

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/T/372/1994

In the matter between

PETER MAHOLA MATLOSA

PLAINTIFF

AND

KHABELE MATLOSA

1ST DEFENDANT

COMMISSIONER OF LANDS

2ND DEFENDANT

REGISTRAR OF DEEDS

3RD DEFENDANT

ATTORNEY GENERAL

4TH DEFENDANT

Neutral Citation: Peter Mahola Matlosa v Khabele Matlosa & Ors [2023] LSHC 28 Civ [2023] (02 September 2023)

CORAM : **BANYANE J.**
HEARD : **07 FEBRUARY 2022, 20 APRIL 2023**
DATE OF ORDER : **02 SEPTEMBER 2023**
WRITTEN REASONS : **29 FEBRUARY 2024**

Summary

Inheritance to Land- Under the Land Act 1979 and Regulations made thereunder-lessee initiating transfer of rights to 1st defendant during his lifetime-but dying before transfer effected-family nominating the plaintiff as heir-deceased dying without a male issue-widow carrying out wishes of her husband by permitting registration of the plot in favour of the 1st defendant-whether registration unlawful- customary law of succession discussed.

ANNOTATIONS:

Statutes:

1. The Land Act 9 of 1979

2. Land Regulations, 1980.

Cited cases:

1. Hlabathe Makibi & Another v Mamoorosi Makibi LAC (2013-2014) 350
2. Khechane v Mosuoalle and others CIV/T/142/90

Books:

1. Sebastian Poulter: 'Family Law and Litigation in Basotho Society, 1976 (Oxford University Press)
2. Patrick Duncan, Sotho laws and custom, 1960(reprinted in 2006) (Moriya Museum & Archives)

JUDGMENT

BANYANE. J

Introduction

[1] This long-standing family dispute arose as far ago as 1982 and sadly dragged on for decades. It is about the inheritance of a certain plot situated at Ha Hoohlo in the Maseru urban area. The plaintiff's claim was filed before this Court in 1994. On 6 September 2018, judgment was issued in favour of the 1st defendant. The present plaintiff successfully appealed the decision under C of A (CIV) 77/2018. The matter was, by an order of the Court of Appeal remitted to this Court. On 02 September 2023, I issued an order dismissing the plaintiff's claim after hearing evidence and arguments in the matter. The written reasons for judgment had been prepared at this time but the typed draft was marred with a litany of clerical errors. I could not immediately attend to editing because I was nominated to sit in the Court of Appeal Session of October 2023 which ended in November 2023. The delay in delivery of the written judgment is deeply regretted. My reasons for the order as are follows.

Background

[2] The parties in this matter are cousins. Their parents were brothers(siblings) sired by the late Azariel Reynolds Matlosa. Azariel owned a huge piece of land situated at Ha Hoohlo during his lifetime. It was identified as plot 105. This plot was later

sub-divided into six parts for the benefit of all his six children, namely; Mirium Mabethuel Boikanyo, Charles Lelatsa Matlosa, John Nkabane Matlosa (plaintiff's father), Nicholson Ramochone Matlosa(1st defendant's father), Philaledel Nuku Mabitle and Raynor Masitise Matlosa.

[3] The dispute between the parties pertains to a portion awarded to the protagonists' uncle Charles Lelatsa Matlosa (hereinafter referred to as Charles). It is plot 105 (D). Charles subsequently acquired a title deed over the plot sometime in 1978. The plot is now identified as plot No. 1228-043 since its registration on 02 March 1987 in favour of the 1st defendant. The plaintiff seeks cancellation of the 1st defendant's lease.

The plaintiff's case

[4] The plaintiff's case is that the lease was wrongfully and unlawfully issued in favour of the 1st defendant. The plaintiff's grounds for challenge are two-pronged. The first is that Charles died childless. Under customary law of Lesotho, he is Charles's rightful heir because his father Nkabane John Matlosa was older than the 1st defendant's father. Based on the order of preference under customary law, he was nominated as Charles' heir by the Matlosa Family Council. Conversely, the 1st defendant was never nominated as heir by Matlosa Family Council nor in possession of a valid registered donation.

[5] The second ground for challenge is that the lease was issued amid a pending adverse claim filed in the Land Tribunal.

The defendant's case

[6] The nub of the defendant's case is that Charles donated the land to him *inter vivos* and even executed certain documents to effect the transfer of the rights to him although Charles died before the transfer process was completed.

[7] It is further his case that Charles was married to Alice 'Matsepe Matlosa. According to him, Alice was Charles' rightful heir. For this reason, the plaintiff could not validly be appointed as Charles's heir. He also impugns the plaintiff's nomination on the grounds that the decision was made by distant relatives of the Matlosa family, to the exclusion of the Charles's siblings and his wife.

[8] After Charles's passing, Alice Matlosa notified the Urban Land Committee about Charles' passing and that Charles designated the 1st defendant's father as heir.

The Trial

[9] At the hearing of the matter, the protagonists gave oral evidence and relied heavily on numerous documents to back up their oral evidence. An officer from the Land Administration Authority (LAA) also testified and handed in a litany of documents extracted from their official records.

[10] These documents reveal that the parties were not personally involved in the wrangle over the inheritance of the disputed plot, but their fathers, Nkabane John Matlosa(the plaintiff's father) and Nicholson Ramochone Matlosa(the 1st defendant's father).

[11] To appreciate the arguments and the issues between the parties, it is imperative to summarize the crucial evidence contained in these documents. The sequence of events shall be traced from Charles's lifetime and after his passing in February 1983.

[12] It is convenient to start with one undated document, on which the 1st defendant's donation is based. It was penned by Charles during his lifetime. It reveals that during his lifetime, Charles addressed a letter to his brother Nicholson Ramochone Matlosa (the 1st defendant's father(labeled confidential)). Although the first part and page of the letter are missing, the crucial contents appear on the second page of the letter. According to this letter, Charles proposed to sell the disputed plot to the 1st

defendant's father for the benefit of his children, particularly the 1st defendant. Because the first part of the letter is missing, I do not know when it was written, nor did the 1st defendant amplify this in his testimony.

[13] The records also reveal that Charles applied for a lease on 22 December 1982. He simultaneously applied for Ministerial consent to transfer his rights in plot 105D to the 1st defendant. However, Charles died on 12 February 1983 before acquiring a lease and before the intended transfer was effected.

[14] On 22 March 1983, the plaintiff's father requested (in writing) the Maseru township chief to send one of his messengers to Matsepe (Alice) with an instruction to release, among others, the title deed for the disputed plot, the marriage certificate between Charles and his deceased wife Apaphia Mamahase Matlosa and other important documents.

[15] On 29 March 1983, the plaintiff's father wrote to LSPP, reporting Charles's death. He identified himself as the next relative in line of succession in the Matlosa family. He further indicated that Charles and his deceased wife Apaphia Mamahase Matlosa bore no children. By this letter, he 'awarded' plot 105 D to his son, the plaintiff.

[16] On 06 April 1983, Matsepe Alice Matlosa filed a notice of death in terms of Regulation 9 of the Land Regulations, 1980. She identified Ramochone Nicholson Matlosa (1st defendant's father) as the heir; indicating that he was designated by Charles himself.

[17] On 24 August 1983, a newspaper publication of the proposed heir was made according to regulation 8 of the Land Regulations 1980. Interested people were invited, through this notice, to lodge their objections before the expiration of six weeks.

[18] On 31 August 1983, the plaintiff's father penned a letter to the Minister of Interior in reaction to an announcement over the radio made on 30 August requesting Alice and Ramochone(1st defendant's father) to report at the *Interior Department* concerning the disputed plot. He explained that being older than the 1st defendant's father, he was entitled to succeed Charles. He further indicated that Alice's marital name is Matsepe Maphleba because she was married to one Maphleba and thus has no say in the affairs of the Matlosa family. He describes the Alice and Charles's marriage certificate as a fraudulent document.

[19] On 24 December 1984, the family council, constituted of one Motlokoa(described therein as the uncle), Tlokotsi Matlosa(whose position is not recorded), and Malefetsane Masitha (described as the senior nephew) decided that the plaintiff was Charles's heir. The document reiterates the contents of the plaintiff's father's letter to the Minister of Interior dated 31 August 1983 regarding the status of Alice in the Matlosa family.

[20] On 17 May 1985, a second notice of death made in terms of Regulation 7 of the Land Regulations, 1980 was issued. This notice identified Peter Ramochone Matlosa (the plaintiff) as the heir.

[21] On 13 June 1985, the family held another meeting, constituted by Matlosa Matlosa, Tlokotsi, and Malefetsane Masitha. The meeting produced a letter addressed to the Principal Chief informing him that the Matlosa family appointed the plaintiff as Charles's heir. The letter also stated that Charles was unmarried at the time of his passing.

[22] On 14 June 1985, the Principal Chief of Matsieng in turn notified the 'Local Administration' officer that the Matlosa family council had appointed Peter the plaintiff as heir to Charles.

[23] Another family meeting (apparently the last one) was thereafter arranged by the plaintiff's father on 12 August 1985. The meeting was scheduled for 26 August 1985. On 26 August 1985, the meeting was held. The Family (again constituted by Motlokoa and others) confirmed their earlier decision nominating the plaintiff as Charles's heir.

[24] On 17 February 1986, the secretary of the Urban Land Committee invited the plaintiff's father to a meeting scheduled for 04 March 1986. The plaintiff's father was requested in this letter, to bring all his evidence because the committee was going to decide heirship dispute. The handwritten note on this letter suggests that the plaintiff's father indeed appeared before the Committee with his witnesses. The meeting was postponed to 13 March 1986.

[25] On 11 June 1986, the secretary of the Urban Land Committee wrote to the 1st defendant to notify him that the committee had resolved to issue the necessary documents concerning plot 105D in his name.

[26] This decision triggered the lodgment of a claim before the Land Tribunal in July 1986. Before filling the adverse claim form, the plaintiff's father wrote to the Land Tribunal to complain about the decision of the Urban Land Committee dated 13 March 1986 relating to the inheritance of this plot.

[27] On 2 November 1986, the Commissioner of Lands published a notice of lease applications under section 33 of the Land Act, 1979. The 1st defendant's name appears among the list of applicants. On 10 December 1986, the Lands Officer issued a form for processing of the lease. On 23 February 1987, the lease was issued. On 02nd March 1987, the lease was registered.

[28] This summary paints a picture of the events as they unfolded. I turn now to summarize the parties' submissions.

The parties' Submissions

[29] Advocate Makhetha KC for the plaintiff commenced his argument by stating that no rights emanate from the defendant's alleged donation because it was unregistered and therefore null and void or invalid. For this submission, he cited **Hlabathe Makibi & Another v Mamoorosi Makibi**.¹ Even if the donation was valid, the process of transfer initiated by Charles during his lifetime was rendered nugatory by his death. He submitted therefore that Charles was a lessee who died intestate.

¹ LAC (2013-2014) 350

[30] He developed this argument by relying on the deeming provisions of section 28 of the Land Act 1979 in terms of which existing titles of land in Urban areas were deemed to be converted into leases when the Act came into operation. For this reason, Charles was a lessee even though he had no deed of lease during his lifetime.

[31] Because Charles, as the lessee, died intestate, his rights to this land were to be dealt with according to Section 8 (2) and (3) of the Act, read with regulations 9 and 10 of the Land Regulations, 1980, since there is no evidence that the written Law of Succession ought to apply to his estate.

[32] According to Sesotho law and custom, he argued, the seniority of the houses dictates the person to whom rights in the land are to pass. In this case, the plaintiff's father was older than the 1st defendant's father and therefore, his son, the plaintiff, was entitled to inherit the disputed plot. The plaintiff was therefore properly nominated as heir. Conversely, the 1st defendant is not only disentitled to succeed Charles but also was never nominated by the family as heir.

[33] Although the plaintiff did not explain the position of signatories on his nomination letter(s) in the Matlosa family, Advocate Makhetha KC submitted that the several meetings held to nominate the plaintiff were properly constituted by family elders in the Matlosa family according to Sesotho custom.

[34] The thrust of the 1st defendant's argument on the other hand is that he was designated by Charles himself to inherit the disputed plot, thus he was entitled to receive registration of the rights and interests in this plot. Charles's intention, according to him, was manifested by his application for consent to transfer his rights to the 1st defendant.

[35] 1st defendant's further argument relates to the plaintiff's nomination. He attacked the propriety of the family meetings because they were according to him, convened by distant relatives in the Matlosa family to the exclusion of Charles's widow and Charles's siblings. It is to be noted that the 1st defendant himself did not explain the position of the signatories during his testimony.

Issues for determination

[36] The primary issue for determination is whether the lease was wrongfully and unlawfully issued and registered in favour of the 1st defendant. Two sub-issues emerge from this issue. The first is whether the plaintiff is entitled to inherit the disputed plot and consequently to receive title thereto. The second is whether the Commissioner of Lands issued the lease during the pendency of the proceedings before the Land Tribunal contrary to section 23 (2) of the Land Act 1979.

Is the plaintiff entitled to inherit the disputed land?

[37] The answer to the question of whether the plaintiff is entitled to inherit the disputed plot and consequently to receive title to the disputed plot is to be found in the provisions of the Land Act 1979 (before its amendment) and customary law of inheritance and succession.

[38] The plaintiff's three-legged argument is that; a) the land could not pass to the 1st defendant because under Sesotho custom, the plaintiff is Charles' rightful heir b) Secondly, there was no valid donation from which any right could accrue to the 1st defendant; c) thirdly; without transfer of rights emanating from the alleged donation during the Charles' lifetime, the land formed part of Charles' estate at the time of his passing. And because Charles died intestate, his interest in the disputed land was inheritable through the procedure outlined under Regulations 7, 8, and 9 of the Land Regulations of 1980, read with section 8 (2) of the Land Act, 1979.

Inheritance to land under the Land Act 1979 and Land Regulations 1980

[39] Section 8 (2) of the Land Act, 1979 governs inheritance to land. Regulations made under this Act outline the procedure to be followed in the inheritance of land. Section 8(2) of the Act (before its amendment in 1992) read as follows:

“(2) Notwithstanding subsection (1) where an allottee of land referred therein dies, the Chairman of the Land Committee having jurisdiction shall record in his register the passing of the interest in the land of the deceased allottee to –

- (a) the first male issue of the deceased allottee (who shall share with his junior brothers in accordance with the advice of the family) unless the deceased allottee had designated otherwise;
- (b) where paragraph (a) does not apply, the person nominated as the heir of the deceased allottee by the surviving members of the deceased allottee’s family; or
- (c) where paragraphs (a) and (b) do not apply within twelve months from the date of the death of the allottee, the State.

39.1 Regulation 9(1)(a) of the Land Regulations, 1980 reads as follows:

“9 (a) Whenever a lessee dies intestate leaving land held under a lease acquired under section 10 (2) for which no deed of lease has yet been issued and such leased land is not governed by any written law relating to succession, regulations 7 and 8 shall be followed *mutatis mutandis*.”

39.2 Regulations 7 and 8 outline the procedure to be followed in the inheritance of land. They read as follows:

“7. (1) Whenever any person dies within the jurisdiction of a given Land Committee leaving any allocated land referred to in section 8 of the Act, the nearest relative or connection of the deceased or in default of any such relative or connection, the person who at or immediately after the death has the control of the land formerly held by the deceased, shall within 12 months thereafter cause a notice of death signed by him to be delivered or transmitted to the Chairman of that Land Committee.

(2) The notice referred to in sub-section (1) shall show:

- (a) the date of the death of the deceased, his district and village of origin, his last place of domicile and his last place of residence;

- (b) the relationship of the informant to the deceased;
- (c) the name and sex of the heir of the deceased;
- (d) whether the heir is the first male issue of the deceased or was designated as heir by the deceased or was nominated as heir by the surviving members of the deceased's family in the event of there being no first male issue heir or a designated heir;
- (e) whether the allocated land is to be occupied by the spouse of the deceased and minor children of the deceased; and
- (f) relevant particulars to identify the locality of the allocated land.

8. (1) Upon receipt of the notice referred to in Regulation 7, the Chairman of the Land Committee having jurisdiction shall give notice so far as is practicable in the particular circumstances of each case, of all the information required by Regulation 7 (2) and shall therein:

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- (a) name the place and fix the period at and within which claims and objections to claims may be lodged and such period shall not be less than six weeks;
 - (b) set the time and date thereafter when the hearing and examination of the evidence relevant to the disposition of the allocation will commence at the said place or any other place so specified.
- (2) The Chairman shall publish the notice referred to in sub-regulation (1) in such manner as he may consider reasonably adequate and most effective including the posting of the notice on the allocated land affected for the purpose of bringing it to the attention of all persons who may have claims or objections to claims and shall record the manner of such publication in records of the Land Committee's proceedings.
- (3) An interested person may be given a reasonable opportunity to be heard, call, and adduce evidence before the Land Committee having jurisdiction and such person may be heard either personally or through his agent deposed in writing for that purpose.

(4) Not later than seven days after the day of determination by the Land Committee having jurisdiction, the Chairman thereof shall publish the decision and endorse the register of allocations accordingly.

The order of succession under customary law

[40] Although no evidence was led by either party regarding Charles's mode of life to establish whether the written law of succession (e.g Administration of Estates Proclamation 1935, Intestate succession Proclamation 1959) ought to apply to his estate, I shall assume in the plaintiff's favour that customary rules of succession apply.

[41] Under customary law in Lesotho, succession is decreed by birth and follows the male primogeniture rule. The identity of an heir is ascertainable from the rules of succession as contained in the Laws of Lerotholi.² The heir under Sesotho custom is designated by section 11(1) of the Laws of Lerotholi as the first male child of the first married wife.

[42] If the deceased dies without leaving a male issue, as in the present matter, the widow, if alive, inherits. Where there is no widow, the deceased's father, if alive, inherits. If the deceased's father is not alive, then the deceased's grandfather. If the

² Sebastian Poulter, Family law and Litigation in Basotho society (1976) p225

grandfather is no more, then the deceased's elder brother, or failing him, his widow inherits. If the widow is dead, then a younger brother, or his widow, inherits.³

[43] With this order of succession in mind, I revert to the facts of the present matter. It is common cause in the present matter that; a) Charles left no male issue; b) the protagonists' parents were Charles's younger brothers c) the plaintiff's father John Nkabane Matlosa was older than the 1st defendant's father Nicholson Ramochone Matlosa.

[44] Because Charles left no male issue, his wife was entitled to inherit the disputed land. If Charles left no widow, then the plaintiff's father, being Charles' younger brother, but older than the 1st defendant's father, would be entitled to inherit.

[45] The parties are at loggerheads over Charles's marital status at the time of his passing. According to the 1st defendant, Charles was married to Alice 'Matsepe Matlosa. He handed in a marriage certificate between Charles Lelatsa Matlosa and Alice Matsepe Mabusela. This certificate shows that on 20 April 1976, the duo married in a community of property.

³ Duncan, Sotho laws and custom p12, see also, S Poulter; Family Law and litigation in Basotho society, p232-233

[46] The plaintiff conversely asserts that ‘Matsepe was not Charles’ wife. He relied on several letters written by his father after Charles’ death where Alice is described as Matsepe Mapheleba. Notably, the plaintiff relied on these letters to support his version. Apart from these letters (for example, the letter dated 31 August 1983), the plaintiff adduced no evidence to controvert the authenticity and validity of the marriage certificate or to establish that ‘Matsepe was married to Mapheleba.

[47] The fact that these letters were admitted in evidence does not necessarily mean that they amount to sufficient evidence establishing the alleged fraud. It follows, in my view, that the plaintiff failed to establish that the marriage certificate is a fraudulent document. The marriage certificate and consequently Matsepe’s marriage to Charles therefore stands unchallenged. The question is whether the plaintiff was properly nominated as heir in the circumstances. I think not.

[48] Although Family councils in their meetings have considerable authority in selecting an heir from a pool of the deceased’s relatives, I am of the view that the selection cannot override rights conferred to any person by law.

[49] For these reasons, I accept the 1st defendant’s assertion that the plaintiff could not validly be appointed as Charles’s heir because Charles was survived by his wife, Alice, who, according to the law was the rightful heir and thus entitled to

inherit the disputed property. The plaintiff's father, or the plaintiff himself, could only inherit if, at the time of Charles's death, he was not survived by his widow.

[50] It follows therefore that even if the signatories on the plaintiff's heirship nomination letter(s) were elders in the Matlosa family, they had no authority to thwart Matsepe's rights to inherit this land, worst still, in her absence. For these reasons, the plaintiff's nomination is legally untenable and cannot therefore advance his case.

The propriety of issuance and registration of the lease in favour of the 1st defendant

[51] Based on the conclusion reached above, the next question to consider is whether the 1st defendant properly received title to the disputed plot when Charles' wife was still alive.

[52] The 1st defendant adduced evidence showing that Charles was desirous to transfer the disputed land to him. Charles initiated the transfer process by first applying for a lease, simultaneously with an application for consent to transfer. This he did in the presence of the 1st defendant according to the 1st defendant's testimony. By filing the necessary forms to effect transfer of his rights, Charles clearly expressed his intention to give away his rights in favour of 1st defendant. The plaintiff

adduced no evidence to contradict that of the 1st defendant in this regard. Although no deed of donation was executed nor registered, a donation is permissible under customary law, and it need not be in writing.⁴

[53] The undisputed evidence showed that the transfer process was terminated by Charles's passing. This notwithstanding, Charles's wife, who, according to evidence, was not in occupation of this plot, elected not to take occupation of the plot but to carry out her husband's wish to pass the rights to the 1st defendant's family.

[54] She resuscitated the process by initiating the inheritance procedure outlined under Regulation 7 read with Regulation 9. She filed a death notice in April 1983, two months after her husband's passing. On this notice, she recorded the 1st defendant's father as heir, indicating that he was designated by the deceased himself. This heirship was publicized in August 1983 according to Regulation 8.

[55] The evidence revealed that instead of objecting to the publication made under Alice's notice of death, the plaintiff's father filed a separate death report, in terms of which the plaintiff was identified as heir. This notwithstanding, the secretary of the Urban Land Committee invited, on 27 February 1986, both the applicant's father and Alice to appear before the Urban

⁴ Khechane v Mosuoalle and others CIV/T/142/90

Land Committee on 04 March 1986. Although neither party handed in the minutes of the meeting of 04 March 1986, some documents issued after 13 March 1986 show that on 13 March 1986, the Committee resolved to issue title documents for the 1st defendant. One of the documents is a letter addressed to the 1st Defendant by the secretary of the Committee in terms of which the decision of 13 March 1986 was communicated. The second is the letter addressed by the plaintiff's father to the Clerk of the Land Tribunal dated 07/July 1986 in terms of which he complained about the decision of 13 March 1986. After receiving communication from the land Committee, the 1st defendant applied for a lease. The application was thereafter publicized in a newspaper in November 1986.

[56] It is clear from the facts of this matter that the Urban Land committee afforded a hearing to all the interested parties, including the plaintiff's father and Alice before deciding as it did. The process leading to the issuance of the impugned lease seems to be compliant with Regulations 7, 8, 9 and 10 of the Land Regulations, 1980, thus legitimate. The next question to address is whether there were pending proceedings before the Land Tribunal in March 1987 when the lease was issued and registered.

Was the lease issued during the pendency of the proceedings before the Land Tribunal?

[57] Adverse claims to land before the Land Tribunal are governed by the Land Act 1979. It is useful to highlight relevant provisions in this regard. Section 21 of the **Land Act 1979** provides that:

- “(1) Subject to section 22, where land is available for a grant of title, the Commissioner shall publicize the fact by notice in the Gazette and a national newspaper.
- (2) The advertisement notice shall –
 - (a) state whether the land is available for lease or license;
 - (b) contain a sufficient description of the land to enable its identification;
 - (c) give particulars of the permitted land use, the ground rent or fee payable, where appropriate, and of the amount to be paid for the improvements (if any) made to the land;
 - (d) invite members of the public to lodge applications with the secretary of the Urban Land Committee by a specified date.”

[58] Section 23 (1) provides that any person claiming title to land affected by a notice issued under section 21 (1) or 22 (1) may, within one month of the date of publication of the notice in the Gazette, lodge a claim to such land before the Tribunal.

- “(2) The Clerk of the Tribunal shall notify the Commissioner forthwith of any claim lodged under subsection (1).
- (3) Until the determination of the claim by the Tribunal or by the High Court an appeal from the Tribunal, applications in respect of the land subject to the claim shall remain in abeyance.

(4) Where no claims have been lodged within the period specified in sub-section (1), any grant made under this part conveys the legal right to use and occupy the land subject to any rights an adverse claimant may have to payment of compensation for lawful improvements made by him to the land. (Underlining mine)”.

[59] It is undisputed that in a newspaper, issue of 2nd November 1986, the Commissioner of Lands (2nd defendant), published lease applications under section 33 of the Land Act 1979. Section 33 of the Land Act, 1979, reads as follows:

“33(1) The Commissioner shall cause to be published in a National Newspaper notice of applications for leases and licences under section 29, 30 and 31 which notice shall give the names of the applicants and an adequate description of the land to which the applications relate.

(2) section 23 shall apply to an adverse claim of title to land affected by notice under subsection (1)”.

[60] The plaintiff handed in a certain Form as proof of lodgment of the adverse claim by his father. The form is divided into four sections. The first part contains details of the claimant and the grounds on which the claim is based. The next section is completed by the person witnessing the signing of the claim by the claimant. These two sections reveal that on 8 July 1986, the plaintiff’s father completed a form for an adverse claim on behalf of the plaintiff. It was witnessed by one Ncholu Setsomi on the same day, 8 July 1986. It is worth noting that on 01 July 1986, the plaintiff authorized his father to act on his behalf in all matters concerning site 105D.

[61] The next part of this form is designed to record the date on which the Clerk of the Land Tribunal issued the notice to the Commissioner in terms of section 23 (2) of the Land Act 1979. This part of the form is indeed signed and stamped by the Clerk of the Land Tribunal. The copy supplied is regrettably so faint that the date of signature by the Clerk is not identifiable.

This notice by the Clerk states as follows:

“Take note that under section 23 (2) of the Land Act 1979 an adverse claim, details of which are contained in the triplicate copy of this form “T2” has been lodged. Kindly complete the RECEIPT on this duplicate copy and return it to me as evidence of service of this form “T2” and copies of documentary evidence to support the claim.”

[62] The heading of the next section of the Form is ‘Commissioner of Lands’ receipt’. It is dated 5 August 1987. It will be observed that on 5 August 1987 when the Commissioner acknowledged receipt of the claim, the lease had long been issued in February 1987.

[63] Although the plaintiff asserts that the Commissioner issued the lease contrary to section 23(2) of the Act, the documents tendered by both parties do not support this assertion. The first part of the form suggests that the plaintiff’s father filed the claim in reaction to a notice dated 17 May 1985. However, no such notice was handed in by the plaintiff. The only publication dated 17 May 1985, is a notice of inheritance issued in terms of Regulation 8 of the Land Regulations, 1980.

[64] My reading of sections 21 to 23 as well as section 33 of the Land Act, 1979 is that adverse claims may only be filed against publications of lease applications, or where land is available for grant of title and members of the public are invited to apply. The Section 23 procedure is not intended to challenge inheritance notices. Inheritance notices are challengeable before the Land Committee in terms of regulations 8, 9 and 10 of the Land Regulations 1980. And according to the documents tendered, the plaintiff's father appeared before the Urban Land Committee in March 1986 before the committee's decision on inheritance was made.

[65] The evidence also revealed that the 1st defendant only applied for a lease after the decision of the Land Urban Committee to issue him with title documents for the plot. The application was publicized alongside others only in November 1986. So, the only notice/ publication of lease applications made under section 33 is the one dated 02nd November 1986.

[66] Absent a notice dated 17 May 1985, it is concludable that the plaintiff's father prematurely and improperly filed the adverse claim without a section 33 or 21 publication. It therefore seems to me that no adverse claim challenging the 02 November publication was in existence at the time the lease was issued.

[67] Even assuming in favour of the plaintiff that the adverse claim was lodged with the clerk of the Land Tribunal after November 1986, the evidence established that the Commissioner was only notified of the same long after the lease was issued. I am, therefore, unable to accept the plaintiff's assertion that at the time the lease was issued, an adverse claim was pending before the Land Tribunal. In other words, the evidence adduced does not conclusively establish that the lease was issued contrary to the provisions of section 23(2). It follows in my view that the second ground for challenging the lease is unsubstantiated and must also be rejected.

Disposal

[68] Having considered the evidence adduced, I conclude that it established Charles' desire to pass his rights in the disputed land to the 1st defendant. No evidence establishing that Alice and Charles' marriage certificate is a fraudulent document was adduced. I conclude on this basis that Alice was therefore entitled, as the person next in line of succession, to either enforce her rights of occupation or carry out to her husband's wishes to pass rights in this land to the 1st defendant's family, either through his father or the 1st defendant himself. Her participation in the inheritance process after Charles's passing validates the registration of the impugned lease.

[69] For these reasons, the plaintiff failed to successfully impeach the registration of the disputed land in favour of the 1st defendant.

Order

[70] As a result, the plaintiff's claim is dismissed. Each party bears its costs.

P. BANYANE
JUDGE

For the Plaintiff : Adv. Ntsiki

For the 1st Defendant : Adv. Makhetho KC

