

IN THE HIGH COURT OF LESOTHO

CIV/APN/0101/2022

HELD AT MASERU

In the matter between:-

REFILOE KOLISANG

APPLICANT

AND

HER WORSHIP MRS RANT'SO

1ST RESPONDENT

CLERK OF COURT - MASERU

MAGISTRATE COURT

2ND RESPONDENT

THATO KOLISANG

3RD RESPONDENT

PEETE LIBE (EXECUTOR –

LATE ESTATE LINEO KOLISANG

4TH RESPONDENT

Neutral citation:- Refiloe Kolisang vs Her Worship Mrs Rantso Clerk of Court – Maseru & 3 others [2022] LSHC Civ 286 (3rd October 2022)

CORAM : M.P. RALEBESE, J

DATE HEARD : 29 SEPTEMBER 2022

DATE DELIVERED : 03 NOVEMBER 2022

SUMMARY

Review of decision of Magistrate joining the executor as plaintiff in ejectment proceedings – Overlap between review and appeal – Review of uncompleted proceedings - No gross irregularity alleged – No prejudice which could result in injustice – Main antagonists being siblings - No order as to costs.

ANNOTATIONS

CITED CASES

LESOTHO

Khali v Khali (C of A (CIV) 40/17 (2019) LSCA Makula and Another v Motinyane (CRI/APN/720/03) (CRI/APN/720/03) [2004] LSHC 65 (23 April 2004)

Phaila v Director of Public Prosecutions (Const 24/2018) 2021 LSHC 07

SOUTH AFRICA

STATUTES

BOOKS

Herbstein and Van Winsen - The Civil Practice of the Supreme Court of South Africa 4th ed., Juta, & Co. Ltd, 1997

JUDGMENT

M.P. RALEBESE J.

Background and Facts

[1] This is a review application in terms of which the applicant is seeking review and setting aside as irregular, the decision of the 1st respondent in terms of which she ordered the joinder of the 4th respondent as the 2nd plaintiff in the ejectment proceedings against the 3rd respondent. The ejectment proceedings are still pending before the 1st respondent.

[2] The brief background to this application is that the applicant and the 3rd respondent are siblings and daughters of the late Lineo Kolisang (the deceased). The deceased died testate having executed a will in terms of which she appointed the 3rd respondent, her younger daughter, as the beneficiary of her leased and developed residential plot situated at Mohalalitoe Maseru urban area (the subject matter). The deceased also appointed the same 3rd respondent as an executor of the said will. Since the 3rd respondent is, apparently, living outside Lesotho, the Master of the High Court, apparently upon the request of the 3rd respondent appointed the 4th respondent as the assumed executor and granted him a letter of administration in respect of the estate of the deceased on 3rd November 2021 for six months.

[3] Apart from the aforesaid will, it appears that the Kolisang family met on 06th December 2018 and appointed the 3rd respondent as the heiress to the subject matter. On 23rd July 2023, the Land Administration Authority effected a transfer of the lease (lease number 13283-1222) in respect of the subject matter from the names of the deceased to the 3rd respondent.

[4] It is common cause that at all relevant material times, the applicant was residing on the subject matter with the consent of the 3rd respondent as the latter is said to be living outside the country. The 3rd respondent being desirous of selling the subject matter informed the applicant to vacate the house but the latter refused. On 29th October 2021, the 3rd respondent instituted ejectment proceedings at Maseru Magistrate Court (**CIV/T/MSU/0218/2021**) in terms of which she sought ejectment of the applicant from the subject matter.

[5] On 29th November 2021, the 1st respondent granted an order for the joinder of the 4th respondent in the ejectment proceedings as the 2nd plaintiff. It is against this order that the instant application for review has been instituted.

The arguments

[6] The applicant's case is that the 1st respondent should not have joined the 4th respondent as the co-plaintiff with the 3rd respondent as the two did not have a common interest in the subject matter. The applicant's case is premised on the submission that the 3rd respondent held a registered title (lease) in respect of the subject matter in the ejectment proceedings, and as such, the subject matter did not form part of the estate of the deceased which the 4th respondent had to administer. The applicant submits that the 4th respondent did not have any interest to protect in the ejectment proceedings and as such lacked the necessary *locus standi in judicio*.

[7] The 4th respondent is the only one who opposed the application though Advocate Mohasoa represented both the 3rd and 4th respondents. The gist of his opposition is that the decision of the 1st respondent is not reviewable as the applicant has not indicated any irregularity whatsoever committed by the 1st respondent. The 4th respondent further submitted that he had a substantial interest in the ejectment proceedings as the subject matter formed part of the estate of the deceased of which he was the executor.

The issue

[8] The issue to be determined by this court is whether the decision of the 1st respondent stands to be reviewed in the circumstance of this case.

Analysis

[9] The difference between an appeal and a review can be blurry sometimes and what distinguishes them is that in an appeal the attack is against the result while in a review the attack is directed to the method or procedure (**Makula and Another v Motinyane**¹. The essence of review has been espoused by **Herbstein & Van Winsen**² in the following terms:

“Judicial review is in essence concerned, not with the decision, but with the decision-making process. Upon review, the court is in general terms concerned with the legality of the decision, not with its merits.”

The case of **Phaila v Director of Public Prosecutions**³ referred to by counsel for 3rd and 4th respondents elaborates on the nature of the irregularity which should found a review application as follows:-

“...an irregularity in proceedings does not mean an incorrect judgment, it refers not to the result but to the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case duly and fairly determined.”

[10] In the instant case, the applicant is actually attacking the decision of the 1st respondent to have joined the 4th respondent as the co-plaintiff in the ejectment proceedings. The ground for the challenge being that the 4th respondent lacked the necessary substantial interest in the proceedings. There is nothing procedural or methodological about this challenge. The applicant has actually instituted an appeal disguised as a review.

¹ (CRI/APN/720/03) (CRI/APN/720/03) [2004] LSHC 65 (23 April 2004)

² *The Civil Practice of the Supreme Court of South Africa* 4th ed., Juta, & Co. Ltd, 1997 at page 929

³ (Const 24/2018) 2021 LSHC 07

[11] While it is true that because of the overlap between an appeal and a review, the court will not turn a blind eye to a manifest injustice merely because of

the form in which the grievance was brought, the court should be wary to interfere with the decision of the lower court where there is no manifest injustice or gross irregularity (**Makula and Another v Motinyane**⁴). Perusing the founding affidavit of the applicant, I could not find any averment of the gross irregularity alleged to have been committed by the 1st respondent which could have resulted in grave injustice to the applicant.

[12] Even supposing that the 1st respondent had committed a gross irregularity in joining the 4th respondent in the ejectment proceedings, the question would be whether the applicant suffered any prejudice which could result in injustice to him. The principle was enunciated by the Court of Appeal in **Khali v Khali**⁵ in the following terms:-

*“It is important to note that irregularity is not in itself a ground for setting aside a decision on review. To qualify for this purpose the irregularity must be of such a nature that it is calculated to cause prejudice (**Napolitano v Comm. of Child Welfare, Johannesburg 1965 (1) SA 742 (A) at 745H-746B**). The court will therefore not set aside proceedings on review if it is satisfied that no substantial wrong was done to the applicant, that is to say, the irregularity was not likely to prejudice the applicant, **Hip Hop Clothing Manufacturing CC v Wagener NO and Another 1996 (4) SA 222 (C) at 230C.**”*

The applicant in the instant case submitted that the prejudice he stood to suffer was that she had to defend a case in which the 4th respondent had not filed any particulars of claim. I cannot find any grave prejudice in this

⁴ Supra.

⁵ (C of A (CIV) 40/17 (2019) LSCA at para. 39

submission which could compel this court to interfere with the decision of the 1st respondent. The applicant still had other procedural avenues which she could explore such as applying for absolution from the instance with costs against the 4th respondent at the close of the case for the plaintiffs in the court *a quo*.

[13] It has been stated time and again that the high court should not, as a general rule interfere with unfinished and ongoing proceedings in the lower courts. The court will only do so in exceptional instances where injustice is either apparent or would be occasioned to the applicant (**Khali v Khali**⁶).

[14] This is a case where I am reluctant to interfere with the decision of the court *a quo* in ongoing proceedings. It is my considered view that notwithstanding the joinder of the 4th respondent as the plaintiff, the applicant could still take further pleading steps and proceed with the ejectment action without any hindrance or prejudice.

Disposition

[15] The application is dismissed and there is no order as to costs. Both counsel were *ad idem* that they would not insist on costs considering that the main antagonists in this matter are siblings; something rather unfortunate that the only daughters surviving their late single mother are at loggerheads over the property which should rightfully be their home, notwithstanding the testamentary wish of their late mother. I made a plea with counsel for the respective parties that pending this judgment, they

⁶ Supra

should collaborate and attempt to refer the siblings for mediation as a way to revive and preserve their sisterly relations. Unfortunately, a report has been filed that such an attempt did not yield anything positive.

M.P. RALEBESE

JUDGE

For Applicant : Advocate L. Molapo

For the 2nd and 3rd Respondents : Advocate Mohasoa