

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the Matter Between:

THATO LEFOSA

Applicant

And

‘MANEO DORIS MOOKI

Respondent

JUDGEMENT

Coram : Hon. Mr. Justice T. E. Monapathi
Date of Hearing : 21st May 2013
Date of Judgement : 10th July 2013

SUMMARY

It is futile to seek to bolster a non-existent right against Applicant, following where Applicant has had a judgment of the Court of Appeal and in his favour in consequence of which Applicant registered title to land. Except for execution of judgement for damages there is no right of lien that supersedes the right to occupy the land by Applicant. Respondent’s defence in that regard accordingly failed.

CITED CASES

Rademeyer v Rademeyer 1967 (2) SA 702
Peens v Botha-Odendaal 1980 (2) SA 381

BOOKS

Law of Property – Silberberg and Schoeman

[1] In the background, to this application for revival of the present application is a string of litigation.

[2] Appeal case C of A (CIV) No. 10/1998 declared Applicant as heir to the estate of his late father Thabo Lefosa and Applicant's widowed mother who were legally married.

[3] The Respondent's purported marriage to Applicant was said to have been void *ab initio* and not even putative, as Respondent did not enter into the relationship with the Deceased Applicant's father in good faith or, in ignorance of the fact that Deceased was already married. Instead, as Applicant submitted Respondent decided to "stolidly tread into a no-go area".

[4] In the year 1999, Applicant and his mother instituted an application in CIV/APN/135/1999 before this court in which they sought the following orders:

- a) that, a lease registered in Respondent's in respect of plot no 1322-764 be declared null and void and fraudulent;
- b) the said lease be de-registered in Respondent's name and be registered in Applicant's name;
- c) that the Respondent be ejected from the abovementioned plot.

[5] All the prayers in that application were granted in favour of Applicant. A new lease was accordingly issued in Applicant's name pertaining to the said plot. All the prayers granted in CIV/APN/135/1999 were performed except that the Respondent never vacated the said plot. It is against this order that the parties are before this court as will be made clear later.

[6] When Applicant sought to enforce that order, in CIV/APN/1999 Respondent instituted an urgent application against Applicant and his mother in CIV/APN/420/2003. Therein she applied for stay of execution pending resolution of a certain case CIV/T/679/2003 where she purportedly claimed costs of improvements for the sum of M151, 129.00. Alternatively it was for M260,000.00 being the market value of the improvements. Significantly, Respondent never prosecuted CIV/APN/420/2003 and the rule lapsed to date. Likewise Respondent has also neglected to prosecute the action in CIV/T679/2003 to date. It has been over a period of eight (8) years that Respondent has neglected to prosecute his action and application.

[7] Ever since the year 2003, Respondent has not lived on the said plot: 13282-764. Instead Respondent has leased the property to other people whose better and further particulars are unknown to Applicant. She has been collecting rent therefrom for over a period of eight (8) years.

[8] Ever since Applicant had been trying to eject Respondent from the plot. Respondent has always frustrated Applicant's efforts and as submitted was undermining the administration of justice. On the other hand, Respondent in her answering affidavit alleges that, she is claiming costs of improvements as alleged

earlier. Respondent however, does not deny the facts that ever-since the year 2003, she has not herself lived on the disputed property. Nor does she deny that she has been collecting rentals therefrom. She said she retains a right of lien over the property by virtue of the claim for improvements alluded to earlier.

[9] A lien is a right of retention “which arises from the fact that one man has put money or money’s worth into another’s property. Liens are generally divided into enrichment liens and debtor and creditor liens. See Silbergberg and Schoeman’s: the *Law of Property*. 4th Ed. at page 389, where the learned authors say that:

“The Legal Principles relating to improvements Liens are to a large extent identical to with the principles and rules relating to claim of possessor in good faith or bad faith respectively and lawful occupiers in good faith and bad faith”.

[10] The *bona fide* occupier’s position is similar to that of *bona fide* possessor save that an equitable deduction may be in respect of his or her use and occupation of the land or property. See *Rademeyer v Rademeyer 1967 (2) SA 702* and *The Law of Property (supra)* at page 293. On the other hand, a *mala-fide* occupier does not have a right of retention in respect of useful expenses and apparently has no right to compensation in respect of such expenses. See *Peens v Botha-Odendaal 1980 (2) SA 381* and *The Law of Property (supra)* page 293.

[11] It was submitted that the Respondent here is even a *bona fide* occupier because in the above-mentioned case of C of A (CIV) 10/98. The appeal court also noted

that the Respondent knew full well that there was a valid marriage between Applicant's mother and the Deceased being Applicant's father. And that the Respondent did not enter into the relationship with the Deceased (Applicant's father) with the required ignorance and good faith required to constitute a putative marriage. I agreed.

[12] The above statement of the law shows that the Respondent is a *mala fide* occupier and must not be allowed to benefit from the situation she knew very well to have been wrong and still continued to improve what did not belong to her. As a result Applicant was merely holding on to the property to frustrate the administration of justice or Applicant in his right. Respondent cannot be allowed to benefit from her own wrong doing. I agreed again.

[13] In the alternative, even if this court finds that the Respondent herein is an occupier in good faith, the legal principle relating to improvements liens in such situation is that an equitable deduction must be made in respect of his or her use and occupation of the property. The court must take into consideration that Respondent has been occupying Applicant's land for over a period of ten (10) years without paying rent to him and in the year 2003, she rented the premises out where she has always been collecting rent. In my view that constitutes a situation where Respondent has also substantially benefited.

[14] It was accordingly submitted that the foregoing must be taken into account and Respondent must be ejected from Applicant's property in view of the fact that

she has benefited over and above the amount she claims for enrichment lien valid as they are. In my opinion that would be a good answer.

[15] But most important of all and the above submission aside and there is no way in where a final valid court order can be frustrated by reason of unfulfilled and pending (own) applications which were not prosecuted by the Respondent.

[16] Judged against the Court of Appeal's decision and the fact that subsequently Applicant registered title in his favour, the only resort that Respondent has, is to file a claim for damages if those have not satisfied by now through rentals and occupation.

[17] The application succeeds with costs.

T. E. MONAPATHI
ACTING CHIEF JUSTICE

For Applicant : Adv. T. Molise
For Respondent : Mr. S. Malebenye