

IN THE LAND COURT OF LESOTHO

HELD AT MASERU

LCC /T/ 09/13

In the matter between:-

MOKOMANE THABO BONIFACE NKHOLI

APPLICANT

AND

‘MABASIA NKHOLI

1ST RESPONDENT

‘MATLOTLISO MPHANYA

2ND RESPONDENT

PHILLIP POOPA

3RD RESPONDENT

JUDGMENT

CORAM: HON. JUSTICE K.E. MOSITO AJ

Date of Hearing: 19 MAY, 2014

Date of Judgment: 11 JULY, 2014

SUMMARY

Application for interdict and declarator – Applicant seeking relief for the return of and original lease document, declarator that he is the customary heir of the deceased Manuel Nkholi – Applicant seeking an order that Respondents should return the original lease document to him and that the sale of the deceased’s commercial site by first and second Respondents to third Respondent be declared null and void.

Held: Applicant is declared a customary heir of the late Manuel Nkholi.

Held: Respondents directed to return the original lease document to Applicant.

First and Second Respondents directed to return the money they received from third Respondent purporting to be the purchase price of the plot in dispute.

Held: Application is granted with costs.

ANNOTATIONS

Cases

- (a) C & S Properties (Pty) Ltd v DR. 'Mamphono Khaketla and Others C OF A (CIV) 63/2011
- (b) Lithebe Makhutla and Another v Mamokhali Makhutla and Others C of A (CIV) No. 7 of 2002.
- (c) *Vicente v Lesotho Bank* LAC (2000-2004) 83.

Statutes

Constitution of Lesotho 1993

Land (Amendment) Order, 1986

Land (Amendment) Order, 1992.

Land Act 1979

MOSITO AJ:

INTRODUCTION

1. In this matter, the Applicant filed the Originating application in which he claims the following relief:-

- (a) An order declaring him the lawful and rightful successor to plot no 23131-224 situated at Maputsoe urban area, by virtue of him being the Customary heir to Manuel Nkholi.
- (b) That first and second Respondents be ordered to cause the release or surrender of the original lease document in respect of plot no 23131-224 Maputsoe urban area to Applicant by the third Respondent.
- (c) That the third Respondent be ordered to release and surrender the original lease document in respect of plot no 23131-224 Maputsoe urban area to the Applicant.
- (d) That the third Respondent be restrained and interdicted from in any manner whatsoever dealing with plot no 23131-224.

- (e) Costs of suit.
- (f) Further and/or alternative relief.

2. On 29 January 2014, the parties appeared before this Court and a pre-trial conference and preliminary hearing were held. The parties agreed that the following issues fell for determination:
 - (a) Whether the deceased ever authorised the sale of the field [plot] subject of dispute herein at all.
 - (b) Whether in any event, the sale thereof was lawful in the sense that it complied with the relevant legislation governing disposal of land in Lesotho.
3. It was common cause between the parties that the Applicant is the eldest son and heir of the late Manuel Nkholi. Both sides called witnesses to testify on their respective behalf. The Applicant's first witness was one Masabala Joseph Nkholi (hereinafter referred to as (PW1)). The witness explained that he is the Applicant's brother, by virtue of Applicant being the son of his paternal grandfather. PW1 stated that he lived at Maputsoe Ha-Mathata Leribe, the same village where the late Manuel Nkholi lived during his lifetime. He further stated that he used to help the deceased with certain chores as, according to PW1, the late Manuel Nkholi lived alone in his house, as it appeared second Respondent, the deceased's daughter-in-Law, lived in another house in the same yard.
4. PW1 testified that he used to collect certain monies from a Mr Karim on behalf of the deceased Manuel. According to PW1, the said monies were an enticement to the deceased to give Karim the first option in the event the deceased decided to sell the plot in dispute. The fact that PW1 was collecting these monies from Karim was corroborated by second Respondent, who later testified as DW1. PW1 stated that he did not know

anything about the deceased having mandated first and second Respondents to sell the plot in dispute.

5. PW1 however testified that he was part of a family meeting where the Nkholi family put the first Respondent to be in charge as a caretaker of the deceased's household including the plot in dispute pending the Applicant's return home. It was put to PW1 that he knew nothing about the instruction given by the deceased, Manuel Nkholi to the first and second Respondents to the effect that they should sell the plot. It was further put to PW1 that he was not in a position to deny that because he was not present when the instruction was given, since the deceased had been taken to second Respondent's home at Mapoteng, where the latter was nursing him.
6. PW1 denied that the deceased had given such instruction as he said he was close to the deceased, and the deceased would have told him about his intention to sell the site, also because he was nursing the deceased before second Respondent "stole him" and took him to Mapoteng. PW1 also testified that he visited the deceased daily at the Jesse hospital where the deceased was before he passed away.
7. Under cross examination, PW1 denied that the plot was sold to the third Respondent because he made a better offer and that this was after the deceased's death. He also denied that the said money was used to pay for the expenses that were incurred during the deceased's illness. He denied this and stated that the deceased had his own money which he kept at ABSA. I believed and accepted the evidence of this witness. He appeared simple and straightforward in his evidence to me.
8. Applicant called his second witness one Motete Nkholi (PW2). PW2 testified that he is the younger brother of the deceased Manuel Nkholi. In

his evidence in chief he simply stated that to his knowledge, the deceased had not made any instructions about his property. PW2 accepted that he knew nothing about the instruction from the deceased about his properties. When confronted that he could neither deny nor confirm whether the deceased made or gave such instructions, he answered that if such instructions had been made, he believed he would have known about it. I believed this witness.

9. The next witness to testify was Applicant himself (PW3). The thrust of PW3's evidence was mainly to assert his right as customary heir to his late father Manuel Nkholi. This witness was reliable and he gave evidence in a very simple and straightforward manner. He did not attempt to testify to issues he did not know. It was common cause that he is a customary heir to his late father Manuel Nkholi. Most of the issues debated with PW3 in this matter were not personally known to him as he was not in Lesotho when they transpired. The cross-examination of PW3 was directed towards issues relating to his absence from home; his alleged failure to assume his responsibilities; his lack of knowledge of his father's instruction that the plot in dispute be sold, etc. At the end of his testimony, Applicant closed his case.
10. I have observed and assessed the witnesses for the Applicant. I am therefore convinced that they are reliable and credible. They did not attempt to give evidence in any affected and suspicious manner. I accept their evidence.
11. The Respondents did also take a stand in their defence. The second Respondent, Mrs Matlotliso Mphanya, testified as DW1. She described the deceased as her cousin, and said their relationship was like that of brother and sister. She stated in her evidence that she would take the

deceased for his checkups in her own motor vehicle and, ultimately looked after him at her own home at Mapoteng after the deceased's condition had worsened. She informed the Court that she was nursing the deceased jointly with the first Respondent. She stated that it was about a month before the deceased passed away when she took him to her home at Mapoteng. The reason for taking him to Mapoteng was because she was also taking care of her own husband who had just had an operation.

12. DW1 described her knowledge of the plot in dispute in detail, and stated that she and the deceased talked about the plot at length. She stated further that she assisted the deceased to secure the release of the lease document in respect of the plot from Mr Karim, who had taken the lease document from the deceased, and was giving the deceased a difficult time by refusing to release the lease document. She testified that the lease document was eventually released to the deceased.
13. She further that the deceased asked her to keep the leased document with her as Karim easily overcame and/or cheated him. The deceased called a family meeting on 20 October 2006 wherein he allocated his sites at Maputsoe, with the exception of the plot in dispute, which he never mentioned in the meeting. None of the family members who attended the meeting and who knew the plot asked the deceased why he did not mention the plot. DW1 testified that she later asked the deceased why he never mentioned the plot at the meeting, but he replied that she knew what he had said to her and the first Respondent about the plot, namely that he wanted them to find a buyer for that and sell it for him.
14. DW1 further testified that the family meeting was attended by the following members namely Mamotete Nkhohli, Motete Nkhohli (PW2), Tumelo Nkhohli and others. She stated that the deceased allocated sites to

various persons. She further stated that a document was executed. However, no document was produced in evidence. She further testified that the deceased had said since Karim had been unreliable, they must find a buyer for the plot. She stated that the reason why the deceased wanted the plot sold was because the plot in dispute was the only plot remaining and left at Maputsoe, and he was afraid that it might be taken away. She also stated that the deceased wanted to distribute the proceeds of the sale to his dependents, but that unfortunately he passed away before he could do so.

15. DW1 testify that the deceased had his ox that was used at his burial, and that his monies from ABSA bank were used to pay of his hospital bills and to purchase a coffin for his burial. It is important to point out that, although DW1 testified that the deceased called a family meeting and distributed his sites to various persons, this was never put to PW2 Motete Nkholi, whom DW1 said was present at the meeting. This is despite the fact that the said Motete had expressly pointed out that he knew nothing about his brother's instruction regarding his properties, neither were those members of the family that were alleged to have been at the meeting called to testify. Another disturbing aspect about the evidence of this witness was that, contrary to what had been put to PW1 that the plot was sold and proceeds from the sale used to cover hospital and burial costs, DW1 testified that the money was still kept in an account belonging to her company in the bank. She was corroborated on this material aspect by DW2 and DW3.
16. The first Respondent namely, Mabasia Nkholi testified as DW2. She testified mainly to corroborate DW1 on the issue of the instruction by the deceased that the plot in dispute be sold. She testified that she had

visited the deceased at Mapoteng, and that while still there, DW1 had asked the deceased about the plot saying: "Manuel, there is something I forgot to ask you about, you allocated all your sites, what about this commercial site?" DW2 says the deceased responded saying: "I want you and this child to help me find a buyer for that site. DW2 then says they found the buyer for the site in 2011, namely the third Respondent. DW2 stated that the reason advanced by the deceased for wanting to sell the plot was so that the money could be used to pay for his medical expenses and to cover burial expenses. Under cross examination she gave a different reason, saying the money was to be used to cater for the needs of the deceased's dependents.

17. The last witness to testify on behalf of the Respondents was Mrs Lucy Mokokoana as DW3. This witness testified that she withdrew the sum of five thousand Maloti from the deceased's bank account at ABSA, which money was used to pay the deceased's hospital bill and to purchase a coffin for his burial. It was pointed out to her in cross examination that the monies that were at the bank exceeded eight thousand Maloti when the deceased passed away, and that she could not have withdrawn only five thousand Maloti. She could not give a satisfactory explanation of where the rest of the money could have gone to.
18. DW3 testified that she also knew about the deceased's instruction that the plot be sold. DW3 stated that the deceased's intention was that the plot be sold so as to enable him to make a living out of the proceeds of the sale of the plot. This witness told the Court that the deceased's intention was that the plot be sold during his lifetime so that he earns a living out of the sale. She also pointed out that they ended up selling the

deceased's plot posthumously because the Applicant would not cooperate with them.

19. On the evidence, I come to the conclusion that the deceased authorised the sale of the field [plot] subject of dispute herein. However, having said so, the issue is whether the necessary legislative requirements were complied with for purposes of selling the plot in dispute. I will revert to this issue later on in this judgment. In the same way, I will consider whether in any event, the sale thereof was lawful in the sense that it complied with the relevant legislation governing disposal of land in Lesotho.

THE LAW

20. In **Lithebe Makhutla and Another v Mamokhali Makhutla and Others C of A (CIV) No. 7 of 2002**, the Court of Appeal dealt with the law relating to Land in this Country. The Court started with the Constitutional provisions ending in the applicable legislation. It pointed out that, in terms of Section 107 of the Constitution of Lesotho all land in this country is vested in the Basotho Nation. Sub-section 108 (1) in turn provides that the power to allocate land that is vested in the Basotho Nation, to make grants of interests or rights in or over such land, to revoke or derogate from any allocation or grant that has been made or otherwise to terminate or restrict any interest or right that has been granted is vested in the King in trust for the Basotho Nation. It pointed out that, there can be little doubt that the "other law" referred to in paragraph [20] above is the Land Act 1979 which in turn contains (for the purposes of this case) several amendments such as the **Land (Amendment) Order, 1986** and the **Land (Amendment) Order, 1992**. Section 3 (1) of the **Land Act 1979** as amended provided that land in Lesotho is vested "absolutely and

irrevocably” in the Basotho Nation and is held by the Head of State as representative of the Nation.

21. In 2010, the **Land Act 2010** was enacted and it replaced the **Land Act 1979**. It follows from the foregoing that, as the law stood as far as relevant to the present case, the best that the law allowed under the **Constitution of Lesotho 1993** and the **Land Act 1979** was an interest in or over land which is akin to usufruct.
22. Turning to the provisions of the **Land Act**, s 35 (1) provides (where relevant:

“A lessee shall be entitled –

(a).....

(b) subject to obtaining the consent of the Minister –

(i) to dispose of his interest;

(ii)

(iii) to sub-let the land leased.”

[16]Section 36(5) states (where relevant) that:

“Any transaction conducted by a lessee without the consent of the Minister shall be of no effect.”

23. It has been held in **C & S Properties (Pty) Ltd v DR. ‘Mamphono Khaketla and Others C OF A (CIV) 63/2011** that, the Act’s purpose is to control, no doubt with anxious official care, the conferment of title to land.
24. The first prayer in this case is for an order declaring Applicant the lawful and rightful successor to plot no 23131-224 situated at Maputsoe urban area, by virtue of him being the customary heir to Manuel Nkholi. It was common cause before this Court that Applicant is the customary heir to

Manuel Nkholi. **The Land Act 1979** provides in section 3 that, the land vesting in the Nation is held by the State and no one other than the State shall hold title to land except as provided by customary law or the Act. The Act's purpose is to control, no doubt with anxious official care, and the conferment of title to land. There was no evidence *in casu* that any other person had the customary law entitlement to inherit this plot other than the Applicant, Consequently, the first prayer must succeed.

25. The second prayer was that, the first and second Respondents be ordered to cause the release or surrender of the original lease document in respect of plot no 23131-224, Maputsoe urban area, to Applicant by the third Respondent. In my view, this prayer is related to the third prayer. This last prayer is for an order that the third Respondent be ordered to release and surrender the original lease document in respect of plot no 23131-224 Maputsoe urban area to the Applicant.
26. I have already found that the lease document was handed over by the deceased to the second Respondent. It is apparent that this original lease document in respect of plot no 23131-224 Maputsoe urban area was handed over to the second Respondent by its owner for purposes of safekeeping. The second Respondent gave it to 3rd Respondent. The second Respondent had no legal right to hand over to the 3rd Respondent the lease document as a result of the purported transfer consequent to the sale of the plot by second Respondent.
27. In any event, the purported "transfer" (if it be properly so-called) could not be valid in the absence of a ministerial consent. In ***Vicente v Lesotho Bank LAC (2000-2004) 83***, there never was any consent. Ramodibedi JA (as he then was) said (at 86 I) that the transaction concerned there was null and void for as long as the Minister's consent was not obtained. The

Respondents must therefore return the original lease document in respect of plot no 23131-224 to Applicant.

28. In the light of the foregoing discussion, it seems to me clear the Applicant has a clear right to the lease document and plot. There is no other satisfactory remedy for the relief sought. The Applicant is bound to suffer irreparable harm should Respondents be allowed to continue in possession of the said lease document and plot. It is clear therefore that the third Respondent should be restrained and interdicted from in any manner whatsoever dealing with plot no 23131-224. He simply has no clear right to that plot.

CONCLUSION

29. It is obvious from my reasoning in the course of this judgment that the following order should be and it is hereby made:
- a) the application is granted as prayed.
 - b) The Respondents are to bear the costs incurred in opposing thin application.

DR. K.E.MOSITO AJ

For Appellant: Adv S. Ratau

For Respondent: Adv Kao-Theoha