

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/T/565/18

In the Matter Between:-

'MAFOLE ELIZA MALOKOTSA

PLAINTIFF

AND

'MAAKHENTE SEQHEE

DEFENDENT

JUDGMENT

CORAM : MOKHESI J

DATE OF HEARING : 03RD FEBRUARY 2020

DATE OF JUDGMENT : 05TH MARCH 2020

CASE SUMMARY: Civil Practice: *The plaintiff suing the defendant requesting a declarator that a developed site forms part of the plaintiff's joint estate with her late husband who had cohabited with the defendant – the defendant excepting to the pleadings on the basis that the High Court in its ordinary jurisdiction cannot hear and determine matters which fall under the jurisdiction of Land Court - Held that although ordinarily, an objection to jurisdiction should be raised by way of a special plea, it is however, permissible for it to be raised as an exception where lack thereof is apparent **ex facie** the pleadings.*

ANNOTATIONS:

BOOKS : *Van Loggerenberg, Erasmus Superior Court Practice 2nd Ed.*

CASES : *Mckenzie v Farmers' Co-oporative Meat Industries Ltd 1922 AD 16*

Viljoen v Federated Trust Ltd 1971 (1) SA 750

STATUTES : *Land Act No. 8 of 2010*

Land (Amendment) Act 2012

High Court Act No. 5 of 1978

Per Mokhesi J

[1] INTRODUCTION

The plaintiff had issued summon against the defendant seeking the following relief:

- a) That the developed property situated at plot number 13301 – 747 Ha-Seoli in the district of Maseru forms part the joint estate between the plaintiff and the late Simon Senyo Malokotsa
- b) That upon granting of the order in (a) above, the defendant be ordered to vacate the said premises at plot number 13301-747 situated at Ha-Seoli in the district of Maseru.
- c) Costs of suit
- d) Further and/or alternative relief.

[2] FACTUAL BACKGROUND

For the sake of convenience, the parties will be referred to as they are in the summons. The facts of this case are pretty much straightforward. The plaintiff was married to the late Simon Senyo Malokotsa. During the subsistence of their marriage, the deceased co-habited with the defendant on the developed plot, now the subject matter of these proceedings.

[3] Upon being served with the summons, the defendant reacted by invoking the provisions of Rule 29 (2) and (3) of the Rules of this Court, that the pleadings are vague and embarrassing (a) for lack of jurisdiction, (b) for lack of averments “as to how the registered title of defendant to the residential place in issue was acquired by late Simon Senyo Molokotsa. It is also not clear as to how and why late Simon Senyo Malokotsa is associated with the property in issue in view of the transfer registered under No. 31039 dated 13th September 2012 in terms of which David Taole Rasethuntśa transferred Plot No. 13301 – 749 to defendant.”

[4] The so-called vagueness and embarrassment adverted to by the defendant was met with dead silence by the plaintiff, thereby, on the 07th November

2018, necessitating the defendant to issue Notice to except to the pleadings in terms of Rule 29. In the Notice of exception the defendant avers that the pleadings are vague and embarrassing for lack of averments to sustain an action by not disclosing this court's jurisdiction to entertain this matter as it falls within the purview of the Land Court in terms of the **Land Act No. 8 of 2010**.

[5] Parties' Submissions:

It is plaintiff's averment that the site in issue formed part of their joint estate and therefore amenable to be declared as such in terms of the order sought from this court. The plaintiff argues that this matter concerns a declarator that Plot No. 13301 – 747 which is situated at Ha-Seoli, forms part of her joint estate with her deceased husband, and therefore, this court has jurisdiction to entertain it. She further argues, in the same breadth that jurisdiction cannot be raised by way of an exception under Rule 29 as the said rule provides that an exception to the pleadings may *only* be taken in the following instances;

- a) Where pleadings lack averments which are necessary to sustain an action or defence.
- b) Where pleadings are vague and embarrassing
- c) Where pleadings do not comply with the Rules.

[6] On the one hand the defendant argues that the pleadings are vague and embarrassing as the court lacks jurisdiction to entertain this matter. She argues that this matter falls to be determined exclusively under the jurisdiction of the Land Court. It will be observed that the defendant has inelegantly dealt with the issue of lack of jurisdiction and tucked it under vagueness and embarrassment requirements of rule 29(2). The defendant is misguided in doing this, as lack of jurisdiction cannot be raised by way of an exception that the pleadings are vague and embarrassing. However, this notwithstanding, does not mean that the issue of lack of jurisdiction cannot be considered at all under rule 29, as will be demonstrated in the ensuing discussion.

[7] The Law and its application to the facts:

I wish to deal only with the issue of jurisdiction and Rule 29 as it is dispositive of this matter.

Rule 29 (1) provides:

“29 (1) (a) Where any pleadings lack averments which are necessary to sustain an action or defence, as the case may be, the opposing party, within the period allowed for the delivery of any subsequent pleading, may deliver an exception thereto.”

[8] The issue for determination is whether rule 29 (1) above is wide enough to cover objections against jurisdiction of the court to entertain the matter. It is trite that, although, the sub-rule does not explicitly require that the pleadings disclose a “cause of action,” it has always been the view of the courts that in fact that is what is required (Van Loggerenberg *Erasmus Superior Court Practice 2nd Ed. Juta at D1 – 301*). In *Mckenzie v Farmers’ Co-operative Meat Industries Ltd 1922 AD 16 at 23* “cause of action” was defined as follows:

“...every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proven.”

[9] Ordinarily an objection to pleadings based on lack of jurisdiction on the part of the court, should be raised by way of a special plea, not exception. But where lack of jurisdiction is apparent *ex facie* the pleadings, lack of jurisdiction may be used to found an exception to the pleadings. This is rooted in the requirement that the pleadings must have averments which are necessary to sustain an action or defence. The words “sustain an action” as they appear in subrule (1) were interpreted in the case of *Viljoen v Federated Trust Ltd 1971 (1) SA 750 at 759 H* (this case interpreted Rule 23 (1) of the South African Uniform Rules of Court which is worded similarly to the subrule in issue), and this is what the court had to say:

“The words ‘sustain an action’ in sub-rule (1) of Rule 23 means, in my opinion, to sustain an action in the court in which such action is brought. One of the averments necessary to sustain an action in a particular court is clearly that such court has jurisdiction to entertain the action. If the court has no jurisdiction in the matter the action cannot be sustained in that court. Absence of jurisdiction is, therefore, a good defence in such an action.”

[10] And further at p. 780 D – G the court said:

“In my opinion it is clear, therefore, that the above-quoted phrase in subrule (1) of Rule 23 has a meaning wide enough to cover a case where the absence of the necessary jurisdiction is apparent *ex facie* the pleading concerned, and that a defence based upon the absence of such jurisdiction can validly be raised by way of exception..... The court has however, in my opinion, the power to dismiss a claim *mero motu*, if it is clear *ex facie* the pleadings that it has no jurisdiction whatever to entertain such a claim....”

[11] In *casu*, the plaintiff is suing the defendant over a developed property. This claim is quintessentially a matter for adjudication by the Land Court, not this court in its ordinary jurisdiction. In terms of section 73 of the **Land Act 2010** as amended by **Land (Amendment) Act 2012**, the Land Court is empowered to determine all disputes, actions and proceedings concerning land; this matter falls into this jurisdictional sphere of the Land Court. That this court lacks jurisdiction to determine this matter is apparent *ex facie* the pleadings even without an objection being raised by the defendant. Where, as we have seen, lack of jurisdiction is apparent *ex facie* the pleadings, the court is entitled to raise it *mero motu* and dismiss the action on its score. Equally, the argument advanced by the plaintiff that it is merely seeking a declaration order, should also be rejected as unfounded. The Land Court is a division of the High Court, and in terms of section 2 (1) (b) of the **High Court Act No. 5 of 1978**, has power to issue declaratory relief.

[12] In the result the following order is made:

a) The exception is upheld with costs.

MOKHESI J

**FOR THE PLAINTIFF: ADV. MOLISE instructed by M.W MUKHAWANA
ATTORNEYS**

**FOR THE DEFENDANT: ADV. C.J. LEPHUTHING INSTRUCTED BY T.M MAIEANE
&CO ATTORNEYS**