IN THE LAND COURT OF LESOTHO

Held at Maseru

LC/APN/161/2014

In the matter between:

'MALIPUO SENKHANE	**APPLICANT**
And	
MAKHAKHE MORIE	**1ST RESPONDENT**
PHILEMON NAMANE	**2ND RESPONDENT**
LEFU KIBI	**3RD RESPONDENT**
NONYANE MONYAMANE	**4TH RESPONDENT**
THABA-TSEKA URBAN COUNCIL	**5TH RESPONDENT**
CHIEF NTAOTE NTAOTE	**6TH RESPONDENT**
MINISTRY OF LOCAL GOVERNMENT	**7TH RESPONDENT**
ATTORNEY GENERAL	**8TH RESPONDENT**

CORAM: **S.P. SAKOANE AJ**

DATE OF HEARING: **28 NOVEMBER 2014**

DATE OF JUDGMENT: **8 DECEMBER 2014**

SUMMARY

Preliminary objection in terms of Rule 66 (2)(b) of Land Court Rules – dispute over a field having been previously brought and decided in the Local Court – principles of the res judicata and its applicability – held that res judicata applicable and therefore application struck off.

ANNOTATIONS

CITED CASES:

Florio v. Minister of Interior And Another LAC (1990-94) 446

Sechele v. Sechele LAC (1985-1989) 297

STATUTES:

Land Court Rules, 2012

BOOKS:

Erasmus and Van Loggernenberg Jones and Buckle, The Civil Practice of The Magistrates' Courts In South Africa Vol. II 8th Edition (Juta)

RULING ON OBJECTION: RES JUDICATA

[1] The applicant sues the 1st Respondent over a field which the latter has been using since 1967. The cause of action is alleged refusal by the 1st Respondent to return the field to the Applicant as it had been loaned to him. The 1st Respondent objects to the institution of these proceedings on the plea of *res judicata* in terms of Rule 66 (2)(b) of the **Land Court Rules, 2012**.

[2] To substantiate this plea, the 1st Respondent answers that:

> "4.1 RES JUDICATA
>
> This matter has already been decided by a court to (sic) competent jurisdiction in CC/174/1987, in the matter between Makhakhe Mokolatsie/Morie (Plaintiff in the case) and Montšo Senkhane. It was decided in Thaba-Tseka Local Court.
>
> Montšo Senkhane is the immediate brother in law to the Plaintiff; 'Malipuo Senkhane (sic); through one Mphejone (sic) Senkhane; and in that case court decided that the same field belong (sic) to the Plaintiff (1st Defendant in this case)."

[3] It is significant that reference to CC/174/1987 is also made by the applicant in her originating application and, in amplification thereof, she annexes as "MS2" a court record which reads as follows:

"CC: 174/87

LEKHOTLENG LA THABA-TSEKA LOCAL LE LUTSENG SETŠENG SA LONA KA LA 26/10/87

Before Court President S.M. Tsiu

Plaintiff	MAKHAKHE MOKOLATSIE of Chief Ntaote
Defendant	MONTŠO SENKHANE of Chief Ntaote
Claim:	Ploughing Plaintiff's field without consent.

Judgment delivered on 26th /10/1987

Judgment entered in favour of Plaintiff, Defendants are ordered to refrain from using the said field since it belongs to the Plaintiff and ordered to pay M26.00 as costs. This judgment should be executed before 30 days expires (sic).

Court President S.M. Tsiu

26th/10/1987

I confirm that this is true and original copy."

[4] The defendants referred to in "MS2" above are all mentioned in the Civil Case Register (annexed as "MS3") as being Montšo Senkhane, Mphejane, Marou and Mabilikoe.

[5] In the originating application, the applicant pleads that she is the wife of Mphejane Senkhane who is now late. Mphejane, her late husband, was the eldest son of the late Hanyane Senkhane. As such, she is the daughter-in-law of Hanyane Senkhane.

[6] The applicant pleads further that she and the 1st respondent belong to related families. The family of the latter is senior to that of hers. The field in dispute is part of two which belong to the estate of her late father-in-law. It was loaned to 1st respondent to use for providing food for minor children in the Senkhane family.

[7] For purposes of the plea of *res judicata*, it suffices that the late husband of the applicant, that is Mphejane, was one of the defendants in CC/174/87 concerned with a claim to the same field and decided in favour of the applicant therein who is the 1st respondent herein.

[8] In **Florio v. Minister of The Interior And Another** LAC (1990-94) 446 @ 462 H-463 A, the Court of Appeal quotes the requirements of *res judicata* enunciated in **Jones and Buckle** Vol. II 8th Edition thus:

> '"Where a party pleads that a point in issue is already *res judicata* because of an earlier judgment *in personam*, he must show –
>
> (a) that there has already been a prior judgment;
>
> (b) by a competent court;
>
> (c) in which the parties were the same; and
>
> (d) the same point was in issue.'
>
> Under the heading 'A prior judgment' the learned authors go on to say:

> ‘There must have been prior litigation or legal proceedings culminating in a final judgment on a decision which has a final effect between the parties based on the merits of the point in issue.’”

[9] In regards to the requirement of the same parties, the learned authors comment (at p. 191) as follows:

> “Unless the judgment is between the same parties, or is a judgment *in rem*, it is *res inter alios acta*, and cannot support a plea of *res judicata*. A judgment binds not only the parties themselves, but also their privies, i.e. persons deriving their interest in title through or from the parties”.

[10] A further comment is that:

> “In determining whether the point has already been decided between the parties, in a manner sufficient to satisfy a plea of *res judicata*, a distinction must at the outset be drawn between judgments *in rem* and judgments *in personam*. If the judgment which it is contended constitutes a bar to the second action was a judgment *in rem* (i.e. affecting either the status of a person, or his property), and if it concerned persons domiciled or property situated within the jurisdiction of the court, it is conclusive against all the world in respect of what the judgment settles as to the status of such person or property, or as to the right or title to the latter, and as to whatever disposition it makes in regard to the disposition of the property… To determine whether a judgment was *in rem* or merely *in personam*, the issues raised in the pleadings must be looked at, and the judgment analyzed to ascertain exactly what decision was given.”

[11] *In casu*, "MS2" and "MS3" contain the identity of the parties, a summary of the case and judgment in the court *a quo*. There are no pleadings annexed thereto because I was told from the Bar by both counsel that the full record is untraceable. But the claim pleaded was apparently for an interdict which was granted on the basis that the field in dispute "belongs to the Plaintiff" who is the 1st respondent herein. Therefore, this judicial determination as to whom the field belongs must have been legitimately or rationally pronounced in the course of determining who has right or title to the field deserving of protection by way of interdictory relief. (See **Sechele v. Sechele** LAC (1985-1989) 297 @ 305 B-C)

[12] In this Court, the 1st respondent is being sued on the basis of the contention that the Senkhane family's title to the said field was never revoked and subsequently re-allocated to the 1st Respondent. It was loaned to him and now refuses to return it back. Hence the prayer "Declaring any document purporting to have allocated the field subject matter hereof to the 1st Respondent to be invalid." In short, the suggestion is that the 1st respondent has no title to the field.

[13] But as I understand "MS2" and "MS3", they constitute a judgment *in rem* settling the status of the field and as to who has a right or title to it. Therefore, it is conclusive against all the world. The issue of right or title

to the said field cannot then be re-opened for litigation again. It has been finally settled by a court of competent jurisdiction in a case in which the applicant's husband was a party.

[14] I then come to the conclusion that the preliminary objection of *res judicata* is well taken on behalf of the 1st respondent. This application is, therefore, struck out with costs in terms of Rule 67 (2) of the **Land Court Rules, 2012**.

S.P. SAKOANE
ACTING JUDGE

For the Applicants: **L.E. Molapo**
For the Respondents: **L.B. Nthimo**