that the construction was still going on despite his request to 1st and 2nd respondents through the builders, to discontinue the construction. Immediately, this application was filed in this court which issued out the Rule Nisi calling upon the respondent to appear before court and show cause why they should not be interdicted om building on applicant's unnumbered residential site situated at SEKAMANENG and why 1st and 2nd respondents should not be ordered to remove all the materials deposited and structures erected on that said site.

The confirmation of the interim court order so obtained is opposed by 1st and 3rd respondents. 2nd, 4th and 5th respondents have not reacted in anyway to this application and interim court order. The attorney for 3rd respondent appear briefly in the course of the proceedings. At that time the court was dealing with application for further postponement of the matter. That application was refused. The court decided to

proceed to hear the arguments, on the main application. The court adjourned at 13hours for lunch-break, to resume at 2.30 pm to continue with the hearing of the arguments in the main application.

At 3 p.m. after waiting for half an hour for 3rd respondent's attorney, the court resumed. The Counsels for the applicant and 1st respondent appeared. There was no appearance for 3rd respondent. The court ordered that 3rd respondent be called three times outside the court-room. The court orderly called 3rd respondent three times outside the court room. 3rd respondent was not present. Even although there was no legal representative either for the 3rd respondent, Intention to Oppose and an Opposing Affidavits had been filed on his behalf. On the authority of Morris V. Autoquip (PTY) LTD 1985 (4) SA 398 WLD, such affidavit cannot be ignored by the court when considering dgment. The hearing continued without 2nd, 3rd, 4th, and 5th respondents.

We should now take a look at the 1st respondent's case as the applicant's case has already been outlined. 1st respondent was allocated an unnumbered residential site at SEKAMANENG on 5th May 1986. According to 1st and 3rd respondents this allocation was effected by one Napo Majara, 3rd respondent herein. 1st respondent has attached - Annexure "A" to her opposing affidavit as proof of that allocation. She also fenced her site after the said allocation had been done. She engaged the services of Messrs Tsietsi Montso and Mohale Tsepe whose supporting

affidavits are attached.

There are these two conflicting claims for the one and the same piece of land. Both claimants have documentary proof to support their claims. One of these claims must be better than the other. There is no accommodation for both claims. The better title must succeed. It was submitted by Mr Mohau, counsel for applicant that in this circumstances, where both claimants are holders of form c's, evidencing the lawful allocation, the claimant, who in addition to form c is holding a title deed must succeed. That title deed must supercede a form c. H.J.F. STEYN N.O-INSOLVENT ESTATE DANIEL TSOSANE V MRS 'MAFOHLE TSOSANE CIV/APN/274/89.

Although it was not mentioned or dealt with, the occupation of the office of chief at SEKAMANENG seems to be the root cause of this problem. It appears there were goings and comings in and out of the office of the chief in this area at the relevant periods. But nevertheless there must be records which show clearly which sites are vacant and which sites are allocated. Nobody complained of lack of properly kept records. The reason, given by Napo Majara for re-allocating already allocated site, is that the owner of that site had surrendered it to him, for re-allocation. The land Act No. 17 of 1979 under which these two allocations must have been effected provides for revocation of the allocation, not surrender. The applicant denied that he ever surrendered his site to Napo Majara to re-allocate. Napo Majara does not have any support, by return to him of form c and

surrender or cancellation of the certificate of title in favour of this applicant. This surrender was done in private with no other person to witness it. The probabilities indicates that there was no surrender. The issue of surrender occurred in Napo's mind after he had re-allocated that site. Applicant was approached and offered a promise of being allocated an alternative site after the applicant had made known to the spondents his claim to his site.

What makes it even more difficult to accept that this applicant surrendered the said site to Napo Majara for re-allocation, is the reason given by Napo Majara for the alleged surrender. In his affidavit Napo Majara averred that this applicant was in the process of separating from or divorcing his wife. Intending to cheat his wife out of her rightful share of the joined estate, the applicant surrendered the said site in order to put it out of the reach of the law. The papers relating to the ownership of that site were still in the possession of the applicant. In the register at the chief's office and at the Registrar General of Deeds office the title was still in the applicant's name. How on earth can it be correct that the property was surrendered in order that it is removed from the ownership of the applicant? With the documents of title still in applicant's possession and still valid, the property remained lawfully his. Whatever went on at the site without the applicant's consent, was an interference with his rights. In those circumstances applicant would be entitled to an appropriate remedy.

Napo Majara may or may not have been the holder of the office of the chief of SEKAMANENG. That is not the issue. But before re-allocation of the piece of land already allocated, there must be revocation of the previous allocation. Section 13 The Land Act NO. 17 of 1979 makes provision of how such revocation can be effected. There was no revocation of the allocation made to this applicant. In the absence of any valid revocation of the applicant's title to the site, no valid re-allocation could be made of that site. Majoro V SEBAPO 1981 (1) LLR 150 and PP 156-157. Napo Majara with his committee (if at all he was with one when he made the allocation) wasted their time and effort in carrying out their purported re-allocation of the site. Their action was a blatant disregard of the law. For as long as the applicant's allocation was still valid, there could be no lawful and valid re-allocation.

This application must succeed. The rule Nisi is confirmed with costs.

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K. GUNI
JUDGE

For Applicant: Mr Mohau

For Respondents: Mr. Matsau

Mr. G.M. Kolisang