IN THE LAND COURT OF LESOTHO

HELD AT MASERU **LC/APN/18/19**

CIV/DLC/BRA/34/2018

In the matter between

TUMISANG SHALE **APPLICANT**

AND

MATS'IU KELEBOGILE GLORIA SHALE **1ST RESPONDENT**

BEREA MAGISTRATE COURT **2ND RESPONDENT**

SENIOR CLERK OF COURT **3rd RESPONDENT**

ATTORNEY GENERAL **4TH RESPONDENT**

JUDGEMENT

Coram: Banyane AJ

Heard: 03/10/19

Delivered: 05/11/19

Summary

Application for review - Magistrate having granted default judgement without hearing viva voce evidence-whether an irregularity, if yes whether prejudicial on the party who was not given a chance to present his case

Jurisdiction of the District Land Court to entertain a matter in which a declaratory ought is sought, or where a title claim is based on inheritance

Held: where a declaratory sought is about title to Land, District Land Court is competent to deal with such a claim

Held further that - Even where default judgment is sought, a party is still required to prove his claim, which has been concisely stated in the originating application.

Further; the Rules in land litigation presuppose a trial, as such, hearing of evidence is mandatory before any adverse order is made against a litigant.

Annotations

Cases

Lesotho

Tseko Machaha V Lerole Mphou C of A (CIV) No.6 of 2010

Rantlamo Motumi V Peter Shale C of A (CIV) No.32 of 2017

Shalane Shale V Mamoshe Limema C of A (CIV) No.53/14

Lehlohonolo Masupha V Meisi Nkoe C of A (CIV) No.42 of 2016

Moletsane V Thame C of A (CIV) No.23 of 2017

Rasetla Mofoka v Lesenyeho Ntsane C of A (CIV) No.71 of 2014

Tseliso Mokhosi V Justice Charles Hungwe Constitutional Case No.22 of 2019

Mphanyane V Lemena & Another CIV/APN/344 /95

Mapetla V Mapetla LC/APN/151/14

South Africa

South African Motor Acceptance Corporation (Pty) Ltd v Venter 1963(1) SA 214

Anchor Publishing Co (Pty) LTD V Publications Appeal Board 1987(4) SA 708 at 728(D*).*

Statutes

The Land Act 2010

Land Court Rules 2012

District Land Court Rules 2012

Administration of Estates Proclamation No.19 of 1935

Books

Herbstein v Van Winsen: the Civil Practice of the High Courts of South Africa, 5th Edition, Juta & Co.

Introduction

[1] The respondent is the wife of the late Mpale Shale (the deceased). The deceased was initially married to the applicant's mother Mamosalla Shale (also deceased). Their marriage was legally dissolved in 1973. During his lifetime, the deceased, Mpale Shale amassed immovable property in the form of arable land (fields) and a residential site situated at Marabeng in the District of Berea. It appears that these fields are used by the applicant herein on the basis of his nomination as heir to the deceased's estate.

The proceedings in the Court a quo

[2] In September 2018, the respondent, (as the applicant) approached the Berea District Land Court seeking relief couched in the following terms;

i. The respondent (now applicant) be interdicted from using two pieces of arable Land situated at Marabeng, Berea pending finalization of this matter
ii. The appointment of the respondent(applicant herein) as heir to the estate of the late Mpale Shale or any part thereof be found to be invalid, unlawful and void *ab initio*
iii. It be ordered that she is the sole owner of the two arable pieces of Land situated at Marabeng in the District of Berea
iv. The respondent be ordered to pay cots hereof on attorney and own client scale
v. Further and/or alternative relief.

[3] The application was opposed by the applicant herein. He accordingly filed his answer, in which preliminary objections of jurisdiction and non-joinder were raised.

[4] The record of proceedings in the Court a quo reveals that on the 07th February 2019, Counsel for the respondent and the erstwhile counsel for the applicant herein, Advocate Pakkies appeared before Court. The Court appointed a hearing date of 04/06/19 after directing counsel to hold a pre-trial conference and file minutes accordingly. On the day appointed for hearing, the applicant nor counsel appeared before Court. Advocate Letompa applied for Default judgement on behalf of the respondent. The learned Magistrate granted the reliefs sought by the applicant in her originating application.

The application before this Court

[5] The applicant has now approached this Court by way of review proceedings to have the order of the Court a quo set aside. His grounds for review are as follows;

[6] Applicants' grounds for review

a) the court gave judgement without hearing evidence
b) the court did not have jurisdiction to declare, to entertain issues of inheritance and to review a decision of the family Council wherein nomination of an heir has been made; that the Court misdirected itself by assuming powers it does not have
c) the court gave judgement without the matter going through mandatory pre-trial procedures
d) It was wrong for the Court to grant judgement pertaining to an estate of the deceased person yet the Master of the High Court, the attorney

General and the executor of the estate, who have a direct and substantial interest in the matter, have not been joined in those proceedings.

e) The Court disregarded the Rules by granting judgement on the basis of Documents written in Sesotho language without a fair translation into English Language.

[7] Before I proceed to deal with the jurisdictional challenge of the Lower Court, I deem appropriate to first determine whether this application is properly before this Court. This is in view of an argument raised by the respondent's counsel to the effect that, the applicant ought to have employed the rescission route in seeking to set aside the default judgement before coming to this Court. I will also deal with the question whether the grounds alluded to above, are not valid grounds for review under the Rules governing procedure in the Land courts (District Land Court included).

Failure to apply for rescission before launching a review application

[8] The contention by the 1st respondent's counsel raises the question whether rule 56 of the District Land Court that deals with the setting aside of a judgement granted by default, is peremptory.

[9] I will begin this inquiry on the premise that; where a complaint against a judgement is an illegality or fundamental irregularity of the decision sought to be reviewed, an aggrieved party is not obliged to first approach the Court which is responsible for the illegality or irregularity complained of.

[10] Ramodibeli P (as he then was) in the case of **Tseko Machaha V Lerole Mphou C of A (CIV) No.6 of 2010**, stated the position as follows, albeit dealing with subordinate Court Rule 21 ,which is worded in similar terms as the District Land Court Rule on rescission;

"*The fact that the respondent may have been entitled to apply for rescission is no bar to an application for review. He was not bound to apply for rescission. Section 21 of the Subordinate Courts Act 1988. This section reads as follows:-*

"*21. (1) the court <u>may</u>, on the application of the party in whose favour a judgment has been given, rescind or vary such judgment in the absence of the party against whom the judgment was granted, provided such last-mentioned party has received notice of the application and has been given an opportunity to appear at the hearing of the same."* (My underlining.)
I have underlined the word "may" to indicate my view that the section is not peremptory. There was, therefore, nothing to prevent the respondent from approaching the High Court by way of a review".

See also **Mphanyane V Lemena & Another CIV/APN/344 /95.**

[11] I conclude, on the strength of this authority that the applicants were not precluded from approaching this Court in the manner in which they did, by the mere fact that they did not first exhaust remedies available to them in the lower Court. See also; **South African Motor Acceptance Corporation (Pty) Ltd v Venter 1963(1) SA 214**.

[12] It is clear in my view that where a complaint against the judgement is some irregularity a party is entitled to approach the Land Court in terms of Rule 84 of the District Land Court Rules, to which I now turn.

Whether it is permissible for one to rely on grounds not listed under Rule 85 of the Land Court Rules.

[13] Advocate Letompa argued on behalf of the respondent that applicant's grounds for review do not form part of those listed under Rule 85 of the Land Court Rules and that the applicant cannot therefore invoke grounds not listed under this Rule for his review application. This contention too can quickly be disposed of. The respondent relied on the wrong Rule for his argument. The correct Rule dealing with reviews from the District Land Courts to the Land court is Rule 84(1) and (2) of the District Land court Rules. It is necessary to reproduce it;

84(1)(c)

"Without prejudice to sub-rule (1), any party to a case may apply for review where the judgement sought to be annulled was made based upon any irregularity on the part of the Court in the conduct of the proceedings.

84(2) an application for review shall be filed at the Land Court, which shall function as a division of the High Court.

[14] In the instant case, the complaint by the applicant is directed at the method of trial. He alleges illegalities and irregularities in the conduct of the trial by the Court a quo. Indeed a review is not concerned with a decision but the decision-making process **Anchor Publishing Co (Pty) LTD V publications Appeal Board 1987(4) SA 708 at 728(D).** gross irregularities include; instances where the Court makes an order against a party without giving him an opportunity to be heard in opposition. (**Herbstein & Van Winsen; The Civil practice of the High Courts of South Africa p1275).**

[15] This argument therefore holds no water. I now turn to the grounds of review. The first being the challenge on the Lower's court competence to hear and determine this dispute.

Jurisdiction of the District Land Court to grant a declaratory order, entertain inheritance issues and review a decision of the family council appointing the applicant as heir.

[16] The applicant's counsel, relying on section 73 of the Land Act 2010,as interpreted in the case of **Lephema V Total Lesotho(Pty) Ltd C of A (CIV) No. 36 of 2014** contended that the District Land Court is a Subordinate Court and for that reason, prayers (ii) and (iii) fall outside its province. He submitted that the Magistrate therefore acted ultra vires in granting those prayers.

[17] A further argument advanced by the applicant's counsel under this heading is that the Court, by granting the order to the effect that the nomination of the applicant is unlawful is equivalent to a review of the family council's decision. He submitted that only the High has jurisdiction to make a determination on this issue. He also cited the case of **Lepholisa V Lepholisa LC/APN/12/12** in support of the contention that issues of inheritance are justiciable in the High Court exercising its ordinary Civil Jurisdiction.

[18] In view of Counsel's arguments, it is necessary to properly construe the respondent's reliefs in the Court a quo. The respondent under reliefs (ii) and (iii), is essentially seeking a declaratory order as correctly observed by the applicant's counsel. The question is whether these reliefs fall outside the purview of the District Land Court.

[19] It is now undeniable that the jurisdiction of the Land Court and district Land Court is concurrent in Land disputes, in respect of which forum has not been specified under any provision of the Land Act 2010. The court of Appeal in the case of **Moletsane V Thame C of A (CIV) No.23 of 2017,** which also involved title claim based on inheritance, stated that; in order to determine whether the District Land Court has jurisdiction to entertain a matter where a declaratory relief is sought, the nature of the rights that a party seeks to enforce is decisive and this means that where the claim involves a dispute as to whether one is an allottee or not, the District Land Court is competent to entertain such a dispute and grant a declaratory order.

[20] Similar reasoning is adopted in respect of the jurisdictional challenge based on the view that the District Land Court has no jurisdiction to "entertain inheritance issues". This statement is, in my opinion too broad and needs modification. The respondent claims her entitlement to the disputed property as the wife and heir of the deceased. Clearly her claim is based on a matter provided for in the Land Act 2010(section 10 and 15 thereof), that is, inheritance to Land. In my view, the main issue is her alleged title to Land based on inheritance. Inheritance as a method of acquiring title is therefore inseparable from the title itself. The fact that a claim of title is based on inheritance does not convert a title dispute into an inheritance dispute *simpliciter*.

[21] In the case of **Mapetla V Mapetla LC/APN/151/14**, Moahloli AJ (as he then was) held that the issue of a Will is inseparable from the issue of determining the applicant's title, as such the Land Courts have jurisdiction in a matter where the applicant seeks an order declaring her as the lawful owner and/or title holder to all rights and interest to land.

[22] This ground is not well taken and therefore stands to be dismissed. I move on to the next ground for review

Non Joinder of the Master of the High Court, and an executor

[23] Advocate Masupha for the applicant is of the view that the case before Court concerns a deceased person's estate, by virtue of which the Master of the High Court is an interested party who ought to be joined. Advocate Letompa brought to the fore the fact that respondent was appointed an executrix by the Master. A letter form the Master's office issued on the 13th July 2009 has been attached on the respondent's answer in these review proceedings.

[24] The Master through this letter indicated that the estate of the deceased should be administered under customary Law, and not under the **Administration of Estates Proclamation of 1935**; that the Chief and District Secretary handle the procedure by assisting the respondent as the executrix. The letter reveals that under the circumstances, there is no need for the master to issue letters of administration. In view of this letter, there is no role that the Master plays in the administration of the estate in question, I thus fail to see how the Master is a necessary party in these proceedings. This point too lacks merit and falls to be dismissed.

[25] The next ground of review relates to whether the learned magistrate committed an irregularity by relying on documents which had not been translated into English language.

Reliance of documents not translated into English

[26] Advocate Masupha, although he could not refer this Court to a specific Rule, submitted that documents on which the parties rely, ought to be

translated into English language. Advocate Letompa argued on the other hand that the Rules of the District Land Court do not require translation of documents.

[27] My perusal of the District Land Court Rules (particularly Rule 12 dealing with annexes to the originating application) reveal that there is no such requirement, however, it is peremptory that all documents filed in Court/annexures to the originating application should be translated into English in the Land Court. Rule 13(2) of the Land Court Rules reads;

"*all such documents shall be duly translated into English*".

[28] This ground similarly ought to be dismissed.

I now move to the last and most important ground. It appears as the first in the list of grounds for review. It is interrelated to the third ground for review because both are directed at procedure. They will be dealt with together.

The procedure adopted by the Court a quo

[29] It is undeniable that learned Magistrate did not hear *viva voce* evidence of the applicant in the matter. Mr Letompa for the applicant simply motivated the application for default judgement by referring the Court to certain annexures to the applicant's originating application and reply.

[30] The first notable irregularity, although it has not been raised in these proceedings is in respect of preliminary objections raised in the respondent (now applicant)'s answer. The record of proceedings evinces the fact that the Learned Magistrate did not dispose of these point before proceeding to the merits of the application. **Mokhesi AJ (as he then was) in the case**

of Tseliso Mokhosi V Justice Charles Hungwe Constitutional Case No.22 of 2019 Aptly stated, albeit not dealing with a review application; that it is procedurally flawed to ignore points of law (preliminary objection in the Land Courts) where they have been raised. He stated that the proper approach is for the court to consider such points before dealing with the merits of a case.

Granting judgement without hearing evidence

[31] It was argued on behalf of the applicant that failure to hear viva voce evidence before granting the Judgement is contrary to Rules 71(1) and (2) of the District Land Court Rules. it was argued that the learned Magistrate acted contrary to the Law requiring him to properly exercise his discretion by arriving at a decision based on the facts before him. A decision of the Supreme Court of Nigeria in **Adamu Suleman & Another V Commissioner of Police SC 19/2005** was cited in support of this contention. it was submitted that this justifies the setting aside of the Judgement so granted. The case of **Rasetla Mofoka v Lesenyeho Ntsane C of A (CIV) No. 71 of 2014**, **Likotsi Civic Association & 14 Others V The Minister of Local Government C of A (CIV)No.42 of 2012** were also cited to support the argument that viva voce evidence is inevitable in the Land Courts. Advocate Letompa contended however that the case of **Mofoka V Ntsane** is distinguishable from the present case because in the present case, there is documentary evidence upon which the Court relied to find for the applicant.

[32] There exists now an array of authorities on this subject. In the case of **Mofoka V Ntsane,** the **Court of Appeal** dealt with a similar situation in which the Land Court, had granted default judgement without hearing evidence. Dr K. E Mosito P, pointed out that Rules 71 and 72 require the leading of sworn evidence in respect of facts contained in the originating

application (para 8 of the judgement) and that judgement so granted without hearing evidence is irregular.

[33] In the case of **Motumi V Shale C of A (CIV) No.32 of 2017,** the Court of Appeal held that *the presiding Judge erred in granting the originating application as prayed without hearing evidence and that; cancelling the appellant's lease without affording him an opportunity to be heard amounted to a misdirection.*

[34] Applying these authorities in the case before Court, it is imperative to refer to the case of either party as pleaded in the Court a quo.

[35] The applicant's claim of title to the disputed fields is based on inheritance so is the respondent's. Both have attached documents to support their case. In essence the respondent claims that by virtue of her civil rites marriage to the deceased Mpale, she has title to this property and the family could not validly nominate the applicant as heir over same.

[36] The applicant's case on the other hand is that he was rightly nominated as heir to his parents' estate being the 1st born male child and that the respondent's marriage to the deceased is invalid because it was concluded during the subsistence of his mother's marriage to the deceased.

[37] The very nature of these averments raised by the answer, in my view reveal a dispute of facts, which necessitated the leading of evidence by the applicant in the Court a quo, even in the absence of the respondent (now applicant). Differently put, the Magistrate was required to inquire into the matter by directing that oral evidence be led in order to establish whether

indeed the respondent's marriage to the deceased was concluded during the subsistence of the applicant's mother's marriage, if yes, whether the respondent is entitled to the disputed property and in the case of the answer being in the negative, whether the applicant has a right to claim such property.

[38] It was stated in the case of **Lehlohonolo Masupha V Meisi Nkoe C of A (CIV) No.42 of 2016** that where dispute of facts arise from the pleadings, such dispute should be not be resolved without the hearing of *viva voce* evidence.

[39] The perusal of the Rules of both the Land Court and District Land Court show the uniqueness of the procedure in these Courts. The proceedings are initiated by an originating "application" in which the applicant is simply required to concisely state Material facts, circumstances and other related matters on which the application is based (Rule 11(C) of the District Land Court Rules .what follows after the filing of the originating application is a clear indication that the hearing of the said application is by way of trial. For avoidance of doubt, I mention below the other rules relating to trial procedure.

[40] Rule 12 requires that the applicant should attach to the originating application "a list of witnesses to be called <u>at the hearing, with their full names and addresses and the purpose for which they are to be called</u>…"

[41] The reading of these two rules, read together with Rule 62(pre-trial conference), 69(opening of trial), 70,71 and 73,74, 79,to mention but a

few, elucidate in no uncertain terms, the fact that the hearing of the application takes form of action proceedings where viva voce evidence will be led.

[42] Peete AJA in **Shalane Shale V Mamoshe Limema C of A (CIV) No.53/14** observed the uniqueness of the procedure in the Land Court and stated the position as follows;

"*Adjudication procedures before the Land Court are essentially sui generis and inquisitorial in nature and the originating applications are usually complemented by "viva Voce" evidence from both parties."* See also **Masupha V Nkoe (supra).**

[43] Counsel for the respondent sought to argue that the applicant suffered no prejudice in the manner in which the proceedings were conducted in the court a quo. He says the applicant herein has no prospects of success should the matter be reverted to the District Land Court.

[44] It appears to me that the argument is based on documents attached to the respondent's originating application in the Court a quo. It is a decree of Divorce granted in 1973. Apparently respondent relies on this decree to support her allegation that the applicant is not entitled to the disputed property. It is noteworthy that the applicant does not appear in that order. Be that as it may, it is not for this Court to speculate why he does not because no evidence has been adduced to establish the nexus between the decree and the applicant's disentitlement. In My view, evidence ought to have been led to clarify issues such as whether the applicant at this time was omitted in the order because he was already a major or whether he was born subsequent to the Divorce proceedings.

[45] Further the respondent seem to rely on some testamentary writing co-authored by the respondent and her husband, in terms of which they designated their son Tsi'u to be an heir upon their demise.

[46]In light of the foregoing analysis; I come to the conclusion that failure by the Magistrate to hear viva voce evidence where there exists a dispute of facts amounts to a reviewable irregularity. I proceed to deal with the question of prejudice.

Whether the applicant was prejudiced by the manner in which the proceedings were conducted.

[47] It is the respondent's counsel's contention that the applicant failed to demonstrate how they were prejudiced by the manner in which the proceedings were conducted.

[48] It is trite that before review proceedings can succeed, there should have been an injustice or irregularity **(Herbstein & Van Winsen p1270**). An irregularity in itself is however not a ground for setting aside a decision on review. Once it is shown to exist, the applicant need not prove actual prejudice but it is sufficient to establish that the irregularity was likely to prejudice him/her.

[49] There cannot be doubt that the applicant suffered prejudice because he was not afforded a day in Court to present his defence, regardless of how frivolous the respondent may conceive it to be. There is no suggestion that the applicant was aware of the date appointed for trial and that he decided, without good cause not to appear before Court. His erstwhile Lawyer's negligence cannot therefore be visited on him.

[50] On the question of costs, since there has been partial success in relation to the grounds raised in this application, no order of costs will be made.

Disposition

[51] In the result, the review application succeeds and the following order is made*;*

a) The decision of the Berea District Land Court in CIV/DLC/BRA/34/18 granted on 04/06/19 is reviewed, corrected and set aside

b) The hearing of the application should proceed in accordance with the Rules of the District Land Court.

c) Each party to bear their own costs

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P. BANYANE
ACTING JUDGE

For Applicant: Advocate M. Masupha

For Respondent: Advocate L. Letompa