

CIV/A/9/89

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

MOHLOKINYANE MASHEANE

Appellant

and

SAMUEL MORAMOTSE

Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai  
on the 6th day of February, 1996.

This is an appeal against the court of the Judicial Commissioner's decision, inter alia, directing the appellant to vacate the Respondent's site.

The Respondent (hereinafter referred to as Plaintiff) instituted, before the local court of Matala, a civil action in which he sought an order directing the Appellant (hereinafter referred to as Defendant) to move away from his (Plaintiff's) site. The action was defended by the defendant.

The trial court heard the case and gave judgment in favour of the Plaintiff. Defendant was, however, unhappy with the decision against which he lodged an appeal to the Central Court of Matsieng. The appeal was upheld by the Central Court. Dissatisfied with the decision of the Central Court of Matsieng, Plaintiff appealed to the Judicial Commissioners' court which upheld the appeal and, inter alia, re-instated the judgment of the trial court. It is against the decision of the court of the Judicial Commissioners that the defendant has now appealed to the High Court on the grounds that:

"(a) The Judicial Commissioner erred in ignoring the provisions of section 82 of the Land Act.

(b) The court failed to exercise its discretion to refer the matter back in the face of confusing evidence."

It is, perhaps, convenient to mention, at this juncture, that a certain woman by the name of 'Masefako Masheane, alias Pakela, was initially sued as co-defendant. After Plaintiff had given his evidence in-chief, the case was, by consent of the parties, withdrawn against 'Masefako on the ground that she was the wife of the defendant. She, however, remained in the court room until towards the end of Plaintiff's cross-examination when she was told to wait outside the court room because the defendant wished to call

her as his witness - see page 7 et seq of the manuscript record of the proceedings before the Matala Local Court.

'Masefako did testify, on behalf of the defendant, as D.W.1. However, the trial court took the view that, by reason of her sitting in the court room whilst plaintiff was testifying, D.W.1's evidence was inadmissible.

The fact that D.W.1 had been sitting in the court room did not, in my opinion, render her evidence inadmissible. It merely affected credibility thereof. The trial court was not correct, therefore, in rejecting, as it did, the evidence of D.W.1 on the ground that she had been sitting in the court room whilst the Plaintiff was testifying before the court.

Be that as it may, the trial court heard the evidence of Plaintiff who, in as far as it is relevant, testified that on or about 1978 he approached Tsiu Mopeli, the Chief of Mazenod ha Paki, with an application for a residential site. He was accompanied by D.W.1 who was his secret lover.

The Chief and his Land Committee considered the application and allocated a residential site to the Plaintiff next to Phuthiatsana river. However, D.W.1

later complained that the site was too remote from the village. Plaintiff then approached the chief with a request for an alternative site in the village. He was, consequently, allocated the site, the subject matter of the present dispute, in the village of Mazenod Ha Paki, just above the Roman Catholic church. As proof thereof, Plaintiff handed in his Form "C" (Certificate of allocation) as exh "B" and part of his evidence.

It is, perhaps, significant to mention, at this stage, that defendant's case was conducted, on his behalf, by a certain Molapo Motemekoane Masheane, presumably pursuant to the the provisions of the Central and Local Courts Proclamation Number 62 of 1938 of which section 20 reads, in part:

"20.... In civil proceedings no party may be represented by a legal practitioner, but shall appear himself; provided that the court may permit the husband or wife, or guardian, or any servant, or the master, or any inmate of the household of any Plaintiff or defendant, who shall give satisfactory proof that he or she has authority in that behalf, to appear and to act for such Plaintiff or defendant."

Defendant himself did not testify in this case.

Instead Molapo Motemekoane Masheane gave, on his (defendant's) behalf, evidence which was, for obvious reasons, inadmissible hearsay and, therefore, of no assistance to the court.

However, D.W.1 told the court that she, at the request of the defendant, who was also her secret lover, went to Chief Tsiu Mopeli and applied for a residential site. She was in the Company of 'Mampe Mapeshaone, Malethole Phakisi and the Plaintiff. D.W.1 denied, therefore, Plaintiff's evidence that he was the one who applied for the residential site which was allocated by Chief Ts'iu Mopeli and his Land Committee.

According to D.W.1, Chief Tsiu Mopeli and his Land Committee allocated the site next to Phuthiatsana river to her, and not to the Plaintiff. The site was, however, too remote from the village and she was afraid to live alone next to the river. For that reason D.W.1 declined the site and requested for an alternative one in the village. The site, the subject matter of the present dispute, was accordingly allocated to her by members of the Land committee who were, however, not called as witnesses at the trial. Forms "C" were, at the time, out of stock and none was ever issued to her.

'Mampe Mapeshoane and 'Malethole Phakisi testified as D.W.2 and D.W.3, respectively. Their evidence corroborated, in material respects, that of D.W.1.

It is significant that chief Ts'iu Mopeli testified as P.W.2 and told the court that he did not know the defendant who was not his subject. Plaintiff was, however, his subject. He confirmed that in 1978 Plaintiff, accompanied by D.W.1, approached him with an application for a residential site. The application was, on 16th March, 1978, favourably considered by him and his Land Committee. A site next to Phuthiatsana river was consequently allocated to Plaintiff who, however, later declined the site and requested for an alternative one in the village. The site, the subject matter of the present dispute, was then allocated to the Plaintiff on 10th March, 1980. As proof that Plaintiff's application for a residential site was, on 16th March, 1978, favourably considered by the Land Committee and the actual allocation entered in the register book, P.W.2 handed in extracts of the minutes of the Land Committee and the register book number 189610 as exh. "C" and exh. "D", respectively.

It is to be observed that although she claimed

that the site, the subject matter of this dispute, had been allocated to her, in her own words, D.W.1 told the court that no Form "C" (certificate of allocation) was ever issued to her or, for that matter, to the defendant. On the other hand Plaintiff produced his Form "C" (exh. "C") as proof that the site had, indeed, been allocated to him.

In his testimony, Plaintiff further told the court that, after it had been allocated to him, he developed the site, the subject matter of this dispute, by fencing it and erecting a house thereon. Thereafter, Plaintiff went to work in the Republic of South Africa, leaving D.W.1 in charge of the house.

According to him, Plaintiff had bought the building materials from various stores in Maseru. He could not, however, produce payment receipts, presumably because they were in the possession of D.W.1.

On his return from the Republic of South Africa, Plaintiff found D.W.1 living in the house with another man, the defendant, as man and wife. Defendant refused to vacate both the site and the house on the ground that they were his property as D.W.1 was his wife. Plaintiff's appeal to P.W.2, the chief of the

area, proved to be futile for defendant persisted in his refusal to move away from the site. Hence the institution of the present proceedings for relief as aforesaid.

In her evidence, D.W.1 told the court that she had erected the house on the site, the subject matter of this dispute, with the building materials bought from a place called Tsoaing (in the district of Mafeteng) and Clifford store. She denied, therefore, Plaintiff's evidence that he had bought the building materials from various stores, here in Maseru.

It may be mentioned that at the close of the case for the defendant, Molapo Motemekoane Masheane, again on behalf of the defendant, handed in, as exhibits and part of his evidence, a number of receipts according to which the building materials had, indeed, been bought from various stores in Maseru. However, for the reasons I have stated, earlier in this judgment, the evidence of Molapo Motemekoane Masheane was inadmissible hearsay and of no assistance to the court.

Be that as it may, the evidence of D.W.1, that she had erected the house on the site, the subject matter of this dispute, was corroborated by her own brother, John Pakela, and a certain Moramang Leino who



testified as D.W.4 and D.W.5, respectively. According to him, D.W.4 gave D.W.1 cheque No. 33-41-20-40 dated 21st June, 1977 to the tune of R194 with which money she built the house.

It is significant to observe that the cheque is one of the exhibits handed in by Molapo Motemekoane Masheane and was marked exh "Y". It had never been cashed and had, therefore, become stale.

The evidence of D.W.5 was to the effect that he had been employed to build the house, on the site, the subject matter of this dispute, by D.W.1 who paid him M447 for the work.

The trial court considered the evidence as a whole and concluded, rightly so in my view, that the site, the subject matter of this dispute, had been allocated to the Plaintiff who was, therefore, the owner thereof. Consequently, defendant was ordered, by judgement, to vacate, together with D.W.1, Plaintiff's site. He was, however, allowed to remove, from Plaintiff's site, the building materials which had allegedly been bought by him and D.W.1.

As it has already been pointed out earlier, in this judgment, defendant was unhappy with the decision against which he appealed to the Central Court of

Matsieng. The appeal was upheld by the Central Court. The Plaintiff was dissatisfied with the Central Court's decision, against which, he appealed to the Judicial Commissioner's court which upheld the appeal.

In upholding the appeal, as it did, the court of the Judicial Commissioners reinstated the judgment of the trial court to the extent that the site, the subject matter of this dispute, belonged to the Plaintiff and the defendant had, therefore, to vacate it. The order of the trial court allowing the defendant to remove the building materials from Plaintiff's site was, however, set aside and the following order substituted therefor:

"it is ordered that the building material may be disputed separately by he who claims to be the owner of the material and adduce evidence to that effect."

It is against this decision of the Judicial Commissioners' court that the defendant has appealed to the High Court, firstly, on the ground that "the Judicial Commissioner erred in ignoring the provisions of Section 82 of the Land Act". Section 82 of the Land Act, 1979 reads:

"82. Where at the commencement of this Act any land or part thereof has, whether by error or otherwise, been the subject of two or more allocations, the allottee who has used the land and made improvements thereon shall hold title to the land in preference

to any allottee who left the land unused and undeveloped."

I have taken the view that the trial court was, on the evidence, justified in rejecting as false the story that the site, the subject matter of this dispute, had been allocated to the defendant and accepting as the truth Plaintiff's version that it had been allocated to him. Assuming the correctness of my view, it stands to reason that the site was not the subject of two or more allocations and section 82 of the Land Act, 1979 did not, therefore, apply in the present case. That being so, the learned Judicial Commissioner could not be faulted in ignoring, as he did, the provisions of Section 82 of the Land Act, 1979.

As regards the building materials of which purchase was claimed by both the Plaintiff and the defendant, the trial court found that on one hand Plaintiff had been unable to support his claim with any payment receipts/invoices whilst on the other hand defendant produced, as proof that he had bought the building materials, payment receipts/invoices. It will, however, be remembered that defendant did not give evidence at the trial. Instead his representative, Molapo Motemekoane Masheane, testified as if he were the defendant and handed in the payment receipts/invoices as exhibits and part of his

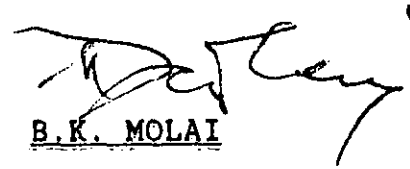
evidence. I have pointed out earlier, in this judgment, that the evidence of Molapo Motemekoane Masheane was, in the circumstances, inadmissible hearsay.

The learned Judicial Commissioner considered this matter and found, correctly so in my opinion, that the evidence that the building materials were bought by either the Plaintiff or the defendant was rather confusing. The trial court had, therefore, misdirected itself in finding, as it did, that the defendant had adduced evidence which was conclusive proof that he had bought the building materials.

To the extent that it had, on the confusing evidence, allowed the defendant to remove the building materials from the site, the subject matter of this dispute, the learned Judicial Commissioner set aside the decision of the trial court and, in exercise of his discretion, ordered that the building materials should be the subject of a separate dispute. The ground of appeal that the court of the Judicial Commissioners failed to exercise its discretion to refer the matter back, in the face of confusing evidence, had, consequently, no substance.

From the foregoing, I come to the conclusion that

this appeal ought not to succeed. It is accordingly dismissed with costs.



B.K. MOLAI

JUDGE

6th February, 1996.

For Applicant : Mr. Molete,

For Respondent : Mr. Monapathi.