



REPUBLIC OF BOTSWANA

IN THE LAND TRIBUNAL HELD IN GABORONE

Case No. GLT LB 240/2016

In the matter between

MOSHE MOSES BAIKAKEDI

APPLICANT

Vs

**KWENENG LAND BOARD
BOARD CHAIRPERSON
BOARD SECRETARY
KGOMOTSO RAKGOBELANG -TAOLO**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT**

Coram: S. B. Kaisara
G. Lecoge
K. Rutherford

Appearances:

1. Moshe M. Baikakedi (Applicant)
2. Pelotshweu Baikakedi (assisting Applicant)
3. M. Seru (Attorney, representing 1st – 3rd Respondents)
4. Kgomotso Rakgobelang (4th Respondent)
5. Ditiro Taolo (assisting 4th Respondent)

JUDGMENT

S.B. KAISARA

This is an application to hold the Respondents in contempt for willfully disobeying an order granted in 1994 by the honorable Minister of Lands who was then the appellate authority for land appeals.

BACKGROUND

The Applicant holds rights over a ploughing field allocated to him by *bogosi* around 1963. The field is situated at Masweabasadi in the Kweneng Tribal Territory. At one point, the Applicant lent a portion of his field (disputed land) to the 4th Respondent's late husband (Motshipo Rakgobelang). Around 1986, the 1st Respondent resolved to register the disputed land in favour of the 4th Respondent. Around 1989 when the Minister was the appellate authority for land appeals, the Applicant complained to the Minister about the 1st Respondent's 1986 decision to allocate the disputed portion to the 4th Respondent. The Minister on 31st May 1994 upheld the appeal and the decision was communicated by letter dated 11th May 1994 as follows;

“Re go itsise fa Tona a atlhotse kgang ya lona mme o laetse gore o busediwe setsha sa gago ka gobo ose filwe ka fa molaong.

Jalo he, o ikopanye le ba Land Board go wetsa kgang”

This meant that the Minister had decided the dispute in Appellant's favour as the latter was lawfully allocated the land. The Land Board was further directed to implement the Minister's decision. Thereafter, the following notable events took place;

- 1st Respondent issued 4th Respondent with certificate of the disputed portion on 3rd August 1994;
- By letter dated 28th October 1997 the 4th Respondent applied to the Minister to reconsider his May 1994 decision- this was rejected;
- It would appear other disputes in respect other portions of the Applicant's field ensued such as that involving neighbours Serwalo Valashia and Molebedi Ntloyakhumo.

- On 25th January 1999, the Land Board stated that the Minister's decision was being implemented and the disputed land belonged to the Applicant. The 4th Respondent however remained on the land.

When the 1st Respondent failed to implement the Minister's decision, the Applicant filed contempt proceedings to the Land Tribunal under case No. **LT 33/04**. Based on this case the Land Tribunal ordered as follows;

- “1. The Kweneng Land board shall enforce the Minister's decision that is that the whole field inclusive of the portion in dispute belongs to Baikakedi, the Appellant.***
- 2. The certificate issued to Kgomotso Rakgobelang on 3rd August 1994 by the Land Board is hereby declared invalid as it was issued in contravention of the Minister's lawful decision and the Land Board, is hereby ordered to cancel it forthwith;***
- 3. The Kweneng Land Board is hereby ordered to issue Moshe Baikakedi with the certificate of Customary Grant for the entire field inclusive of the disputed portion now legally belonging to him”***

At its meeting of August 2006, the 1st Respondent resolved to cancel 4th Respondent certificate and issue the Applicant with a certificate of the disputed portion measuring 891x193x444x1051x381x327m. The Applicant then declined the offer. Thereafter, the Applicant filed an appeal under Land Tribunal LT 23/08 which was withdrawn by consent on 24th September 2008. In December 2012, the 1st Respondent issued the 4th Respondent with a lease over the disputed portion.

On 20th October 2016, the Applicant filed the present application. In terms of the sketch plan filed;

- Appellant's claimed field measures **1511ha** and encroaches on other neighbouring field allocations including that of Serwalo Valashia, Molebedi Ntloyakhumo and Taolo Ditiro.
- The disputed field presently registered in favour of 4th Respondent measures **23.5ha**;
- The total land the 1st Respondent proposed to register in favour of the Applicant measures **67.8ha** (inclusive of the disputed portion).

APPLICANT'S CASE

The Applicant's complaint is that the 1st Respondent is refusing to register the land allocated to him in 1963 by *bogosi*. He said the Minister had ordered that he be given land as per *bogosi* allocation. This he said was also confirmed by the Land Tribunal order in case No. LT 33/04 which covered the entire claim measuring 1511ha. He is therefore opposed to the offer for registration of 67.8 ha of land as depicted in the filed sketch plan.

The Appellant however confirmed that the dispute that the Minister addressed was that concerning the 4th Respondent. Hence when he appealed to the Minister the parties were himself and the 4th Respondent. Further that at the time of the Minister's decision there was a parallel dispute with a certain Kegoetse Ntloyakhumo (the mother to Molebedi Ntloyakhumo and Serwalo Valashia). Further that the appeal to the Minister was made before the encroachment dispute with the said Kegoetse. In the meantime, the Land Board allocated other people leading to the dispute with Kegoetse

Ntloyakhumo. Further that there was never a Land Board decision on the Kegoetse matter.

The Appellant prayed that his field be allocated as per claim of 1151 hectares as opposed to what the Land Board offered.

1ST- 3RD RESPONDENTS' SUBMISSIONS

Counsel Seru stated that as this is a case of contempt, which is willful disobedience of a court order, the starting point would be to interpret the Minister's decision of 1994. She argued that the dispute related to the Applicant and the 4th Respondent, something that the applicant confirmed. Further that the Minister's decision is straight forward and specified and directed that the field allocated to the 4th Respondent be returned to the applicant.

Concerning willful disobedience; Counsel stated that as far back as 14th November 1994, the 1st Respondent tried to implement the Minister's decision. In 1999 the 1st Respondent also wrote to the Applicant regarding implementation of Minister's decision. On 23rd November 2006 following the Land Tribunal case LT 33/04, the Land Board resolved to cancel 4th Respondent's certificate and issued the Applicant with a certificate which he declined. Counsel confirmed that the 4th Respondent is still in occupation and that they ought to have started eviction proceedings as the latter is in unlawful occupation. However, there is no evidence such as minutes to show the steps that the 1st Respondent took towards compliance. The representative said the explanation is that the Applicant refused to accept the certificate and they also wanted to ensure that the dispute over the Applicant's field boundary is resolved before the eviction.

Regarding the registration of a lease in favour of the 4th Respondent, counsel said it was an error on the part of the 1st Respondent to have registered the lease. Further that the 4th Respondent procured the registration by fraudulent means as she knew she had no rights in respect of the field in dispute. Hence the lease agreement does not confer any rights.

In conclusion, counsel said they are in a position to fully implement the Minister's decision by evicting the 4th Respondent as she is in unlawful occupation.

4TH RESPONDENT'S CASE

The family representatives stated that the 4th Respondent did not know about the Minister's decision until this case but they were ready to comply with the Minister's order and vacate the land. The 4th Respondent said she developed the land; the field is fenced, debushed partly and has one *mokgoro*. She has also buried her husband and 3 of her children in the land to the knowledge of the Applicant. The family however argued that before they can vacate the remains of their relatives buried in the disputed land should be relocated at the Applicant's cost as the family will be affected psychologically if they were to remain in the land.

Further the representative stated that he applied for a lease of the disputed land as he was not aware of the cancellation of 4th Respondent's certificate nor the field dispute. They were also under the impression that the Applicant who is their uncle had withdrawn his claim against the 4th Respondent. The family sought a grace period of 8 months grace period to vacate the land as they had already tilled it in September 2017.

In reply, the Applicant's representative stated that the Applicant refused the certificate as it did not comply with his claim. Also that the 4th Respondent developed and got a certificate when she knew the Minister had taken a decision in respect of the land. Further that there is no truth that the land has been cultivated and opposed the request for 8 months as this is a long outstanding dispute. Again that the Applicant was not aware of the burial sites, but it would not be the responsibility of the Applicant to relocate the remains as the disputed field was only lent to 4th Respondent's partner. Therefore, it was demanded that the 4th Respondent be ordered to vacate the land immediately or within a reasonable time.

ISSUE FOR DETERMINATION

The issue calling for determination is whether there has been willful disobedience of the order granted by the Minister. The dispute centers around the extent of the land the Minister adjudicated upon.

THE LAW

Civil contempt is initiated in order to bring to a logical conclusion an order granted by the court which has been disobeyed deliberately; see the case of ***Chana and others v Chana and another (2003) 1 BLR 125***. In the case of ***Modisenyane V Modisenyane (2006) 2 BLR 62***, the court held that it is important that court orders be complied with otherwise the authority of the court will be diminished and this may result in the risk that aggrieved parties may take the law into their own hands.

In order to find a Respondent guilty of contempt, there must be a court order which is legally valid, clear and unequivocal. The order must have been served on the Respondent. The Respondent should

have disobeyed or neglected to comply with it. In addition, the disobedience of the court order must be willful and *malafide*. Once all the above three requirements have been proven, then willfulness and *malafide* on the part of the Respondent shall be inferred. The onus therefore rests on the Respondent to rebut such inference on a balance of probabilities.

COURT'S DETERMINATIONS

It is not in dispute that the Minister by letter dated 11th May 1994 decided a land dispute in Applicant's favour on the basis that the latter was lawfully allocated the land. The Minister then ordered that that the disputed land be reverted to the Applicant. The Applicant's argument is that this included all the land that he is claiming amounting to **1511 ha** including that occupied by other persons not herein cited. The Respondents argue that it is only the land occupied by the 4th Respondent decided by the Minister measuring about **23.5ha**.

In determining the correct extent of the land, the guiding factor is which dispute did the Minister decide on? The parties are in agreement that the case that was filed with the Minister pertained to a field dispute between the Applicant and the 4th Respondent after the Land Board had issued the latter with a certificate. The court notes that the Applicant's other field claims only arose much later and it cannot therefore by any stretch of imagination be said that they formed part of the Minister's decision. Again these other parties were never cited during the case before the Minister. The applicant also informed the court that a determination on these other claims has not been made.

Based on the above, the court finds that the Minister's decision related only to the land occupied by the 4th Respondent totaling about **23.5ha**. Therefore the Applicant is entitled to a total **67.8ha** comprising of the said 23.ha and the undisputed portion of his field. This finding is consistent with the Land Tribunal decision in case **No LT 33/04**. The Applicant is however at liberty to pursue his other claims regarding the land in excess of the 67.8ha.

Regarding contempt, the first consideration would be whether there was a valid and unequivocal court order. The Minister had handled the dispute as the appellate authority for tribal land appeals before establishment of the Land Tribunal. When the Tribunal assumed authority over these appeals, it also assumed jurisdiction over enforcement of compliance with orders earlier made by the Minister in terms of Section 14 and 40 of the Tribal Land Act. Refer also to the case of ***Moshe Baikakedi and Kweneng Land Board and Kgomoitso Rakgobelang LT 33/04*** at page 2.

Consequently, the Minister's decision would be enforced in the same manner as if it is a decision of the Tribunal. There was an issue that the correct extent of the disputed field was not reflected on the Minister's letter. Given that what Rakgobelang occupied was land which could be ascertained on the ground, the court finds that the decision was clear, legally valid and unequivocal. The order was also communicated to the Respondents in compliance with the second requirement.

The 3rd consideration is whether there has been compliance with the decision. The Respondents admitted that there has not been compliance and that that is the reason the case has dragged.

The 1st -3rd Respondents' explanation for the non-compliance is that the Applicant refused an offer of the 67ha of land and that they were still awaiting a decision on the field extent dispute before they could initiate eviction proceedings. This the court completely rejects. It is clear that the Land Board has never taken concrete steps to ensure implementation of the Minister's decision. This was even after the strong warning to comply in terms of the Land Tribunal case No. **LT 33/04**. Instead, they went ahead and issued the 4th Respondent with a lease over the disputed piece of land. To this end, this conduct has to be addressed with appropriate stiffer orders.

The 4th Respondent is in a position to vacate and requested for a grace period of 8 months. The 4th Respondent also demanded that the Applicant should bear expenses of relocation of his deceased family members' remains; something which falls outside the ambit of the present case. The 4th Respondent's explanation for not vacating is that she was not aware that the present dispute was still ongoing. This is illogical in light of the fact that she was party to the Land Tribunal case No. LT 33/04. Again there has been a number of correspondences directing her to vacate. The court's view is that she just took advantage of the 1st Respondent's inaction to the extent of even registering a lease using a cancelled certificate.

On the basis of the above, the court finds that the Respondents have willfully disobeyed the Minister's order. Accordingly the court orders as follows;

- a) The Respondents are declared to be in contempt for willfully disobeying the Minister's 1994 decision;
- b) The four Respondents are subject to clauses (d) and (e) below fined **P3000.00 (three thousand Pula)** each;

- (c) The 4th Respondent's title over the disputed piece of land is cancelled forthwith.
- (d) The 4th Respondent shall vacate the disputed piece of land and remove all improvements erected thereon within **3 (three)** months from today. The 4th Respondent shall pay the fine imposed above only if she fails to comply with this paragraph.
- (e) The 1st Respondent shall at the end of the **three months** period above advise the Registrar of the Land Tribunal on the status of compliance with Paragraph (d) above;
- (f) In the event the 4th Respondent fails to vacate as ordered above, the 1st Respondent shall within **2 (two) months thereafter** using reasonable force evict the 4th Respondent from the land and claim the costs of doing so from the 4th Respondent. The fines imposed on the 1st -3rd Respondents above shall only be payable should the 1st Respondent fail to comply with the requirements of this paragraph;
- (g) The 1st Respondent shall within **three months** from today issue the Applicant with a certificate of the land depicted in the filed sketch plan described as "**proposed allocation**" measuring **67.8 ha**;
- (h) There is no order as to costs.

The parties are hereby informed of their right to appeal to the High Court within eight (8) weeks of delivery of this judgment if any feels aggrieved.

Judgment read in open court at Gaborone this **21st** day of **December 2017**.

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S.B. KAISARA
CHIEF LAND TRIBUNAL PRESIDENT

