

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

LC/APN/36/2020

In the matter between

PULANE MABITLE

APPLICANT

AND

P.E.G. (PTY) LTD REG. NO.197/243

1ST RESPONDENT

FOOD FOR AFRICA REG. NO.191/217

2ND RESPONDENT

KOLISANG MOCHESANE LEPHOLISA

3RD RESPONDENT

STEPHAN CARL BUYS

4TH RESPONDENT

DUPREEZ LIEBETRAU & CO.

5TH RESPONDENT

ALL TENANTS/OCCUPANTS ON PLOT NUMBERS

122281-425 AND 12281-426

6TH RESPONDENT

LAND ADMINISTRATION AUTHORITY

7TH RESPONDENT

LAND REGISTRAR

8TH RESPONDENT

REGISTRAR OF DEEDS

9TH RESPONDENT

MASERU CITY COUNCIL

10TH RESPONDENT

MASTER OF THE HIGH COURT

11TH RESPONDENT

COMMISSIONER OF POLICE

12TH RESPONDENT

ATTORNEY GENERAL

13TH RESPONDENT

RULING ON PRELIMINARY OBJECTION

Neutral Citation: Pulane Mabitle v P.E.G. (Pty) Ltd REG. No.197/243 & 12 Others [2022] LSHC 31

CORAM: BANYANE J

HEARD: 10/06/2021

DELIVERED: 03/03/2022

Summary

Preliminary objection – lis alibi pendens – an action commenced in 2011 and set down for hearing – second application commenced in 2020 – both for cancellation of deeds of transfer pertaining to disputed plots – Reliefs claims in each essentially the same – No good reason for Court to permit second action to proceed.

ANNOTATIONS

Cases cited:

1. Shale v Shale C of A (CIV) 35/19
2. Moletsane v Thamae C of A (CIV) 23/17
3. Ntoa Abel Bushman v Lesotho Development and Construction (Pty) Ltd & 2 Others C of A (CIV) No.3 of 2015
4. Motebele v Matekase LC/APN/152/2012.
5. Khoali v His Worship Mr Selebeleng C of A (CIV) 23/20.
6. Sechele v Sechele (1985-1989) LAC 297
7. Williams v Shub 1976 (4) SA 567
8. Nestle (SA) Pty Ltd v Mars Incorporated 2001 (4) SA 342

Legislation

1. The Land Act No.8 of 2010
2. Land Regulations 2011

BANYANE J

Introduction

[1] The dispute between the parties pertains plot number 12281-075 (later subdivided into plot numbers 12281-423, 12281-424, 12281-425 and 12281-426 situated at Ha Hoohlo within the Maseru urban area. Plot 075 was registered in the applicant's mother Mapulane (deceased) prior to its transfer to some of the respondents (**Food for Africa** and subsequently to **P.E.G** herein). The applicant has approached this Court seeking cancellation of deeds of transfer in relation to these plots, an order declaring such deeds as null and void, and an order declaring the applicant as the lawful successor and owner of all rights and interest on these plots.

1.1 It must be stated at the outset there is another claim (CIV/T/530/2011) pending before the High Court in relation to the subject-matter herein. This is common cause.

The preliminary objection

[2] The respondents oppose this application. In their answer, they raised the following preliminary objections;

- a) That the suit is pending in another Court under CIV/T/530/2011 due to be heard on 01st June 2021 before Mokhesi J in which similar facts are pleaded and the relief sought is also similar.
- b) This matter involves inheritance and as such this Court has no jurisdiction over it.
- c) The applicant is not qualified to act in these proceedings in as much as she is seeking to be confirmed as successor in title therein.

[3] I immediately address this objection. It is appropriate to start with the second objection because it is discernible that the respondents take issue with the jurisdiction of this Court on the ground that this matter involves inheritance and should not have been brought before this Court.

3.1 This objection may quickly be disposed of. It is ill-advised and therefore dismissible for the simple reason that the nub of the dispute

between the parties is whether the respondents fraudulently acquired title over the disputed plots. It is not an inheritance dispute in my view.

[4] In **Shale v Shale C of A (CIV) 35/19**, a similar argument was raised that the Land Court does not have jurisdiction to deal with disputes relating to inheritance and or succession nor can it deal with declarators based on heirship; that such issues can be adjudicated by the High Court exercising its normal jurisdiction. The applicant (appellant) had sought (in the High Court), **a)** an order declaring him as the lawful and sole heir to the property that used to belong to the deceased, **b)** recognition of the family letter written in his favour to be in relation to the property which he inherited from his parents and **c)** invalidation of certificates of allocation issued for the respondents.

[5] The High Court (per Sakoane J as he then was) declined to hear the matter on the basis that it ought to be heard by the Land Court. The Court of Appeal agreed. It held that the phrase “concerning land” used in **section 73 of the Land Act 2010** to define the type of disputes justiciable in the Land Court(s) is not restrictive, but expansive. That if a dispute relate to, is about, affect or involve title to land, it falls within the jurisdiction of the Land Court.

[6] Addressing the contention that inheritance ought to be threshed out in the High Court before the question of title may be placed before the Land Court for determination, the Court remarked as follows at para 36 of its judgement;

“the core dispute touched on the appellant and respondents’ interest in Land and not heirship. In any event there was no heirship to be determined. The core issues raised in the notice of motion predominantly deal with interest in Land...”

6.1 See also **Moletsane v Thamae C of A (CIV) 23/17**, where the Court of Appeal considered the question whether a District Land

Court is competent to issue a declaratory order where title is claimed on the basis of heirship. It held that the District Land Court possesses Jurisdiction to hear the matter if a right that a party seeks to assert is about title to land.

6.2 See also **Maoeng v Maoeng C of A (CIV) 9/2019**, where the Land Court had to determine who in law between the claimants, was the rightful heir to the disputed land.

[7] I deal next with the second objection, whether there is a pending suit between the parties in the High Court (ordinary jurisdiction).

The suit is pending in another Court

[8] For the respondents, Mr Mpaka argued that CIV/T/430/2011 and the present matter are between the same parties or successors in title, concerning the same subject-matter and founded on the same cause of complaint. He referred the Court to the case of **Ntoa Abel Bushman v Lesotho Development and Construction (Pty) Ltd & 2 Others C of A (CIV) No.3 of 2015** to submit that this matter is dismissible on the grounds that both actions concern the same parties or successors, concerns plots No.425 & 426, the reliefs of cancellation of deeds of transfer and ejectment based on the same complaint of fraud.

[9] In seeking to distinguish this matter from CIV/T/530/11, the applicant's counsel Mr Molapo conversely contend that the prior action was between the applicant's mother and 2nd, 3rd, 5th, 7th & 9th & 13th respondents, but the 1st, 4th, 6th, 8th, 10th, 11th and 12th respondents were not parties thereto.

[10] Secondly the causes of action herein are dissimilar from the prior action. In his view the cause of action in this matter is that the 1st & 5th respondents assumed title in plots 425 and 426 through fraudulent misrepresentation while the cause of action in the prior action was based

on termination of a sublease agreement concluded by the applicant's late mother and Mr Mochesane Lepholisa.

[11] His further contention is that the reliefs sought in these two proceedings is different.

[12] He similarly referred the Court to the case of **Ntoa Abel Bushman** (supra) to submit that this matter is not a replica of the prior action.

[13] He concludes that if the Court were to uphold this special answer, the effect would be to delay hearing of this matter because the objection is dilatory. He contends that the Court has discretion to direct the applicant to either withdraw this application or prosecute the prior action. For this submission, he relied on **Motebele v Matekase LC/APN/152/2012**.

Requisites of plea of *lis pendens*

[14] I proceed now to consider the question whether the plea of *lis pendens* is validly raised in this matter.

[15] The requisites of a valid plea of *lis pendens* are that the actions must be between the same parties, on the same cause of action and in respect of the same subject matter. **Williams v Shub 1976 (4) SA 567 at 570**.

This means where a party raises *lis pendens* objection, he must establish that an applicant has brought another action against the same defendant on the same cause of action and in respect of the same subject-matter whether in the same or in a different Court. In other words, in order to succeed, it must be shown that another action has been instituted. **Khoali v His Worship Mr Selebeleng C of A (CIV) 23/20**.

[16] In **Nestle (SA) Pty Ltd v Mars Incorporated 2001 (4) SA 342**, it was held that;

“The defence of *lis alibi pendens* shares features in common with the defence of *res judicata* because they have a common underlying principle which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it the suit must generally be brought to its conclusion before that tribunal and should not be replicated.”

[17] In deciding what is meant by the *same cause of action or same matter in issue*, the Court of Appeal in **Sechele v Sechele (1985-1989) LAC 297** held that for a successful *res judicata* plea, the *matter in dispute* must be identical in both proceedings; though it is not necessary that it should be the only point in issue in either. That the *matter in dispute* mean exactly the same as *matter in issue*.

[18] In the instant matter counsel for applicant sought to argue that parties in the two actions are not the same, the cause of action is not the same and there is a difference in the relief claimed.

[19] In order to determine the tenability of this contention, one must refer to the pleadings in these two actions.

[20] It will be observed from the summons attached to the respondents' answer in this matter that in the prior action i.e **CIV/T/530/2011**, the applicant's mother (deceased) Mapulane Mabitle as plaintiff sued Du Preez, Liebterau & Co as first defendant, Kolisang Mochesane Lepholisa as 2nd defendant, Owen Donald Wilson as 3rd defendant, Food for Africa as 4th defendant, GCP Equipment as 06th defendant, Commissioner of Lands as 08th defendant, Deeds Registrar as 09th defendant and Attorney General as 10th defendant.

[21] The plaintiff averred in that case that in 1995 she concluded an oral sub-lease agreement in relation to plot No.12281-075 with the 1st defendant (represented by the 2nd defendant) in terms of which the 1st defendant was to develop this plot and make use of developments

thereon for a period of fifteen (15) years and additionally pay a monthly sum of M500 for plaintiff's subsistence.

[22] The second prong of her complaint is that she discovered many years later that the defendant (unspecified) caused the plot to be subdivided without her knowledge nor consent. This land was divided into four plots and the development lie on plots No 12281-425 and 12281-426.

22.1 She avers that she never transferred her rights to Owen Donald Wilson, and asserts consequently that the subsequent transfer of title to Mochesane in relation to plot 425 is null and void.

22.2 She further avers that she discovered that plots 425 and 426 have been transferred to **Food for Africa (Pty) Ltd** in 2004. She states that she never consented to such transfer hence she seeks cancellation of same.

22.3 Under paragraph 11 of her declaration, she avers that the 15 years period (sublease) lapsed sometime in February 2010 but the defendants remain in occupation despite several demands to vacate these plots.

22.4 She concludes that the registration of the transfers without her knowledge and or consent makes it unlawful.

[23] On the basis of these averments, she sought an order in the following terms;

1. That the agreement of sub-lease entered into between herself and 2nd defendant be declared null and void and of no force and effect.
2. Cancellation of the transfer and deed of transfer of title in plot No.12281-425 and plot No.12287-426 from plaintiff to the 4th defendant as being null and void ab initio.
3. Cancellation of a deed of sale concluded by and between the 2nd and 3rd defendants as being null and void ab initio and of no force and effect.

4. An order ejecting the defendants from the plaintiff's land situated at Ha Hooхло in the Maseru District held under plot No.12287-425 and plot No.12287-426.
5. Costs of suit.

[24] It is common cause that this matter is still pending and subsequent to the plaintiff's passing, the applicant in the instant matter has been substituted as the plaintiff therein.

[25] In the instant matter, the applicant instituted this application in her capacity as sole heir to her mother's estate. She restated that plot No 12281-075 was sub-divided into four plots; 12281-423 to 426 respectively, all of which were registered in her mother's name.

25.1 She avers that plot 423 and 424 remain registered in her mother's names and she asks the Court on the basis of the alleged heirship, to direct relevant authorities to endorse her as successor of these plots and register them in her names.

25.2 She similarly avers that a sub-lease agreement of fifteen years was concluded by 2nd respondent (Food for Africa), who was, during the period of 1998, a tenant on plots 12287-425 and 426.

25.3 It came as a shock, so she avers, in 2011 when her mother sought to negotiate new terms of a further sublease, to discover that plots 425 and 426 have been transferred without her knowledge and consent.

[26] It is on this basis that CIV/T/530/2011 was instituted to challenge the alleged unlawful transfer. She confirms in her originating application that this matter is still pending, and she successfully sought substitution subsequent to her mother's passing.

[27] In this application, she avers that her mother's signature as depicted on the impugned declaration by seller and any document allegedly giving rise to the transfer(s), has been forged. It is on this basis that she seeks an order directing the Commissioner of Police through his officials to investigate this alleged fraud.

[28] Her further complaint is that the transfers are riddled with irregularities because **a)** the 3rd respondent (Mr Lepholisa) is a conveyancer and a shareholder in the 2nd respondent and **b)** a power of attorney has been given to 04th respondent, a partner of 5th respondent, to act on behalf of 2nd respondent. In her view this demonstrates conflict of interest in the preparation of the deed of transfer.

[29] She asserts further that the deeds of transfer (in favour of 1st respondent in 2018) executed and registered during the pendency of CIV/T/530/11 is null and void.

Discussion

[30] On close examination of the declaration in the prior action as well the originating application in this matter, it seems to me that the dispute between the parties is essentially over some of the respondents' occupancy of the disputed plots and acquisition (allegedly fraudulent) of title over these plots. The cause of action in both matters is the same because the claim in both is based on the same ground i.e fraudulent acquisition of title over the plots by the respondents. In other words, the basis for the claim in both cases is that the defendants fraudulently acquired the leases over these plots hence a prayer for a declarator to that effect and cancellation of same.

[31] The real issue of substance in these two cases is whether these plots were fraudulently registered in favour of **Food for Africa** and later **P.E.G.** It is clear in my view that the other reliefs sought flow directly from the decision of this main issue.

[32] The mere fact that the transfer of the disputed plots in favour of **P.E.G** occurred in 2018, does not on its own justifies the launching of an independent claim during the pendency of the prior action because **P.E.G** derives its right from **Food for Africa**, the validity of whose title and transfer is the bone of contention in the prior action.

[33] I must comment further on the other reliefs sought. The applicant asserts that the reliefs sought in these two matters are different. It is noteworthy that she is seeking an order directing the relevant authorities (Maseru City Council) to endorse her heirship. It is important to also note that the procedure for inheritance of land held under a lease is set out in the **Land Act 2010** (s35) read with Regulation 43 of the **Land Regulations 2011**, a procedure she is at liberty to set in motion without intervention of this Court in so far as the undisputed portion of the land is concerned. In so far as re-registration of the disputed plots in her names is concerned, this is dependent on the outcome of the prior action.

[34] I may add that that as I stated earlier in deciding the preliminary issue of lack of jurisdiction, the dispute before me is not about heirship or inheritance. The relevance of this relief and the purpose of joinder of the MCC (at this time) is therefore unclear to me at this stage.

34.1 If the cancellation of the deed of transfer was to succeed in the earlier action, I see no reason why the legal process set out in the Act and regulations may not be invoked by the applicant with regards to plots 425 & 426.

[35] The applicant has also joined (unnecessarily in my view) the Commissioner of Police to be directed to investigate the alleged fraud. As

I see it, the applicant does not need the Court's intervention for the police to perform their functions. The procedure for reporting and investigation of criminal cases is well-known. She is therefore at liberty to set that machinery in motion to pursue the criminal aspect of her complaint.

[36] In the light of these observations, I am of the view that joining unnecessarily parties to litigation and seeking unnecessary reliefs cannot justify the launching of an independent claim (the present application) during the pendency of the prior action (CIV/T/530/11)

Conclusion

[37] In all circumstances, I have come to the conclusion that the two cases are on the same cause of action because the claims are based on the same grounds, they are between the same parties and the subject matter is the same. The objection is therefore validly raised.

[38] Since the earlier matter is ripe of hearing, I see no good reason why I should proceed with this matter.

Order

[39] In the result, the following order is made:

- b) The objection on *lis pendens* is upheld and these proceeding are stayed pending the determination of CIV/T/530/2011.
- c) Applicant is ordered to pay costs of this objection.

P. BANYANE
JUDGE

For Applicant: Advocate L.D Molapo

For Respondents: Mr. Mpaka