

**IN THE HIGH COURT OF LESOTHO
(Land Court Division)**

In the matter between:

DORIS NKUNDLANDLE MAPETLA

APPLICANT

And

AARON MAPETLA

1ST RESPONDENT

LAND ADMINISTRATION AUTHORITY

2ND RESPONDENT

O/C MASERU CENTRAL CHARGE OFFICE

3RD RESPONDENT

COMMISSIONER OF POLICE

4TH RESPONDENT

ATTORNEY GENERAL

5TH RESPONDENT

**DECISION ON PRELIMINARY OBJECTIONS
(Land Court Rule 66 and 67)**

CORAM: The Hon. Acting Justice Keketso Moahloli

Date delivered: 14 June 2016

SUMMARY

Practice and procedure – preliminary objections in terms of Rule 66 of the Land Court Rules 2012 – failure to make objections at the first court appearance – which type of objections can not be waived – meaning of a valid judgment.

Moahloli AJ

INTRODUCTION

[1] A pre-trial conference was held and signed minutes thereof filed on 24 October 2014. Both parties were legally represented thereat.

[2] The court then began hearing evidence on 8 December 2014. In August 2015, after several postponements and technical delays, 1st Respondents legal representative withdrew and was replaced by the current representative.

Points of Law

[3] Soon after his appointment, 1st Respondent's new counsel, on 22 September filed a "Notice to Raise a Point of Law", which reads as follows":

"KINDLY TAKE NOTICE THAT the first Respondent intends to raise the following points of law at the hearing of this matter:

1. **JURISDICTION:** The Land Court has no jurisdiction over this matter in that Applicant's originating papers invite this Honourable Court to interpret and determine the validity of a will by the late Minah Mamaniniza Mapetla.
2. **JURISDICTION:** The relief sought by the Applicant falls within the jurisdiction of the Land District Court (sic).
3. **PRESCRIPTION:** From the facts of this matter it can be established that the 1st Respondent and/her (sic) mother have been in occupation of the site being the subject matter herein since 1977 and the Applicant only approached this Honourable Court in 2014. It is

accordingly prayed that the Applicant's claim over the said site, if any, has since prescribed.

4. **NON-JOINDER:** One Manthati Mapetla is also in occupation of the site in issue herein and has a direct and substantial interest in the present matter. She accordingly ought to have been joined as a party in this matter.

5. **LOCUS STANDI:** Applicant though born a Mosotho is no longer a citizen of Lesotho and has no right of ownership of land in terms of the Land Act 2010.

Whereof (sic) it is prayed that the main application herein be dismissed with costs on attorney and own client scale."

[4] Applicant vigorously opposed the taking of these points at this stage of the proceedings on the basis that 1st Respondent was time barred by virtue of Rule 66 (1) and (3) of the Land Court Rules 2012 ("the Rules").

THE APPLICABLE LAW

[5] The procedure for raising and dealing with preliminary objections in proceedings before this court is set out in detail in the Rules as follows:

"Preliminary objection

66. (1) Before proceeding with the trial, the court shall decide such objections as may be made by the parties by way of a special answer.

(2) Any party may make an objection on the following grounds:

- (a) That the court has no jurisdiction;
- (b) That there is a final and binding decision by a competent court over the same claim;
- (c) That the suit is pending in another court;

- (d) That the other party is not qualified for acting in the proceedings;
- (e) That the suit is barred by prescription; or
- (f) That the claim has been previously been made the subject of a compromise or other agreement;

(3) Where more than one objection is made under this rule, they shall all be taken together and *any objection not made at the first court appearance shall be considered to have been waived, unless the ground of objection is such as to prevent a valid judgment from being entered.*

[My emphasis]

Decision on objection

67. (1) The court shall decide any objection made under Rule 66 after hearing the opposite party and ordering the production of such evidence as may be appropriate for the decision to be made.

(2) Where the court is satisfied that the objection is well founded, it shall, in the case of an objection under Rule 66 (2) (a) and (f) dismiss the application and, in all other cases, strike out the application or make such other order as it thinks fit.

(3) The striking out of the application shall not of its own force preclude the institution of a new application with respect to the same cause of action and the court shall, in appropriate cases, inform the applicant that he may sue in the court having jurisdiction or in the court in which the previously instituted application is pending.

(4) Where an application is dismissed on the ground of want of jurisdiction, the prescribed portion of the court fee paid on the filing of the application shall not be refunded.

(5) Any decision passed under this rule shall be recorded together with the reasons for such decision.”

[6] It is clear from Rule 66 (3) that if a respondent fails to raise his preliminary objection(s) at the first court hearing he shall be considered to have forgone or relinquished his entitlement to do so, except when “the ground of objection is such as to prevent a valid judgment from being entered”.

[7] The crucial question then is which grounds of objection are covered by this proviso. That is to say, which grounds of objection have the effect of preventing a valid judgment from being entered? There is a dearth of authority on this matter. My learned brother Sakoane AJ has (in **Motebele v Matekase**, LC/APN/152/2014) suggested that “objections which are not waivable are those whose effect constitute a bar to legal proceedings – usually called pleas in abatement (or special pleas). I think that this formulation is too broad as it cannot be said that in our law failure to take a plea in abatement does not in all cases result in a void judgment. For instance, although a special plea of non-joinder is regarded as a plea in abatement, it is settled law that if it is not raised in limine it may not be raised subsequently except on questions of interest or costs.¹ Therefore, it is waivable, without rendering the resulting judgment invalid.

[8] According to the case of *Bethel Temple Inc. v Herrera*, quoted in the Phillippine Law Dictionary, “a judgment is valid when the court has authority

¹ HR Harms, Civil Procedure in the Superior Courts, Service Issue 51, June 2014, Lexis Nexis 1990

to pronounce the judgment and jurisdiction over the subject matter and the parties”.

[9] The Encyclopaedia Britannica makes a similar proposition. “A judgment is valid and of legal effect only if the court that issued it had competence to decide the questions of law presented by the case, as well as jurisdiction over the persons or things involved”²

[10] The only scholarly writing I could find on this question is the article entitled “Requisites for a Valid Judgment” penned by Yale Law School Professor Geoffrey C. Hazard in 1978.³ He makes the following pertinent legal proposition:

“a judgment is valid only if it is based upon adequate notice and is rendered by a court having territorial jurisdiction and invested with the authority to adjudicate the type of controversy involved” [at 38-39]

[11] He however adds the qualification that territorial jurisdiction may be waived by the parties if they do not make proper threshold objection, whereas subject matter jurisdiction can never be waived [at p44].

[12] Closer home, in South Africa, the general rule is that all judgments and orders of court whether correctly or incorrectly granted have to be obeyed

² www.britannica.com/topic/judgment-law

³ Available at http://repository.uchastings.edu/faculty_scholarship/873

until they are properly set aside.⁴ “The tendency is against holding that judgments are void. According to our common-law authorities judgments are void in only three types of cases – where there has been no proper service, where there is no proper mandate or where the court lacks jurisdiction. See *Minister of Agricultural Economics and Marketing v Virginia Cheese and Food Co (1941) (Pty) Ltd 1961 (4) SA 415 (T) at 422E-424H; S v Absalom 1989 (3) SA 154 (A) at 163C and 164E-G*; and the earlier authorities cited in these cases”⁵. In such instances the judgment may be disregarded without having it set aside. But often the prejudiced party will seek a declaratory expressly nullifying it.

[13] On the basis of the above, it seems that of the grounds for objection listed in Rule 66 (2), the only objection which cannot be waived because this would result in the entering of an invalid judgment is that of jurisdiction, particularly subject matter jurisdiction.

Jurisdiction

[14] Firstly, 1st Respondent argues that since the parties have agreed in their Pre-Trial Minutes that the issue for determination is the validity of a will, this Court has no jurisdiction over such a dispute. I do not agree. The principal relief sought by the Applicant in her Originating Application is an order

⁴ *Clipsal Australia (Pty) Ltd v Gap Distributors (Pty)* [2009] ZASCA 49, [2009] 3 All SA 491 (SCA); *Culverwell v Beira* 1992 (4) SA 490 (W) 494; *Jacobson v Havinga t/a Havingas* 2001 (2) SA 177 (T) 180; *Bezuidenhout v Patensie Citrus Beherend Bpk* 2001 (2) SA 224 (E); *Jabocs and Others v Baumann NO and Others* [2009] 3 All SA 398 (SCA), 2009 (5) SA 432 (SCA) par 20; *The Master of The High Court (North Gauteng High Court, Pretoria) v Motala No and Others* 2012 (3) SA 325 (SCA).

⁵ Per EM Grosskopf JA in *Todt v Ipsier* 1993 (3) SA 577 at 589C-D

“declaring the Applicant the lawful owner and/or title holder to all rights and interests to a site presently known as site No.76, Stadium Area, Maseru City in the district of Maseru”.

[15] It is very clear to me that the real dispute in this case concerns land as contemplated in section 73 of the Land Act 2010. It is a dispute involving a claim to title to land. Applicant is claiming that she is the rightful holder of title to the said site by virtue of testate succession. This places the dispute squarely within the jurisdiction of the land courts as interpreted in **Lephema v Total Lesotho (Pty) Ltd and Others** [C of A (CIV) 36/14 at paras 19-22].

[16] The question of determination of the validity of the will is inseparable from the issue of determining Applicant’s claim to title. In the interests of efficiency and swift resolution of land disputes it is necessary that the Land Court has authority to determine peripheral issues which affect the determination of the main issue before it.⁶ Indeed in **Evelyn-Wright v Pierrepont NNO**⁷ the court went so far as to hold that an action in which the validity or legal effect of a will is to be determined is really an action relating to or in property.

[17] Secondly, 1st Respondent contends that even if the issue of interpretation and validity of the will is held to be ancillary, the Land Court is not the appropriate forum. Rather, the matter falls under the jurisdiction of the appropriate District Land Court in terms of Rule 9 (2) of the Land Court Rules 2012. In my view the full purview of the jurisdiction of the Land Court is as

⁶ cf. Department of Justice v CCMA (2001) 22 ILJ 2439 (LC)

⁷ 1987 (2) SA 111 (c) at 112I-J; 113 c

stated in Section 73 of the Land Act 2010. The court's jurisdiction cannot be further circumscribed by subordinate legislation such as the Court Rules. Rule 9 (2) cannot therefore be construed as imposing additional jurisdictional limitations or restrictions on this court which go beyond what is enacted in Section 73 itself, in particular [and Part XII of the Act, in general].⁸

[18] It is significant that 1st Respondent is only raising this objection when the Land Court is already proceeding with the trial, and has in fact finished with the evidence of Applicant's first witness. It cannot be disputed that the Land Court is competent to deal with the present kind of legal controversy. It is not a subject matter which falls outside its jurisdiction. Therefore this is a classic example of a case in which person who has not objected to the jurisdiction of the court until after the trial is well under way must be assumed to have submitted to the court's jurisdiction. *In casu*, 1st Respondent cannot be allowed to raise this objection, more so because the District Land Court and the Land Court have concurrent jurisdiction. It would cause Applicant unnecessary hardship and result in unacceptable delay if this court were to direct that this matter start *de novo* in the District Land Court.

Costs

[19] Both parties asked for costs on the attorney-and-own-client scale. In my view this is an appropriate case for granting punitive costs, in order to penalize the 1st Respondent for unreasonably and vexatiously interrupting and delaying the progress of the trial.

⁸ cf. *Masoabi v Mofelehetsi*, civ/APN/10/14

HOLDING

[20] In the result the points of law raised by the 1st Respondent are dismissed with costs on the attorney-and-own-client scale.

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KEKETSO MOAHLOLI
ACTING JUDGE

Appearance:

Adv N. Khatala for Applicant
Mr. T. Mosotho for 1st Respondent