



REPUBLIC OF BOTSWANA
IN THE LAND TRIBUNAL HELD AT GABORONE
CASE NO: LT 149/2014

IN THE MATTER BETWEEN

ESTATE LATE BETHUEL S MPHAFE
(Represented by Bunny Mphafe)

APPELLANT

And

NGWAKETSE LAND BOARD

RESPONDENT

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

APPEARANCES: 1. M.T. T. Gobhoza (Attorney for the Appellant)
2. L. Mokete (In house Attorney of the Respondent)

JUDGMENT

S. B. KAISARA

The Appellant is challenging the Respondent's decision rejecting its application for registration of land around borehole number Z2654 situated at Papajathama lands within Ngwaketse Tribal Territory. The Appellant claims that the land was originally allocated to Kgosi Bathoen as a special pastoral land parcel whilst the Respondent's position is that the land is communal area and was never allocated for exclusive use.

BACKGROUND

On the 9th May 2000, the Respondent issued the Appellant with a certificate of customary land grant in respect of borehole No. Z2654 situated at Papajathama lands as transfer from Kgabosetso Mosielele. Around 2014, the Appellant applied to Kanye Sub Land Board for registration of land around the borehole which application was rejected. The matter was then appealed to the Respondent. In terms of the Respondent's minutes of 26th May – 17th and 19th – 20th June 2014, the Respondent resolved as follows:

“The Board resolved to uphold Kanye Sub Land Board resolution taken on the 29th January 2014 to reject the application on the basis that the area around the livestock borehole is a communal area and cannot be allocated or fenced.”

Aggrieved by the decision, the Appellant lodged its appeal with the Land Tribunal through a letter dated 24th September 2014.

APPELLANT'S CASE

Three witnesses were called in support of the Appellant's case. First to testify was **Bunny Mphafe (AW1)** Appellant's surviving wife. She stated that her late husband acquired the disputed land from Kgosi Seatla Gaseitsiwe. The witness testified that the land was first transferred to Kgosi Kgabosetso Mosielele's names for subsequent transfer to her husband. She said the points shown to her husband

were *Tsatsu (Moraga, quarry, Mogobe wa dipina and Tsatsu (Ramatlaweng)*. When the witness approached the Respondent, the application was rejected on the basis that there was no documentary proof for the claim. She was also advised to bring witnesses from *bogosi* to attest to the claim. In conclusion, she observed that the Respondent was continuing to allocate within the disputed land.

Under cross examination, the witness explained that the disputed land was first transferred to Kgosi Mosielele who held it on behalf of the Appellant because Kgosi Seatla Gaseitsiwe could not transfer the land directly to the Appellant as a commoner. The witness conceded that the Appellant only bought a borehole and improvements in terms of the sale agreement. Further that she did not know anything regarding the disputed land prior to 1999.

Next to testify was **Thelelo Molomo (AW2)** born in 1941 who has been a land overseer of the area since 1984. He said he was called to testify about the beacons of Mphafe's borehole. He stated further that he knows the disputed land because during his childhood he used to water his family's cattle from the borehole and he also used to graze them in the area. The witness said the corners of the land were marked by *Moraga, Tsatsu (Ramatlaweng), quarry and Mogobe wa dipina*. He told the court that the land initially belonged to Kgosi Bathoen, then Kgosi Seatla Gaseitsiwe and in 1999 the land was transferred to the Appellant. He said at the time, Kgosi Seatla Gaseitsiwe informed residents at a *kgotla* meeting at Gasegwagwa that

he had transferred the borehole and the land around it to the Appellant. Further that Kgosi also showed them the beacons of the land but the Land Board did not measure it correctly.

Under cross examination, the witness stated that when he was a boy, the land in issue was used for “*moraka*” and grazing for *Kgosi*’s cattle. Further that what belonged to *Kgosi* was a borehole but the land surrounding it was used for grazing purposes.

The Appellant’s last witness was **Kgosi Donald Kgabosetso Mosielele (AW3)** aged 48 years, a member of the Customary Court of Appeal. He said he was called to testify about regularization of a farm belonging to Seabelo Mphafe. The extent of the farm area was marked by the points *Tsatsu (Moraga)*, *quarry*, *Tsatsu (Ramatlaweng)* and *Mogobe wa dipina*; He said within the disputed area, there is a borehole in the centre of the above points.

The witness said that Kgosi Bathoen was allocated the borehole in 1945 before the witness was born and before establishment of the Land Boards. He also owned the grazing land and at the time, he was allocated 8km x 8km grazing land but as he was Kgosi, the size was reduced and given demarcation points. Later Kgosi Seatla Gaseitsiwe, inherited the borehole and the land within the demarcation points.

AW3 told the court that he later bought the borehole with those demarcations from Kgosi Seatla. He said he obtained title to the

borehole whilst the disputed land had no title. He then attempted to regularize the farm but without any success, so he transferred it to his uncle who was self-employed and thus had ample time to pursue the matter with the Land Board.

Under cross examination, the witness confirmed that he was not yet born when in 1945 the borehole was allocated, and that he only ascertained the date from the certificate. He also stated that when he referred to 8km x 8km, he was only stating what he heard. Further that he was not told the actual size nor was he shown the pegged area and that they were just asking for 50 ha of the area.

APPELLANT'S SUBMISSION

The Appellant's case is that the Appellant already owns the land and only approached the Respondent for regularization.

In support of its case, the Appellant's representative cited from Isaac Schapera's book ***'Tswana Law and Custom'*** at page 195, 204 and 208. This according to counsel provided *inter alia* that control over the land and its resources is vested in the chief who exercised it through his headmen for allocation to tribesmen except for land reserved for him and his family. Further that the chief had his special pastoral land and upon his death this will pass on to his beneficiaries.

Based on the above principles, it was submitted that the question becomes whether *Kgosi* was allocated the disputed land for exclusive use and whether upon his death it passed on to his beneficiaries.

According to the representative, witnesses called being AW2 and AW3 who grew up in the area, testified that they knew that the land surrounding the borehole belonged to Kgosi Bathoen. Further, such would be adequate proof of allocation as in the past according to Schapera, the chief in allocating land would just call his advisors or headmen and simply point out land to be allocated. Further that in the process chiefs could allocate grazing land to themselves.

It was therefore argued that the uncontroverted evidence before the Tribunal was that the land was allocated to Kgosi Bathoen in 1945. Counsel said that AW3 testified that when allocated a borehole, you were also given the surrounding land for grazing purposes. Further that title to the land passed to Kgosi Seatla Gaseitsiwe as inheritance and if Kgosi Seatla and Kgosi Bathoen had title, the title could not be lost in the air. This title could be traced to Kgosi Mosielele and to the Appellant by virtue of the sale agreement.

The Appellant's representative concluded that what was required from the Land Board was simply regularization of ownership of the disputed land, which land is not subject to the Tribal Land Act. He referred to the cases of ***Kabo Matlho v Kweneng Land Board (1992) BLR 292 and Mpofu v Kweneng Land Board (2005) BLR 3*** where it was held that the matter stands to be resolved by reference to customary law particularly ownership of Kgosi Bathoen.

The Appellant prayed for an order directing the Respondent to register and regularize the land in question and for costs on ordinary scale.

RESPONDENT'S SUBMISSIONS

The Respondent's representative Mr Mokete stated that the dispute is over registration of the grazing land surrounding the borehole. He said that whilst the Appellant sought to rely on Isaac Schapera's Hand Book to emphasize that in the past chiefs had special pastoral rights, the Appellant's witnesses failed to prove that Kgosi Bathoen had special grazing rights in the disputed area.

Counsel observed that AW2 was noted to have said he knew the borehole to belong to Kgosi Bathoen and the surrounding area to be a grazing area; therefore exclusive grazing rights in respect of that land did not apply. Further that in 1999 only the borehole was transferred to the Appellant and not the grazing area in terms of the sale agreement entered into between AW1's late husband and Kgosi Mosielele. Further, the witness said before the Kgotla meeting was called to indicate the grazing area, he was not aware of any boundaries marking exclusive grazing rights in favour of Kgosi around the borehole. Further AW1 was also said she was not aware of the beacons of the disputed land but was just shown the beacons around 1999 when they bought the borehole.

It was also argued that Kgosi Mosielele (AW3)'s evidence was admittedly hearsay; he was not aware if Kgosi Bathoen was given exclusive grazing rights in respect of the disputed land. Also that Kgosi Mosielele was noted to be unaware of the size of the land he wants regularized. Further that Kgosi Mosielele confirmed that he attempted

to register the surrounding grazing area but failed and having failed he decided to pass on to the Appellant, what he did not have. This is because neither himself nor Kgosi Bathoen had title as proof of ownership of the disputed land.

It was further submitted that two authorities cited by Appellant's counsel being **Matlho** and **Mpofu** supra were irrelevant; as **Matlho** dealt mainly with private ownership over tribal land whilst **Mpofu** tried to clarify what rights are held under Tribal Land Act. Instead, the relevant authorities were said to be **Phumaphi Vs Ngwato Land Board BLR 2005 (2) page 318** and **Kwape Vs Ngwaketse Land Board and another BLR 2005 (2) page 70**. Counsel said the authorities stated the principle that grazing area surrounding livestock water points are communal such that no person can claim exclusive rights for grazing. It was therefore submitted that similarly in the current case, if beacons were pointed out to the Appellant, they were in reference to boundaries of the grazing area to the borehole but did not confer exclusive rights.

It was further submitted that the mandate of the Land Board was not just to register any land right claim purported to accrue from the era of Chiefs; rather, the Land Board conferred with trust purpose, has a duty to interrogate such claims for validity either through documentary or viva voce evidence. According to the Respondent, in the present case the Appellant dismally failed to prove its claim that there was exclusive grazing right for the land claimed.

The Respondent prayed that the court dismisses the appeal with costs on account of the fact that the Appellant dragged the Respondent before the court unnecessarily.

In reply, the Appellant stated that it did not seek to hold the land privately but just wanted to exercise usufruct rights. Also that the cases cited in support of the Appellant's case served to show that where land was held before establishment of the Land Board, customary law applies not Tribal Land Act, nor does Respondent's policies. The case of ***Phumaphi*** supra was said to be distinguishable as in that case the applicant was not a chief whilst the Appellant's case is special pastoral land rights accorded to a chief. Further that the best evidence available was of people who grew up knowing that the land belonged to the Chief as it would be unrealistic to demand that people who lived in 1945 be called to give evidence.

ISSUE FOR DETERMINATION

The issue is whether the Appellant's purported predecessors in title ever held exclusive rights over the disputed land which was then passed on to the Appellant.

In making the determination, the court will be guided mainly by two principles of law of evidence being that "***He who alleges must prove***", and that this being a civil matter, "***the standard of proof shall be on a balance of probabilities.***"

The court will also be guided by the principle “***nemo dat qui non habet***”, which means no one can give something which he does not have; this draws from the principle that no one can transfer more rights to another than he himself has. The relevance of the principle being that the Appellant could only have validly acquired rights over the disputed area that were possessed by his predecessors in title.

ANALYSIS OF EVIDENCE AND SUBMISSIONS

The Appellant’s case is that Kgosi Bathoen had exclusive grazing rights over the disputed piece of land, allocated pre-Land Board era; and that these rights were ultimately transferred to the Appellant. Therefore what was required was just for the Respondent to register the land. According to the Appellant, as there was no documentary proof of title to the land, evidence of existence of the rights can only be ascertained through the testimony of those who grew up in the area knowing that the land belonged to Kgosi Bathoen.

The evidence of AW1 who is the Appellant’s surviving spouse is that the disputed piece of land was acquired through a sale agreement concluded with Kgosi Seatla Gaseitsiwe. The witness conceded that in terms of the agreement, the Appellant bought the borehole and improvements only and not the disputed piece of land. Again she could not explain how the land claimed was not accounted for when the certificate of customary land grant was issued for the borehole. Furthermore, the witness was not aware of the land until 1999 when they bought it. It was only at that time the land was pointed out to

both the Appellant and herself. For this reason the witness could not be one of the people in possession of the best evidence in support of the Appellant's case, so the witness testimony is not helpful for purposes of the present inquiry.

AW2 was aged about 4 years when Kgosi Bathoen was allegedly allocated the disputed land. The witness grew up in the area and because of this close connection with the area, the court could trust his knowledge of the area. His evidence is that he grazed his family cattle in the very area and the area was used by the community for the same purpose including for grazing of Kgosi's cattle. The witness also said he only became aware of the extent of the claim when the beacons were announced by Kgosi Gaseitsiwe in a Kgotla meeting in 1999 and before then the area was for grazing. To this end, the court's impression is that the witness's testimony on the use of the land somehow contradicts the Appellant's claim.

In his evidence AW3 talked about registration of a farm constituted by the land around the borehole which he bought from Kgosi Seatla Gaseitswe who had inherited it from Bathoen. The witness's claim of a farm also contradicts the Appellant's claim. The witness conceded that there was no title to the land and he was candid enough to say he attempted to register the land but failed and ended up transferring the borehole only, to the Appellant. His account of Kgosi Bathoen's allocation in 1945 and rights to the disputed land is mostly hearsay.

Again his knowledge of the size of the area which he puts at 50ha is also scanty.

The Respondent's submission is that its role as custodian of Tribal Land is to interrogate claims of land rights purported to accrue from the era of Bogosi administration of Tribal Land for validity and not to just register any claim. In that regard attorney Mokete for the Respondent submitted that the Appellant failed to show that exclusive grazing rights applied in respect of the land claimed.

COURT'S FINDINGS AND DETERMINATION

The Appellant claims that the land surrounding borehole No. Z2654, constitute special pastoral land rights allocated by *bogosi* before the establishment of the Land Boards. The court notes that the claim whilst similar to those in ***Phumaphi*** and ***Kwape*** case supra, it can be distinguished to the extent that the Appellant wants to register what he perceives to be allocated special grazing rights. The cases of ***Matlho*** and ***Mpofu*** supra would not assist the Appellants case as they show that under customary law the chief was in charge of land as a trustee; the land belonged to the community and could not be held in personal and private capacity.

Isaac Schapera in his book '***A Handbook of Tswana Law and Custom***' an authoritative textbook on customary law, also states that the concept of exclusive ownership of land did not apply under customary law; the land remained communal. Again at the time,

tribesmen were only entitled to what their family required and there was no incentive to acquire large tracts of land for speculative purposes. Again when the chief allocated pastures to the various village wards, he also catered for himself and his family. Most importantly none of the land was his property to dispose as he pleased. Refer to **Page 207** Schapera's book on grazing and water rights, where it is noted that;

“Pasture land was originally allotted by the Chief to the wards of the tribe. Each ward thus had its own cattle posts together in the same district, spoken of as naga (veld) or lefatshe (country) and supervised by its headman. This district was usually a very extensive tract of country, within which members of the ward might move their cattle about as freely as they pleased without asking permission from others. All members of the ward had the right to keep their cattle in this region, and grazing and water rights within it belonged to them. The Chief had his own special pasture lands, but could also move his cattle to any part of the tribal territory for grazing.”

To succeed, the Appellant would have to satisfactorily prove that the land was originally allocated to Kgosi Bathoen for exclusive use. This however does not necessarily have to be people who were present when *Kgosi* was allocated but those who knew about the allocation. As stated above, two of the three Appellant's witnesses were clueless about the allocation. The one key witness who played a role in the

history of the associated borehole, was not able to sustain the allegation that the land was allocated for exclusive use. He said the disputed area was used for communal grazing. To this end the court finds that the Appellant has failed on a balance of probabilities to prove that exclusive grazing rights subsisted in respect of the disputed piece of land.

In conclusion, the court agrees that in terms of its role under Tribal Land Act, the Land Board is duty bound to interrogate and assess claims of land allocations made during the era of *bogosi*, before registration of same. Refer to the case of ***Kerr and Downey v Land Tribunal (2001) 2 BLR 55 at page 57*** where the court held that;

“Allocation of land, and particularly of tribal land, is a sensitive issue of considerable public importance. It must be done fairly and with great care. That is why the task is entrusted to a full Land board and not to any individual.”

The court having found that there is no evidence, documentary or otherwise to suggest that the land was ever allocated for exclusive use, this means that there could not have been passing of title as no such title existed. The only title was of the borehole, and that title was indeed transferred to the Appellant. Consequently, the Respondent’s resolution rejecting the Appellant’s application for registration of the disputed land cannot be faulted and is therefore confirmed. Accordingly the court orders as follows:

1. The Appeal fails and is accordingly **DISMISSED**;
2. 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 this **17th** day of **June 2016**.

S. B. KAISARA
PRESIDENT OF THE LAND TRIBUNAL