

IN THE LAND COURT OF LESOTHO

HELD AT MASERU

LC/APN/28/2019

In the matter between

TSIETSI MOKITIMI

1ST APPLICANT

'MAMONAHENG MOKITIMI

2ND APPLICANT

And

THABANG BUTI

1ST RESPONDENT

MOHLAKENG COMMUNITY COUNCIL

2ND RESPONDENT

LAND ADMINISTRATION AUTHORITY

3RD RESPONDENT

PRINCIPAL CHIEF OF MATSIENG

4TH RESPONDENT

ATTORNEY GENERAL

5TH RESPONDENT

Neutral Citation: Tsietsi Mokitimi & 1 v Thabang Buti & 4 Others
(LC/APN/28/2019) [2021] LSHC 55

JUDGEMENT

CORAM: BANYANE J

DATES OF HEARING: 25/02/2020, 27/10/2020

DATE OF JUDGEMENT: 04/06/2021

Summary

Acquisition of real rights in immovable property - sale agreement – nature of right acquired by the purchaser pursuant to the agreement - same confers no real rights in land but only gives rise to personal rights entitling the buyer to sue for specific performance - locus standi of the applicant to seek a declarator of ownership and ejectment - not established - preliminary point upheld with costs.

Annotations

Cases cited

1. Shuping v Abubaker LAC (1985-89) 186
2. Mahomed v KPMG Harley and Morris Joint Venture C of A (CIV) No.34/2013
3. Ntoa Abel Bushman v Lesotho Development and Construction Company (Pty) Ltd and Others LC/APN/36/2014
4. Mphofu v Ranthimo LAC (1970-79) 46
5. Taka v Pheko C of A (CIV) 59/15
6. Three Zeds v Ranchoba C of A (CIV) 51/18
7. Legator Mckenna & Another v Shea & Others 2010 (1) SA 35 (SCA)
8. Staegemann v Langenhoven 2011(5) SA 648
9. C & S Properties (Pty) Ltd v Dr Mamphono Khaketla & Others C of A (CIV) 63/11

Legislation

1. The Land Act No.8 of 2010
2. The Land Court Rules 2012
3. The Land Regulations of 2011

Books

1. Silberberg and Schoeman; the Law of Property, (3rd ed) Butterworths
2. Badenhorst et al

BANYANE J

Introduction

[1] The dispute between the parties pertains to a certain unregistered piece of land situated at Maburung, Ha Mphoto. The applicants (a married couple) are in occupation of this piece of land pursuant to an oral agreement of sale in terms of which the 1st respondent (who is the 2nd applicant's biological brother) agreed to dispose of his rights over this land in favour of the applicants for a certain consideration. There is a dispute between the parties as to the exact amount or consideration for the sale. According to the applicants, the purchase price is the amount of M120,000.00 which was paid in two equal instalments of M60 000.00 to the 1st respondent. The 1st respondent's version is conversely that the parties agreed on twenty herds of cattle as consideration. The 1st respondent has to date declined to facilitate transfer of the land to the applicants on grounds that they have not honoured the agreement.

[2] The applicants' disgruntlement about the 1st respondent's failure to effect transfer despite payment of M 120 000.00 precipitated the launching of this application. They seek reliefs set out fully under paragraph 8 of their originating application. They are couched as follows;

1. First Respondent and/or his agents be evicted from the portion of the field allocated to Applicants at Leqhetsoaneng Ha Mphoto.
2. It be ordered that the existing dimensions of the area agreed between the parties as a share of Applicants be taken to be final and definitive on the redistribution of the parties' estate.
3. An order directing the 2nd Respondent to take such proceedings as may be necessary and appropriate to enforce

the allocation made to Applicants in terms of issuing them with documents of title.

4. An order interdicting 1st Respondent and/or his agents or representatives from entering into any agreement that places an encumbrance upon or creating any charge, pledge or option or any similar rights in respect of the place in issue pending finalization of this matter.
5. An order that declares Applicants as the owners of the designated landed property of the field at Leqhetsoaneng Ha Mphoto.
6. That 1st Respondent and/or his agents be interdicted and restrained from interfering with the specific portion of the field situated at Leqhetsoaneng Ha Mphoto.
7. An order directing 2nd Respondent to facilitate registration of the lease on the survey coordinated and dimensions contemplated in the Form S.10 in favour of Applicants.
8. Costs of suit on attorney and own client's scale.
9. Further and/or alternative relief.

The preliminary issue

[3] The application is vigorously opposed by the 1st respondent. In his answer, he raised two preliminary issues, namely; non-joinder of his wife and *locus standi* of the applicants to seek the reliefs set out under paragraph 2 above.

[4] The issue of *locus standi* and the merits are interwoven. I thus invoked rule 67(1) of the Land Court Rules 2012 and directed that oral evidence be led for the determination of this issue. This rule reads as follows;

“(I) The court shall decide any objection made under rule 66 after hearing the opposite party and ordering the production of such evidence as may be appropriate for the decision to be made.”

The hearing

The 1st respondent's testimony

[5] The 1st respondent testified that in 2016 the applicants approached him seeking advice on viable farming business, which they were keen to launch. He suggested dairy farming. They identified a portion of land within his field for purposes of implementing this business. They then agreed on twenty freelance heads of cattle as consideration.

5.1 He told the court that after conclusion of the agreement, they proceeded to South Africa to buy the cattle. The applicants subsequently took occupation of this piece of land in 2016.

5.2 He says after some time, the 1st applicant asked him to commence the process of rights transfer to them (applicants). He says at this time he had started the process to have the land registered in his names to enable transfer to them. The process he refers to entails survey of the land and obtaining a form C for same.

5.3 When the applicants again approached him demanding transfer, he turned them down saying they must first fulfil their obligation under the contract, i.e. give him twenty cattle as agreed. He told the 1st applicant that he would only then cause transfer of rights over this land after full payment. The 1st applicant told him that the 2nd applicant is opposed to this payment.

Applicants' version

[6] The first applicant's version of the agreement and its terms is that after the 1st respondent encouraged them to start the freelance cattle project towards the end of 2015, his wife, the second applicant secured land at Ha Motlohelo for M120 000.00. She did not however conclude any agreement with its rights holder because the 1st respondent offered them the disputed land for the same amount.

They accepted and he subsequently paid the 1st respondent through two cheques.

- [7]** After the first half of the money was paid, he proceeded to South Africa with the 1st respondent to buy the latter's cattle. The second half was paid two weeks later, and they again went to South Africa to buy their (applicants') own cattle.
- [8]** After making payment, they erected a structure on this land. This was in January 2016 and subsequently took occupation.
- [9]** He told the court that he promised the 1st respondent that he would, depending on his business prospects, assist him to acquire more cattle (without specifying the number). He says the promise was never part of their agreement and his wife was not part of it. He denied ever saying his wife refuses to have the payment made.
- [10]** The second applicant also took the stand. She corroborated her husband on how the agreement was concluded; the circumstances under which the 1st respondent made the offer and how they took occupation and paid the M120 000.00.
- [11]** She handed in the two bank cheques drawn in favour of the 1st respondent as proof of payment. The first cheque in the amount of M60 000.00 was signed on the 26th August 2015 and the second on the 04th September 2015.
- [12]** She told the Court further that after payment of M120 000.00 was made, the 1st respondent penned a letter in terms of which he expressed his intention to transfer the disputed land to them. This was taken to the chief of Ha Motjoka for endorsement. She thereafter

approached the relevant community council with the letter. It was however rejected on account of the manner in which it was drafted or framed. According to council officials the words used therein, in particular, to the effect that the 1st respondent had 'allocated the land to them' were to be expunged.

Submissions

- [13] Mr Setlojoane for the 1st respondent firstly challenges the legal validity of the applicant's averments to the effect that they were allocated the Land by the respondent because the latter possesses no such powers in law.
- [14] The second argument is that the sale concluded between the parties confers no title to Land but a personal right to the applicants to seek specific performance against the 1st respondent. The case of **Mahomed v KPMG Harley and Morris Joint Venture C of A (CIV) No.34/13** was cited in this regard.
- [15] He submitted that the applicants lack *locus standi* to seek reliefs set out in the originating application; that their only available remedy is to sue for recovery of the amount of M120 000.00 allegedly paid. This is because, so it was contended, the contract relied upon by the applicants does not give rise to a legally enforceable right to this Land. He cited the cases of **Ntoa Abel Bushman v Lesotho Development and Construction Company (Pty) Ltd and Others LC/APN/36/2014** and **Mphofe v Ranthimo LAC (1970-79) 46** to submit that absent any registered certificate of title to occupy (title deed), a litigant has no *locus standi*.
- [16] He argued further that absence of a registered deed of agreement as required under section 16(1) of the Deeds Registry Act of 1967

renders the deed *null and void*. The case of **Taka v Pheko** was cited in this regard.

[17] On behalf of the applicants, Mr Lephuthing contended that the applicants are “owners of the disputed land on account of the contract of sale”. He cited the case of **Legator Mckenna & Another v Shea & Others 2010(1) SA 35 (SCA)** to submit that the evidence led elicits a real agreement, whose elements are an intention on the part of the transferor to transfer ownership and the intention of the purchaser to become owner of the property.

[18] He submitted that the applicants have discharged their obligation under the contract by paying the amount agreed upon, consequent upon which the applicants took occupation of the Land and submitted the necessary documents to the chief of the area and the relevant land allocating authority for purposes of processing transfer of title to them.

[19] He agrees by relying on **Mahomed v KPMG Harley Morris Joint Venture (supra)** that indeed a sale agreement confers a personal contractual right on the buyer to claim transfer of rights from the seller and this can be achieved by an order of specific performance.

Issue

[20] Parties are in agreement that the 1st respondent’s wife is a necessary party and ought to have been joined in these proceedings. The only issue to be determined is whether the applicants have *locus standi* to seek the reliefs set out in the originating application.

Discussion

[21] As shown earlier, the applicants seek, inter alia, a) ejectment of the 1st respondent from the plot, b) an order declaring them as owners

of the disputed land, c) an order directing the 2nd respondent to take such proceedings as may be necessary to enforce the “allocation” made to them, e) that they be issued a title document for this piece of land.

[22] It appears from the averments in originating application and the reliefs sought that the applicants’ case is premised on a legally flawed basis, namely, that they have been allocated the land in question. While their originating application makes no mention of a sale agreement, it became explicitly clear during their testimony that their claim to this land is based upon the contract of sale between themselves and the 1st respondent. It seems to me that in formulating their case in the manner they did, they equate the sale agreement with allocation of the disputed piece of land.

22.1 While title to land can be founded on sale agreements as stated in **Shuping v Abubaker LAC (1985-1989) 186**, it is necessary to consider whether a sale agreement gives rise to the type of rights that entitles the applicants to the reliefs sought. In order to establish this, the distinction between real rights and personal rights must first be discussed because real rights and personal rights are acquired, transferred, excised and protected differently.

The distinction between real rights and personal rights

[23] Real rights are dealt with in property law, whereas personal rights are governed by the law of obligations (in our case the Law of Contract); hence real rights are protected by proprietary remedies while personal rights are protected by contractual remedies including specific performance, interdict, cancellation, damages and declaration of rights (depending of the facts of each particular case).

23.1 Real rights are exercisable against the world at large, whereas personal rights bind only a specific person. **Mostert et al: The Principles of the Law of Property in South Africa (2012) p47.**

23.2 The object of a real right is the thing while the object of a personal right is some performance by another coupled with a duty to counter-perform an obligation. This obligation is a personal right and not a real right. Ownership is a real right which avails the owner rei vindication i.e. the right to recover the thing in question from anyone in possession of it. **Staegemann v Langenhoven 2011(5) SA 648** (available on Saffli)

[24] As stated in **Mohamed v KPMG**, a contract only creates personal rights and an obligation to perform. For one to acquire a real right in the property, an additional transaction is required for the transfer of the real rights from the transferor to the transferee. In other words, transfer of real rights can only be effected by registration. The contract and transfer constitute two separate acts, each having its own requirements. **Silberberg and Schoeman; The Law of Property, (3rd ed) Butterworths P75 to 77.**

[25] It is abundantly clear from the authorities above that a purchaser does not acquire title to the immovable property pursuant to a sale prior to transfer. The rights that accrue to the purchaser pursuant to the contract of sale is enforceable between the contracting parties, in this case, against the 1st respondent. The applicants' complaint is that the 1st respondent fails to fulfil his obligations under the contract. The appropriate remedy would be to seek an order compelling him to do what he had promised (specific performance) and transfer of the property. The transfer would then be transformed into vindicatory rights entitling the applicants to eject the 1st respondent from the disputed land.

[26] To put it differently, the only right that the applicants have, regard being to their complaint, is to sue for specific performance by the seller. No real right entitling the applicants to the reliefs sought has been created by the agreement.

[27] I need also address the applicants' counsel's reliance on **Legator Mckenna**. An argument based on the abstract theory of transfer of real rights discussed in this case would not, on the facts of this matter, advance the applicants' because firstly the essentials of a real agreement are misapplied in the instant case and secondly; the facts in that case are distinguishable from the facts of the present matter.

27.1 The respondent (*Shea*) in that case sought re-registration of the immovable property in her names following its sale to other persons. An argument was raised to the effect that the sale giving rise to the transfer was invalid and as such, the registration did not transfer ownership to the purchasers. The Court discussed the two theories of transfer of rights; namely, the causal and abstract theories and their requirements. With regard to the abstract theory which Brand JA endorsed as the correct position of the South African Law, he remarked as follows at para 22;

“In accordance with the abstract theory of transfer, the requirement for passing ownership are two-fold, namely delivery, which in case of immovable property is effected by registration for transfer in the deeds registration of transfer in the Deeds office, coupled with a so called real agreement. The essentials of a real agreement are an intention on the part of the transferor to transfer ownership and an intention of the transferred to become the owner of property”

27.2 My reading of this case is that ownership in immovable property passes upon registration coupled with the intention of both parties to

transfer and receive ownership respectively. In the instance case, the first requirement is lacking. Reliance cannot therefore be singly placed on the latter requirement.

[28] Under the Deeds Registry Act of 1967, an owner in relation to immovable property means the person registered as the owner or holder thereof. The applicants would only become 'owners' only upon registration of the rights over this plot in their names. They cannot therefore be declared as owners of the disputed property. For the same reason, the 1st respondent cannot be evicted (even assuming he is in occupation) from this land until his legal right to use it is transferred into their names.

Derivative acquisition of rights over land

[29] I proceed now to deal with the legal validity of the applicants' prayer for an order directing council to confirm their allocation and accordingly issue title documents for them.

[30] The convenient starting point of the inquiry is that title to land is held in terms of customary or the Land Act only. This is according to section 3(2) of the Land Act 2010. As the court stated in **Three Zeds v Ranchoba C of A (CIV) 51/18**, the Act's purpose is to control conferment of title to land. (See also **C & S Properties (Pty) Ltd v Dr Mamphono Khaketla & Others C of A (CIV) 63**/The procedure for allocation of land, (be it in the rural or urban areas) is clearly set out in the Act and Regulations made thereunder i.e Land Regulations of 2011. Derivative acquisition through transfer of existing rights (whether the land is held under a lease or not) is also governed by the Act and the Land Regulations of 2011.

[31] It is undoubtedly clear from the evidence led that the land in question was never allocated to the applicants, yet they seek to have their

'allocation' confirmed. In short, they seek confirmation of a non-existent allocation. Notably too, they seek no relief for transfer of rights from the 1st respondent but instead an order directing council to issue title documents to them. The question that must be answered is; against whom must performance of the contract be sought? And the simple answer is; the 1st respondent and no one else. He is the person who has to give transfer under the contract.

[32] For the reasons stated above, it is clear in my view that for the applicants to obtain registration of rights for this piece of land, participation of the seller is inevitable because their alleged right derives from that of the seller. Under Regulation 26 of the Land Regulations 2011, the procedure for disposal of land not held under a lease is set out. It reads;

29. (1) An allottee in rural areas who is desirous to dispose of or transfer his rights in land which is not held under a lease or is not a subject of a registrable title shall in a prescribed form notify the allocating authority and request permission of the allocating authority to proceed with the transfer.

(2) The notice and request referred to under sub-regulation (1) shall include;

(a) the location and use of the land involved;

(b) the names and particulars of the allottee and the person to whom the land is being transferred or disposed off to;

(c) the certificate of allocation or any other documentary proof of title to and; and

(d) any other information that may be required by the allocating authority;

.....

(5) Where the allocating authority is satisfied that all requisites in terms of sub-regulation (2) have been complied with, it shall allow the transfer whereupon it shall notify the allottee of its

decision and shall proceed to record the transfer or disposal of land in the register of allocations.

[33] It is abundantly clear that the process of transfer must be initiated by the allottee (1st respondent). No evidence was tendered to suggest that he has initiated this process by issuing a notice in the prescribed form pursuant to Regulation 29 above. To their peril, they are not even asking the court to compel the 1st respondent to initiate the process. It follows in my view that the community council, through its land allocating authority cannot be directed to issue title documents to the applicants contrary to the Law governing acquisition of title and transfer of same.

Conclusion

[34] Having considered the authorities, I conclude that the sale agreement concluded between the applicants and 1st respondent conferred no title to the applicants. The reliefs sought are therefore not legally sustainable. To put it differently, they cannot sue 1st respondent for ejectment under the circumstances of this case not obtain a declarator or ownership over the disputed piece of land. Similarly, an order directing the 2nd respondent to issue tile documents to confirm "allocation" is untenable because no allocation has been made to them. They have no real right in the property but only acquired a contractual right enforceable against the 1st respondent. Their failure to seek an order compelling the 1st respondent to cause the transfer of the rights to them, this being their available contractual remedy, is fatal to their case and renders it liable to be struck of in terms of Rule 67 of the Land Court Rules. They have in my view failed to establish the requisite *locus standi* to bring a claim for ejectment and reliefs sought without an order for specific performance.

Order

[35] In the result, the preliminary objection is upheld, and the application is struck out with costs.

**P. BANYANE
JUDGE**

For Applicant: Advocate Lephuthing

For 1st Respondent: Advocate Setlojoane