

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the matter between:

MOHAPI MARK MOHAPI

Applicant

And

‘MACHABELI SELLO

1st Respondent

LAND ADMINISTRATION AUTHORITY

2nd Respondent

LAND REGISTRAR

3rd Respondent

ATTORNEY GENERAL

4th Respondent

JUDGEMENT

Coram : Hon. Acting Chief Justice T. E. Monapathi
Date of Hearing : 13th June 2014
Date of Judgement : 3rd December, 2014

SUMMARY

In an application for condonation for late filing of a rescission application, it was necessary to call viva voce evidence where the Deputy Sheriff's return of service was hotly disputed. This was so because Applicant had denied that he was served with original application. Where such service was proved the application for condonation for late filing accordingly failed.

ANNOTATIONS:

CITED CASES

‘Mahopolang Moqhali v Ephraim Lephole and 2 Others CIV/APN/6/1996

STATUTES

High Court Rule 9 (4)

BOOKS - None

[1] This was an urgent application wherein the Applicant (Mohapi) herein prayed for *inter alia* condonation for late filling of a rescission application. The Respondent herein had obtained a default judgement in CIV/APN/313/2010 for cancellation of lease issued in Mohapi's name. Applicant alleged that he was not served with the original application.

[2] The First Respondent's case for having obtained a default judgement was that the Applicant herein had been served with the notice of motion; but had failed to file his intention to oppose nor was he present on the day when the application was moved and the default judgement was accordingly granted.

[3] In March 2014, Mohapi then filed an urgent application for condonation for late filling of a rescission application contending that he had not been served with the main application for cancellation of his lease and that he only became aware of the said order of cancellation upon being served with an application for surrender of the said lease before the District Land Court in CIV/APN/12/2014. It was sometime in early March 2014.

[4] The application for condonation was accordingly moved on the 9th April 2014. However, during submissions it became clear that the only issue was whether the Mohapi was served with the Notice of motion for cancellation of his lease as the Mohapi contended that he was never served and the First Respondent contended that she served the Applicant. This court had been unable, on the papers as they stood, to determine whether there had been service or not.

[5] As a result, the court ordered that *viva voce* evidence be led to prove whether Applicant was served with the notice of motion or not. The Deputy Sheriff, Serobanyane, had filed a return of service alleging that he served the Mohapi at Thaba-Bosiu with the notice of motion. The Deputy-Sheriff, Serobanyane, filed a return of service alleging that he served the Applicant herein at Thaba-Bosiu with the court order.

[6] The said Deputy-Sheriff put in *viva voce* evidence and informed the court that he went to Thaba-Bosiu Primary School to serve Mohapi with the Notice of Motion CIV/APN/313/2010, but he did not find him and as a result he called him on his mobile phone and they met somewhere between Ha Sofonia and Ha Makhoathi.

[7] The Deputy-Sheriff further informed the court that Mohapi signed the original copy of the Notice of Motion. He admitted that there are two different signatures between the Notice of Motion and the notice of withdrawal. He admitted that he did not serve the Applicant at Thaba-Bosiu as alleged but somewhere between Ha Sofonia and Ha Makhoathi.

[8] The Deputy-Sheriff most candidly said that he knew the Mohapi personally and that he tried to serve him at Thaba-Bosiu Primary School before he called him on his mobile phone to determine his whereabouts. Mohapi denied this and informed the court that he never met Serobanyane at the time alleged and at the place alleged and that he was never served with the alleged notice of motion in CIV/APN/313/2010. He further informed the court that he only became aware of the case in CIV/APN/313/2010 when he was served with DLC/APN/MSU/12/2014 requesting that he surrender his lease. He admitted that he has different signatures. One of them being the one the Deputy-Sheriff attributed to him. Mohapi was not able to explain this anomaly. The court concluded that this was one of the facts against Mohapi and from which the court inferred that he intended to mislead the court. Generally he had been evasive and untruthful.

[9] Service of process is governed by Rule 4 of the ***High Court Rules 9 of 1980*** and in this case the relevant provision would be Rule 4 (1) (a) which provides a) by delivering copy of the process personally to the person to be served. See ***Mahopolang Moqhali v Ephraim Lephole and 2 Others CIV/APN/6/1996*** (unreported) the court therein said:

“Now it is trite law that the return of service of a sheriff or duly authorised person to perform his function is *prima facie* evidence of what it states and that therefore the clearest and most satisfactory evidence must be adduced if it is disputed.”

I concluded that in no way was Mohapi's evidence reliable as against the Deputy Sheriff and his return of service.

[10] The return of service in issue states that the Deputy Sheriff went to Thaba-Bosiu Primary School and then went to Ha Sofonia where Mohapi was served. It is pertinent to mention herein that in giving *viv voce* evidence, the Deputy Sheriff admitted that he knew, at the time of the alleged service, that Mohapi did not live at Ha Sofonia. He further said he served the Applicant along the main road leading to Thaba-Bosiu and Ha Makhalanyane Road by the Phuthiatsana River near Ha Makhoathi. Respondent therefore submitted that the evidence contained in the return of service is contradictory to the evidence given by the Deputy Sheriff as there are now two places where the Deputy Sheriff alleges to have served Mohapi. This cannot be correct. There was no basis upon which the Deputy Sheriff was proved to be lying and untruthful. I believed him.

[11] It was submitted that again that the *viva voce* evidence of the Deputy Sheriff is contradictory to that contained in the return of service, and that the only logical conclusion to be drawn is that the Deputy Sheriff is lying about this service. It was further submit that the Applicant's testimony that he was never served with the notice of motion is true as this is corroborated by the inconsistent testimony of the Deputy Sheriff which is not clear where he alleges to have served him. In my view this cannot be believed.

[12] The Deputy Sheriff further said that after failing to locate the Applicant at the Thaba-Bosiu Primary School, he then called him and they agreed to meet at the bus stop near Phuthiatsana Bridge on the junction to Ha Sofonia. It was submit that it is incredible that the Deputy Sheriff knew the Applicant's phone numbers yet he went to Thaba-Bosiu Primary School to serve the Applicant before confirming whether he is there or not and he only called Mohappi after failing to find him at the said school. This defies logic. Mohapi who was evasive could not be believed by this court.

[13] The Deputy Sheriff alleges that he called the Applicant herein to meet at the alleged arranged place in order to serve him. However, the return of service does not prove the said call as it does not show that the Deputy Sheriff claimed his fees for he alleged call as it is expected of him to claim for the expenses incurred by him. The Applicant informed the court that he was never served with the Notice of Motion at any time alleged by the Deputy Sheriff. It was correctly submitted that his testimony in this regard was very clear and most satisfactory more so corroborated by the testimony of the Deputy Sheriff regarding his alleged service.

[14] Furthermore, the Applicant disputed the signatures on the notice of motion as well as the court order as not genuine. The *onus* was on the First Respondent to prove that the signatures were the Applicants. In this regard, he contended the First Respondent failed to discharge this *onus* as they failed. He could have called an expert witness competent in handwritings to testify that indeed the signatures were that of the Applicant. This was not necessary judging from the unsatisfactory evidence of Mohapi. I find that the Applicant was served with the notice of motion and therefore accordingly refuse to grant the application for condonation.

[15] Costs are awarded to the First Respondent.

T. E. MONAPATHI
JUDGE

For Applicant : Mr. Tsenase
For Respondents : Miss Lesaoana