



REPUBLIC OF BOTSWANA
IN THE LAND TRIBUNAL HELD AT GABORONE
CASE NO: LT 128/2014

IN THE MATTER BETWEEN

DORCUS K PHIRI

APPELLANT

And

KGATLENG LAND BOARD
DIPUO MOGOTSI

1ST RESPONDENT
2ND RESPONDENT

CORAM: S. B. Kaisara
G. T. Lecoge
K. Rutherford

APPEARANCES: 1. Dorcus K Phiri (Appellant)
2. P. Mudzimo (Counsel for 1st Respondent)
3. 2nd Respondent (no appearance)

JUDGMENT

S. B. KAISARA

The Appellant is objecting to the allocation of a residential plot to the 2nd Respondent at Ntshinoge ward in Mochudi. The Appellant argues that the disputed piece of land is part of a proposed extension to her adjacent residential plot and her proposed tailor-shop plot. The 1st Respondent dismissed the objection on the basis that there was no concrete evidence supporting the Appellant's claim that she applied for extension and tailor-shop. Further that her existing residential plot measuring 2199m² is already huge and not fully utilized.

BACKGROUND

The history of this matter dates back to the year 2003 when the Appellant lodged a complaint to the Mochudi Sub Land Board concerning the allocation of a residential plot to the 2nd Respondent. Adjacent to her plot. The matter was later escalated to the 1st Respondent. The latter wrote several letters from August 2004 through to November 2007 inviting the Appellant to hearings but the Appellant failed to turn up. In 2009 and after a back and forth, the 1st Respondent resolved to dismiss the Appellant's complaint. The Appellant then appealed the 1st Respondent's decision to the Land Tribunal under case **No. LT 93/2011**; which matter was remitted to the 1st Respondent for reconsideration. At its meeting of 6th to 26th March 2013, the 1st Respondents resolved as follows:

“The Board resolved to dismiss the appeal by the Appellant and uphold the decision of Mochudi Dub Land Board to allocate Ms Mogotsi the plot in dispute:

There is no substantial evidence confirming application for extension; the allocated plot is not fully utilized and it is far bigger than the standard plot size.”

The Appellant was aggrieved by this decision and she subsequently filed the appeal at hand on 22nd August 2014. In terms of the sketch plan filed;

- Appellant's plot as fenced is **39.97m x 50.84m x 44.55m x 53.33m (2199.2 m²)**
- Appellant's proposed tailor-shop is **20.9m x 52.2m x 22.1m x 54.8m;**
- Appellant's proposed extension is **9.3m x 5.8m x 9.8m x 6.3m;**
- 2nd Respondent's plot measures **1077.9m².**

During the hearing of the matter on 12th May 2016, the 2nd Respondent was not represented. The court then decided to proceed with the hearing in her absence given that she was adequately served.

APPELLANT'S CASE

The Appellant stated that in 1970 her late husband Dikeme Phiri was allocated a residential plot at Ntshinoge ward, Mochudi. According to the Appellant the plot measurements were **50m x 100m** although there is no certificate of customary land grant to confirm the allocation. She further claims that an extension to the said plot was granted by the Land Board in 1974 but there is no documentary proof in that regard. Further, soon after her husband's demise in 1994, she fenced in part of the extended portion.

The Appellant stated further that in 2000 the 2nd Respondent was allocated a residential plot next to her residence without consultation with her and other neighbours. Much to her surprise, she later learned that she had been reflected on the records as having been a witness to the 2nd Respondent's allocation. The Appellant

subsequently lodged a complaint against the 2nd Respondent's allocation pointing out that the 2nd Respondent was allocated within her residential plot extension. Further, the allocation was made within a portion of land the Appellant had previously applied for in 1985 for a tailor shop but was rejected on the basis that there was a water pipeline traversing the land in question. She stated that she and her neighbours had allowed the Department of Water Affairs to construct pipelines across their plots as a cost saving measure on account of shortage of pipes.

The Appellant stated that the 1st Respondent rejected her objection on the basis that there was no proof on record that she ever applied for the extension of her residential plot. Further, she made several enquiries and follow-ups but regrettably was unable to provide required documentary proof because as at the time of her application, the Land Board hardly ever issued acknowledgements of receipt of applications. She also lamented what she considered the 1st Respondent's reluctance to rope in former Land Board members to give evidence attesting to her claimed applications.

1ST RESPONDENT'S CASE

The 1st Respondent's Attorney P. Mudzimo stated that the Appellant's case was that the 2nd Respondent's allocation encroached on a piece of land she was granted by the 1st Respondent and also land she applied, for the purpose of establishing a tailor shop. According to counsel Mudzimo, the Appellant's objection was dismissed on the basis that:

- The Appellant failed to adduce substantial evidence as confirmation of her alleged application for the piece of land in question;
- The Appellant's existing residential plot was much bigger than the standard size and was not fully utilized.

Concerning the tailor shop application, the 1st Respondent's position was that whilst the Respondent's resolution does not categorically state its position on the claim, in the body of the minutes it is shown that the Appellant never applied for a tailor shop in the disputed area. This is because the Appellant had failed to provide any evidence of such, not even a letter of rejection of same.

Counsel Mudzimo submitted in respect of the alleged application for extension by the Appellant that there is no indication on record showing registration of the Appellant's residential plot and that being the case, there is no way the 1st Respondent could entertain an application for the extension of an unregistered parcel of land. As a matter of fact, said counsel, the Appellant was advised to apply for registration of the very residential plot she wants extended. Further that the measurements of the Appellant's uncertificated plot are 39m x 50m x 44m x 53m, contrary to her submission that the measurements of same are 50m x 100m.

Regarding the issue of the water pipeline, counsel Mudzimo submitted that it would be improper for the Land Board to allocate on land that has pipelines underneath it. Further that the pipe line in issue is not visible on the ground and that is probably what led to the error to allocate in the area.

In conclusion, counsel implored the court to uphold the 1st Respondent's resolution and dismiss the Appellant's appeal.

ISSUE FOR DETERMINATION

The issue calling for determination is whether the 1st Respondent acted legally and correctly in dismissing the Appellant's objection to 2nd Respondent's allocation of the disputed plot, in view of the Appellant's claims.

THE APPLICABLE LAW

In determining the matter, the court shall be alive to the following rules of evidence;

- a) **He who alleges must prove.** In the case of PILLAY v KRISHNA (1946) AD.946 at pages 951 – 952, DAVIS AJ quoted Roman jurists on this rule as follows:

“The first principle in regard to the burden of proof is thus stated in the corpus juris: SEMPER NECESSITAS PROBANDI INCUBIT ILLI QUIT AGIT. i.e, 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”.

The second principle is that the present case being a civil matter, **proof** here means that the standard of proof is on a balance of probabilities. The said standard was formulated by LORD DENNING in the following terms:

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

(See case of ***MILLER Vs MINISTER OF PENSIONS (1974) 2 ALL ER 372 AT P374***).

COURT’S FINDINGS AND DETERMINATION

The Appellant’s case is that the 2nd Respondent’s allocation forms part of her residential plot extension as well as the land she was previously denied for a tailor shop plot on the basis that it was traversed by a pipeline. The 1st Respondent’s position is that there is no indication in its records showing that the Appellant was ever granted a residential plot extension or applied for a tailor shop in the disputed area. The court is therefore required to determine which of the two versions should prevail.

In order to succeed in the tailor shop claim, the Appellant ought to bring evidence documentary or otherwise to support the claim. The court observes that the Appellant failed on all counts to produce evidence to support the claim that she applied for a tailor shop which application was rejected on account of a pipeline. The Appellant could for instance have filed her rejection letter. Therefore the court's view is that her claim remains bare allegations which cannot be sustained.

The court similarly observes that no information was tendered in support of the residential plot extension. Further that it will be absurd for the Appellant to have been granted an extension of a plot measuring 2000m². Not only is the allocated plot already too big, there is also no evidence of optimum use looking at developments in the existing plot. The Appellant's explanation about why her alleged extension was not fenced is also not convincing. Again taking into consideration that the Appellant during the hearing claimed that she was originally allocated a plot measuring 100x50m which translates to 5000m², this just shows that her supposed knowledge of the extent of the plot cannot be relied on. The Appellant's claim in this regard therefore fails.

What now is the correct order in this matter? During the hearing, it became apparent that the 1st Respondent is not opposed to the Appellant's occupation of a portion of the alleged residential plot extension falling outside the 2nd Respondent's allocation; no explanation was however given for this position. The court does not

wish to tamper with the arrangement noting that there are no pre-existing rights in favor of another person over the portion.

Consequently the court orders as follows;

1. The appeal fails and it is accordingly **dismissed**;
2. The 2nd Respondent allocation is confirmed;
3. The 1st Respondent shall within **30 days** register the Appellant's residential plot in respect of the land as presently fenced which is the represented in **blue** in terms of the filed sketch plan compiled by V.B. Job on 11/05/16;
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.

Judgment read in open court this **3rd** day of **June 2016**.

S. B. KAISARA
PRESIDENT OF THE LAND TRIBUNAL