



IN THE LAND TRIBUNAL OF THE REPUBLIC OF BOTSWANA
HELD IN GABORONE

REPUBLIC OF BOTSWANA

In the matter between

Case No. LT 186/2013

CONSTANCE MODISE

APPELLANT

And

ROLONG LAND BOARD

1ST RESPONDENT

MODISENYANE TEKANYO

2ND RESPONDENT

MOTANKA THAELO

3RD RESPONDENT

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

APPEARANCES:

1. C. Modise [Appellant]
2. O. Molema [Chairperson of the 1st Respondent]
3. G.G. Moepeng [Secretary of the 1st Respondent]
4. Modisenyane Tekanyo [2nd Respondent]
5. Motanka Thaelo [3rd Respondent]
6. Marry Nkobi [assisting 2nd and 3rd Respondents]

JUDGMENT

S.B. KAISARA

The Appellant is challenging the 1st Respondent's decision made in favour of the 2nd and 3rd Respondents over a fields' boundary dispute. The Appellant alleges that the 2nd and 3rd Respondents encroached into her ploughing field by approximately 3.6ha and 4089m² respectively. The concerned fields are situated at Kgoro lands within Rolong Tribal Territory.

BACKGROUND

The matter at hand relates to an old dispute dating back to the 1970s. The background to this matter is that:

- In 1976, Rasebedi Matsheka (Appellant's late father) approached the 1st Respondent beseeching it to resolve a boundary field dispute between the former and Morwe James Tekanyo (2nd Respondent's father).
- The Land Board intervened in the matter and purportedly resolved it in 1976 and in the process prepared a sketch plan hereafter referred to as the 1976 sketch plan. The sketch plan depicted the parties' boundaries as per the Land board resolution. (the original copy of the plan is filed in case LTGA 02/09).
- In or around 1978, Mr Matsheka who was aggrieved by the Land Board's resolution, complained to the District Commissioner who in turn advised the Land Board that the case should have been referred to the customary court. Mr

Matsheka then complained to the Minister Local Government and Lands.

- Mr Matsheka passed on in 1982 before the issue was resolved; consequently the Appellant inherited her father's field.
- In 2008 the Appellant approached the Land Board whereupon she requested the Land Board to resolve the outstanding field boundary dispute above. At the time, the Appellant complained that there was also an encroachment by the 3rd Respondent's field. The 2nd Respondent had also taken control of a part of her late father's field.
- In the meantime, the matter previously registered with the minister was transferred to the Land Tribunal and registered under LTGA 2/2009. The Appellant later withdrew the appeal on 21st April 2009 to allow the Appellant to pursue the complaint filed with the 1st Respondent in 2008.
- Being aggrieved by the manner in which the 1st Respondent resolved the issue, the Appellant approached the Land Tribunal to appeal on the 5th October 2011 under case No. 119/2011.
- On the 13th February 2013, the Land Tribunal set aside the 1st Respondent's decision and remitted the matter back to the Land Board for reconsideration.
- The 1st Respondent reconsidered the matter during its meeting of the 27th August 2013 and resolved to dismiss the Appellant's appeal and referred her to *bogosi* for adjudication.

- The 1st Respondent's decision was communicated to the Appellant through correspondence dated 1st November 2013.
- The Appellant then appealed to this court as per her letter of 18th November 2013.

In terms of the sketch plan dated 3rd May 2015 and filed of record the following scenarios are reflected;

- Appellant's claimed field -**18.0262ha**;
- 2nd Respondent's claimed field- **18.5665ha**
- 3rd Respondent's claimed field -**2.7183ha**;
- Encroachment 1 (between Appellant and 2nd Respondent's fields) -**3. 6591 ha**;
- Encroachment 2 (between Appellant and 3rd Respondent's fields) - **4089.12m²**.

APPELLANT'S EVIDENCE

The Appellant called four witness including herself. First to testify was the Appellant (**AW1**) Constance Modise nee Matsheka born in 1949. She informed the court that when she retired in 2008, she approached the 2nd and 3rd Respondents and asked them to show her the extent of their fields in relation to hers and she realized that the fields encroached into hers.

The Appellant informed the court that she knows her parents' field as she was involved in its ploughing (*a tshwara teu*) when she was in primary school up to 1964. Thereafter she left the area for secondary and tertiary level schooling. When her father died in

1982, they stopped ploughing the field and lent it to various people. She testified that the 2nd Respondent had moved southwards to encroach into the field. She stated that they used to pass between Macaga's field east of Matsheka and Tawana; east of Modisenyane but the road now leads into Modisenyane Tekanyo's field.

The witness further stated that the field was not fenced. The only feature was a road alongside which there was a drift fence. In describing the beacons of the field, AW1 stated thus:

- drift fence to the east, between points 9 and 10 in the sketch plan;
- *mokala* tree at point 10;
- gravel road accessing the Water Utilities Corporation borehole which is inside the field ;
- Thaelo's field to the west.

AW1 testified that Matsheka's field of 20 acres translated to 8.0936 hectares. The 1st Respondent's earlier decision had indicated the field was 12 hectares after including land around the borehole which was excluded by the 1976 sketch plan.

On Thaelo's side, the two fields are distinguished by the road between Thaelo and Matsheka fields but the amount of encroachment is not as much as that at Tekanyo's side. In accordance with the 1976 sketch plan, Thaelo's field is 8 acres which converts to 3.05 hectares but he now occupies less land measuring 2.5617 hectares. The witness does not know what

occasioned the deficit but reckons Thaelo's field has now occupied what according to the 1976 sketch plan was virgin land.

On Tekanyo's side, the boundary was marked by trees which trees Tekanyo removed. In 1976, the 1st Respondent placed stone beacons. AW1 testified that they used to pass Macaga's field to access their field through an area that now 2nd Respondent's claims. The 2nd Respondent's land was 30 acres in terms of the 1976 sketch plan which is equivalent to 12 hectares. However the 2nd Respondent now has additional 6 hectares because he encroached into Matsheka's field; he self-extended southwards and encroached to the west. The 2nd Respondent has encroached into Matsheka's field by 3.659ha.

Under cross-examination, AW1 stated that the changes to size of Matsheka's land arose because the 1976 sketch plan had excluded the Appellant's land on the side of the borehole which was not ploughed. The portion around the borehole was not as big as the portion ploughed. AW1 further stated that it was not possible that when ploughing that draft power would have to tread on (*romogela*) onto the other field even though both fields were not fenced as Matsheka ploughed in an east to west direction which was different from 2nd Respondent's direction of ploughing.

Keikotlhae Evelyn Tekanyo, (**AW2**) born in April 1956, residing at Bethel in Borolong, and a neighbour to the Appellant, testified that in 1990, her husband, Selelo Tekanyo borrowed a field from Ogomoditse Matsheka (Appellant's mother). AW2 ploughed the field

from 1990 to 1991. She ploughed 5 hectares away from 2nd Respondent's field. There was a small track between Appellant's and 3rd Respondent's fields.

When cross examined, AW2 mentioned that during the period she ploughed part of the Appellant's field, the land to the south belonged to the Matshekas as Mrs Matsheka had shown her. The Appellant's field was in alignment with Gaolatlhe Macaga's field on the south. That was before the Council drilled a borehole inside the field.

Meshack Macaga (**AW3**) born in 1942, residing in Bethel and the Appellant's neighbour stated that he inherited his father's field. He knows the Matshekas' field extended to the north past Macaga's field by 3-4 metres. AW3 stated that he didn't know the beacons of 2nd Respondent's field but there was a passage between Tekanyo and Matsheka's fields however he does not know how it disappeared. He stated that he knew 2nd Respondent's field to the south because he has seen it being ploughed. AW3 confirmed that he knew Matsheka's field well but only on the eastern side and the field used to be ploughed in a north to south direction.

AW4, Noni Winifred Lephole, born in 1955, and Appellant's sister testified that in the 1970s her father used to complain that the 2nd Respondent had taken part of his field. Mr. Matsheka at one point complained to the 1st Respondent, later to the District Commissioner in Kanye and later to Minister responsible for Lands. During cross-examination, AW4 explained that there was once a

mix-up of crops in the area under dispute between the Tekanyo and Matsheka's fields. The witness did not know how his father's field related to that of the Macagas' and the 3rd Respondent.

RESPONDENTS' EVIDENCE

2RW1, Modisenyane Joseph Tekanyo, born in 1932, testified that the field he holds originally belonged to his father James Tekanyo who died in 1995. He stated that his field is about 18 hectares. Further, there was a passage between the field and Matsheka's field wide enough for a car to pass through. He said that the Appellant had now encroached into the field and has removed his beacons. The witness added that he ploughed this field even during his father's life time and the field is at par with Macaga's field. He stated that he ploughed about 8-10 hectares of the field and about 4 hectares remained fallow as it was difficult to plough on that area.

3RW1 Motanka Thaelo, born in 1949 who resides at Kgoro testified that he acquired the field as inheritance from his father, Khabana who passed on a long time ago. 3rd Respondent's field is about 2 hectares in size. The field was borrowed by Modisenyane Tekanyo who ploughed beans when the witness was away working in South African mines. When he returned from the mines, he continued to plough the field. Recently the witness saw some poles erected in his field and was told they were placed by the Appellant.

3RW1 told the court that there used to be a passage between the Appellant and 2nd Respondent's field. The Appellant has now closed up that passage. There was also a passage between Appellant's and the witness's field. Further, that cattle used to pass through this passage to 2nd Respondent's field then past Macaga's field to the dam.

Next to testify was Sekgabo Mapogo (**3RW2**), born in 1951, who is 3rd Respondent's neighbour on the east of the field. He could not remember when he was allocated but it was during *dikgosi* era. He testified that Appellant has encroached into the 3rd Respondent's field. According to 3RW2, there should be a passage between the 3rd Respondent's and Appellant's fields. He said both the Appellant's field and his field are not fenced.

Under cross examination, 3RW2 stated that the boundary of the 2nd Respondent's field is straight. Further, that the Appellant's and Macaga's fields are in line. He added that he used to work for the 2nd Respondent as a tractor operator and used to plough the disputed fields.

APPELLANT'S SUBMISSIONS

The Appellant submitted that the 3.6591 hectares encroachment on the Tekanyo side was a portion of Matsheka's field and that initially only 8 hectares of the field was debushed. Further, the *maromogo* of the two fields were not the same. He said all the fields have changed from the 1976 measurements; the stone beacons which were used in 1976 have been removed. The Appellant argued that the 2nd

Respondent annexed 6.5 hectares from the Appellant's side and the surrounding areas. On the basis of the evidence tendered, what was ploughed fell within the 8 hectares.

On the west there was a road between 3rd Respondent's field and the Appellant's field but it has since been closed. There was a road west of point 14-15 in the sketch plan. The road between 3rd Respondent's field and the Appellant's field was closed when the field was lent to the 2nd Respondent. The field was ploughed east to west as opposed to north to south as done previously.

The Appellant prayed that the Matsheka's field be reverted to correct beacons.

RESPONDENTS' SUBMISSIONS

Mr Molema for the **1st Respondent** stated that at one point there was a dispute between Matsheka and Tekanyo regarding the passage between the two fields. The dispute was settled and the 1st Respondent established the boundaries between the two fields as per illustration of the 1976 sketch plan. The sketch plan is not detailed as it only indicated dimensions of the fields and that is why it was difficult to locate fields on the ground; The 1st Respondent had stone beacons around the fields to mark the beacons. Mr Molema said in terms of the 1978 minutes, Appellant's father was not happy with the demarcations and wanted the Board to make straight boundaries. He later appealed to Minister which case was transferred to the Land Tribunal.

The matter was later remitted by the Tribunal wherein the 1st Respondent tried to separate the fields in terms of the 2011 decision as supported by the sketch plan prepared then. The 1st Respondent in its decision created a 12m passage between the three fields after the 2nd Respondent agreed to release land to create the passage. The Appellant was however still not happy with the decision and appealed.

The latest 1st Respondent's decision was a rejection of the Appellant's claim and the direction that the Appellant should seek assistance from *bogosi* as the allocation of the field was made by *bogosi*. Mr Molema said the 2011 sketch plan is the best that could have resolved the issue. The Sketch plan was amended as the Appellant's claim has gone further south. The 3rd Respondent's claim remains the same in both sketch plans and it did not increase as the other fields increased in sizes.

The **2nd Respondent's** position is that the way the 1st Respondent decided on the matter is acceptable and the only problem is that a peg was removed and put inside the field in contravention of the decision.

The **3rd Respondent** prayed that his field be reverted to the original beacons.

The **Appellant's reply** was that it was possible to plot the disputed fields from the 1976 plan as points 2-3 in the current sketch remained constant. Further, in 1978 when the Appellant's father said he was not happy with the boundary that it was not straight,

that was in reference to the boundary on the south and west. The 1st Respondent is biased in its decision. In addition, the 2008 sketch plan shows the Appellant's field was 15.6 hectares but it was reduced to 12.9 hectares in the 2011 sketch plan. Lastly, the Appellant has never moved beacons placed by the 1st Respondent or other Respondents. Furthermore, she never moved the boundary further down south.

ISSUE FOR DETERMINATION

The Land Tribunal is to determine the correct extent of the disputed fields given the Appellant's claim that both the 2nd and 3rd Respondents' fields encroach onto her field.

THE LAW

In resolving the case the Land Tribunal will be alive to the following legal principles;

In terms of law of evidence **he who alleges must prove**: In other words, if one person claims something from another in a court of law, then he has to satisfy the Court that he is entitled to it; that is the obligation to satisfy the Court on an issue rests on the party who in substance asserts the affirmation of an issue.

Since the matter is a civil one, **the standard of proof is on balance of probabilities**. In the case of MILLER V MINISTER OF PENSIONS [1947] 2 ALL ER272, **Lord Denning** described the degree of

congency required to discharge a legal burden in a civil case in the following terms;

“It must carry reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the Tribunal can say: “we think it is more probable than not, then the burden is discharged, but if the probabilities are equal it is not”.

The other principle is that “you cannot give more than what you have: ***nemo dat quod non habeat***. In other words, the Appellant in this case is NOT entitled to acquire a better title than what her father (the previous owner) had with regards to the size of the field in question. The same rule applies similarly to both the 2nd and the 3rd Respondents.

EVALUATION OF EVIDENCE AND SUBMISSIONS

The Appellant’s case is that the field she inherited from her father has been encroached onto by both the 2nd and 3rd Respondents on the north and the west respectively. During her testimony, **AW1** stated that she knew the field very well as she was involved in its ploughing. She testified that there was a passage between her field and the 2nd Respondent’s field which led to Meshack Macaga’s field. The court observes that her testimony on the direction of ploughing the fields (*maromogo*) is not helpful in resolving the dispute. Again, the witness’s attempt to analyse the calculations of hectarage of the fields is also not helpful as it is guess work. Furthermore, her

absence from the disputed area during her schooling years, means that she could have missed some important aspects of the dispute.

AW2 who once ploughed the Appellant's field testified that to the south the field is in line with Gaolathe Macaga's field. This piece of evidence is vital in determining the correct extent of the Appellant's field in relation to the 2nd Respondent's field.

AW3 owns a field adjacent to the Appellant's field. His testimony corroborates AW2's assertion that Appellant's field northern boundary is almost aligned to his although he said the Matsheka's field exceed his further north by 3 to 4 metres. He stated further that there was a passage between the Appellant's and 2nd Respondent fields. As a close neighbour and an elderly person who ploughed in the area, the court's impression is that AW3 knows the area well and his testimony can be relied upon.

AW4 is the Appellant's sibling. She mostly related the events leading to the present dispute as set out in the background. Again most of her testimony is not firsthand information but what she heard from third parties. The amount of time she has been away from the field staying and schooling in the Gaborone area makes her knowledge of the field area in general and the extent of the field in dispute very limited. Therefore her testimony is of very little assistance in the resolution of the dispute at hand.

2RW1 Tekanyo who ploughed his field during his father's life time testified that his field has been encroached into by the Appellant. He pointed out that there was a passage between the fields, width of

which, a car could pass. He pointed out that the boundary of the field is aligned to Meshack Macaga's edge of the field on the southern side. Being an elderly person and having actively participated in the ploughing of the field, the court's impression is that his testimony is reliable.

3RW1's testimony is that Appellant has encroached into his field as seen from some poles he found in his field. He said there were passages between his field and the Appellant's as well as between the Appellant's field and the 2nd Respondent's field, continuing past Macaga's field and going all the way to the dam. However having been away from the fields during the period when he worked in South African mines, it is possible that he could have missed some crucial factors relating to the dispute.

3RW2 who once worked as 2nd Respondent's tractor operator testified that he knew the fields well as he used to plough them. He stated that the 2nd and 3rd Respondent fields shared a boundary but there were passages between the three fields in issue. He also mentioned that the Appellant's field was aligned to Macaga's field.

A common thread running through the witnesses of parties is that the Appellant's field northern boundary is in line with the neighbouring Meshack Macaga's field. The other piece of evidence is that there used to be a passage between the Appellant and the 2nd Respondent's fields. The court observes that a number of witnesses failed to address the claimed encroachment between the Appellant and the 3rd Respondent.

COURT'S FINDINGS AND DETERMINATIONS

In resolving this dispute the court faced a number of challenges. First the dispute involves fields allocated by *bogosi* long before the Land Boards were established; these allocations were not registered and are registered upon request from land holders. Secondly, the original holders of the fields are late and the present parties were not there when the allocations were made which makes their knowledge of the true extent of the fields not very authoritative. The other constraint is that the fields were not fenced hence the extent of the fields cannot easily be identified. Lastly, the 1976 sketch plan used to determine the dispute earlier was not professionally drawn and therefore does not clearly show how the fields were apportioned. The court will deal with the two encroachments under separate headings as follows;

1. Encroachment 1 (between Appellant and 2nd Respondent)

In terms of the filed sketch plan, the encroachment measures **3.6591ha**. From the evidence tendered by most witnesses, the Appellant's field was aligned to the Macaga's field on the eastern side. For this reason it is more probable that the extent of the Appellant's field goes right through the middle of the piece of land labelled "encroachment area 1" to correspond to the northern corner of Meshack Macaga's field. The court finds that the Appellant is therefore entitled to approximately half of the 3.6591hectares of Encroachment 1 land area.

The other relevant piece of evidence which is not in contention is that there was originally a passage between the Appellant and 2nd Respondent's field. Therefore the court determines that in apportioning the encroachment area a reasonable passage should be created between the two fields. In terms of the plan, the encroachment area does not include south western corner of the 2nd Respondent's claim (Triangle 1-14-15-1). The court's view is that this portion should also be included in the land to be apportioned for proper alignment of the fields.

2. Encroachment 2 (between Appellant and 3rd Respondent)

The area of the claimed encroachment is **4089m²**. The Appellant could not provide convincing proof that the piece of land is part of her field; actually most witnesses did not deal with this encroachment. On the other hand, the court is convinced by the 3rd Respondent's claim over the piece of land as corroborated by 3RW2 and which was not challenged by the Appellant. Again in accordance with the 1976 sketch plan, the 3rd Respondent's land was 3.05 hectares while the latest plan show it as 2.5617. Therefore the court's view is that any further reduction of the field would not justifiably address the imbalance. Consequently, the court finds for the 3rd Respondent for this particular encroachment.

All in all, the court finds that the Appellant failed to discharge the onus of proof on a balance of probabilities that the entire claimed area of encroachments were part of her field. However, the court

observes that it is important for land holder to develop their land by fencing and putting permanent beacons as soon as they are allocated in order to avoid similar disputes in future. The 1st Respondent is also behoved to undertake registration of land parcels within their areas of jurisdiction which were allocated by *bogosi*.

During the hearing, the 1st Respondent conceded that as the authority currently responsible for land administration, it was improper for it to resolve that the parties should approach *bogosi* for resolution of the dispute. In light of the aforementioned, the court finds that the appeal partially succeeds and the 1st Respondent's decision is replaced with orders as follows;

1. The 1st Respondent shall equally apportion the land marked **points 1,14,16,15 (where it meets the purple line) and 1** in the filed sketch plan dated 03/05/2015 between Appellant and 2nd Respondent. In the realignment, 1st Respondent shall create a passage of reasonable width between the two fields;
2. The 3rd Respondent's claim shown as **Points 7,12,6,5,8,7** in the filed sketch plan dated 03/05/2015 is hereby confirmed;
3. The 1st Respondent shall register the fields and prepare certificates depicting the dimensions that comply with the orders above within **2 months**;
4. 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.

Delivered in open court this **28th** day of **August 2015** at Gaborone.

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S.B KAISARA
President of Land Tribunal