SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(SOUTHERN DIVISION)
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CASE No. 96.

MARY NOCINGO *v.* MITCHELL NTLOKO.

KINGWILLIAMSTOWN: 15th March, 1950. Before J. W. Sleigh, Esq., President; Pike and van Heerden, Members of the Court (Southern Division).

Native Appeal Case—Lease—Lessee can validly cede whole or part of his right of occupation to another without consent of lessor—Practice and Procedure—Absolution judgment at close of plaintiff's case should not be granted if reasonable person might *find for plaintiff or when there is an onus on defendant.*

Appeal from the Court of the Native Commissioner, East London.

Sleigh (President), delivering the judgment of the Court:—

This is an appeal against a judgment of absolution in an action in which appellant claims an order of ejectment against respondent from a room in a dwelling situate on Site No. 1291, East Bank Location, East London, and for payment of the sum of £3 as damages.

Site No. 1291 is owned by the Municipality of East London, and appellant avers in her particulars of claim that she is the owner of the improvements thereon, that respondent is an illegal occupier of a room in the dwelling, and that he refuses to vacate it although called upon to do so. The illegality relied on is that respondent resides there without her permission and that she has not registered him as a tenant as is required by the municipal regulations.

The defence is that appellant had let the room to one Lennox Mbekeni, who in turn had sub-let it to respondent.

At the close of appellant's case, and on application, the Assistant Native Commissioner granted the absolution judgment holding that the lease to Lennox Mbekeni had not been terminated and that respondent occupied the room with appellant's permission.

It appears from the evidence that appellant is the site permit holder of Site No. 1291. Her legal relationship *vis à vis* the Municipality is therefore that of lessee and lessor [*Lusiti v. Goniwe,* 1947 N.A.C. (C. & O.) 121]. Lennox is a sub-lessee and respondent, according to the plea, is sub-lessee of the latter. The right of a lessee to sub-let, in cases where sub-letting is allowed without the consent of the lessor, is based on the general principle of the law of contract that a party to a contract may cede his rights under the contract but not his obligations. In the absence of a stipulation in the contract against sub-letting, a lessee may validly cede the whole or part of his right of occupation to another without the consent of the lessor, and it is the implied duty of the latter to recognize the sub-tenancy. It follows that when the lease is cancelled the sub-lessee's rights are automatically terminated [*Hamza v. Bailen,* 1949 (1) S.A.L.R. 993]. The onus was therefore upon appellant to prove that the lease to Lennox had been lawfully terminated and that she had not accepted respondent as the new lessee.

According to the evidence Lennox hired the room in 1944 and was granted a lodger's permit. He vacated the room in January, 1949, without giving notice of termination of the lease to appellant, and moved with his family to another part of the location. He paid the rent for January and February and offered the rent for March, but it was refused. About this time appellant cancelled his lodger's permit. Now, there is no evidence that Lennox is in unlawful occupation of the premises in which he is living at present. The presumption is that such occupation is with the knowledge and permission of the Location Superintendent. In the circumstances a reasonable person *might* come

to the conclusion that he had abandoned his tenancy of the room at No. 1291 and tacitly acquiesced in the cancellation of his lodger's permit. For this reason alone the Assistant Native Commissioner erred in granting absolution judgment at the close of appellant's case [see *Ndongeni v. Ngodwana,* 1 N.A.C. (S) 93].

The Native Commissioner also erred in holding that respondent is occupying the room with appellant's permission. She states definitely that she has never given him permission to live there and that he is not her tenant, and her whole attitude confirms this. The Native Commissioner probably intended to convey that respondent is occupying the room with appellant's knowledge.

Finally, the Native Commissioner has overlooked the fact that the sub-lease, on which respondent relies to counter the allegation of his illegal occupation and which requires the approval of the Location Superintendent, has not been proved. For this reason also absolution judgment at the close of appellant's case should not have been granted.

The appeal is allowed with costs, the judgment of the Court below is altered to read "application for absolution judgment is refused", and the record of proceedings is returned to the Court below for further hearing and a fresh judgment.

For Appellant: Mr. Kaplan, East London.
For Respondent: In default.

CASE No. 97.

KATE MAQULA *v.* **JOHNSON MAQULA.**

KINGWILLIAMSTOWN: 16th March, 1950. Before J. W. Sleigh, Esq., President; Pike and van Heerden, Members of the Court (Southern Division).

Native Appeal Case—Practice and Procedure—Where question of custom involved Native Commissioner has discretion to decide case according to Native Law and Custom—In Cape Province widow can sue or be sued unassisted—Native Custom—A widow can acquire own property with own earnings—Municipalty is owner of immovable improvements on municipal ground—Deceased's estates—Heir cannot claim rights which never vested in estate.

Appeal from the Court of the Native Commissioner, Queenstown.

Sleigh (President), delivering the judgment of the Court:—

Plaintiff, who is the son of defendant, a widow, prays for an order against her to sign all the necessary documents and perform all such acts as may be necessary to transfer to him all her right, title and interest in and to Lot No. B.K. 12, Municipal Location, Queenstown; or alternatively, for judgment for the sum of £100 for improvements which, he avers, he effected upon the said lot.

The Native Commissioner ordered defendant to transfer the lot. From this judgment defendant appeals.

The facts in this case are few and simple and are not disputed. Defendant and her children lived at the kraal of her own people in Macibini Location, Glen Grey District, where her husband died in 1920. In 1921, when plaintiff was about 7 years of age, she removed with her children to Queenstown where she hired accommodation in the Municipal Location. In 1937 she obtained a site permit for the lot in question in her own name. On this site she built a house using some of the money given to her by plaintiff who was at that time in employment. About the year 1946 they quarrelled and he left the site.

In his evidence he claims transfer of the site on the ground

that the improvements belong to him by virtue of the fact that he is heir to his father, head of the kraal and guardian of his mother. The Native Commissioner in upholding this contention decided the case according to Native Law and Custom, and one of the grounds of appeal is that he erred in doing so. It cannot be said that a question of Native Custom is not involved. This Court would, therefore, not be justified in interfering with the discretion conferred on the Native Commissioner by section 11 (1) of Act No. 38 of 1927 [see *Lebona v. Ramokone,* 1946 N.A.C. (C. & O.), at p. 16].

The Native Commissioner justifies his judgment on the ground that a widow, while living at the kraal of her deceased husband, cannot acquire property for herself in her private right and that any property so acquired by her belongs to the head of the kraal, namely, in this case, the plaintiff. According to pure Native Law this is correct. A widow had no right to leave her husband's kraal without the permission of her husband's male relatives. If she did she was regarded as a deserter and her dowry holder could be compelled either to return her or refund the dowry paid for her. In regard to the acquisition of property, she was in the same position as a minor. Any property she acquired, while residing at her husband's kraal or at a kraal approved of by her husband's relatives, belonged to her husband's family unit and was under the control of the head of the family. This principle applied to property acquired by any inmate of the kraal [*Mlanjeni v. Macala,* 1947 N.A.C. (C. & O.) 1]. But since the case of *Nbono v. Manoxoweni,* 6 E.D.C. 62, this Court has laid down in a number of cases [see e.g. *Ndema v. Ndema,* 1936 N.A.C. (C. & O.) at pp. 20] that a widow can acquire property earned by her after her husband's death. It is true that this decision is based on decisions in cases emanating from the Transkeian Territories, which decisions, in turn, although contrary to pure Native Law, are based on the provisions in the various annexation proclamations prescribing 21 years as the age of majority. But this does not affect the law in the Ciskei where the age of majority is governed by the Common Law. The principle of *stare decisis* consequently applies and the Native Commissioner had no option but to follow the previous decisions.

The structure on the lot is referred to by plaintifl as a " house ", we are therefore entitled to assume that it is immovable. Consequently, the Municipality, as owner of the ground is also owner of the building. Plaintiff cannot therefore claim that the ownership vested in him. Nor can he, by virtue of the fact that he is his father's heir, claim transfer of the site permit to him because his father never had any right to the site, the lease of which was acquired by defendant personally.

The Native Commissioner further states in his reasons that defendant, being under the guardianship of her son, has no *locus standi in judicio* and should not have been sued unassisted. This was never raised in the pleadings, and is, in any case, not correct. In the Cape Province a widow, like a major spinster, can sue or be sued unassisted [see section 11 (3) of Act No. 38 of 1927 and *Ex parte Minister of Native Affairs in re Yako v. Bevi,* 1948 (1) S.A.L.R. 388].

The appeal is allowed with costs and the judgment of the Court below is altered to one for defendant with costs.

For Appellant: Mr. Gillett, Kingwilliamstown.
For Respondent: In default.

CASE No. 98.

ELIAS MAPHANGA *v.* AMOS KOZA & ANO.

KINGWILLIAMSTOWN: 16th March, 1950. Before J. W. Sleigh, Esq., President; Pike and van Heerden, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Damages for seduction and pregnancy—Evidence—Practice and Procedure—Admission of intercourse by man affords corroboration of woman's testimony—If intercourse within a year of birth of a child is admitted onus on man to prove that he is not the father—Conclusions of handwriting experts should not be accepted in absence of corroboration—Where there is only prima facie *evidence of intimacy, as opposed to an admission, the man need only rebut such evidence.*

Appeal from the Court of the Native Commissioner, Salt River.

Pike (Member), delivering the judgment of the Court:—

This is an appeal against a judgment for defendant in an action for damages for seduction and pregnancy. The plaintiff avers that on or about October 1947 the defendant seduced his daughter Grana, as a result of which she became pregnant. Defendant in his plea denied the above allegations.

The evidence of Grana was that defendant proposed love to her in 1946, that she accepted him in February, 1947, when he gave her his photograph, that thereafter they became sweethearts, that they had sexual intercourse from that month until she missed her periods in October, 1947, and that she gave birth to a child in July, 1948. She stated the acts of intercourse took place in the bush near her home at Retreat.

Julia Sibisa, a friend of plaintiff's, testified that on one occasion she saw Grana and defendant at Retreat after they alighted together from a train from Langa, that she called them to her house and that there, in the presence of defendant, Grana told her that she loved him.

The defendant admitted in his evidence that he gave Grana his photograph, that they were sweethearts and that he had intercourse with her once only, in August, 1947, at a concert near Tokai. He admitted that they became friendly in February, 1947, and said "All our meetings and seeing her were at Langa" indicating that their meetings were not infrequent.

The Native Commissioner refers to Grana's evidence as being vague as to actual times when intercourse took place. He does not, however, reject her evidence or find that she was too unreliable to be believed. He rejects the evidence of Julia, but, nothwithstanding, the fact remains that defendant has admitted intercourse in August and thus provides corroboration of intimate relations between him and Grana. The requirement of the law in regard to corroboration was thus fulfilled.

In *Grotius Introduction to Dutch Jurisprudence* (Maasdorp's *Translation*) the following passage occurs at page 324: "A woman is not believed who says that a man has had connection with her, if he denies it, even though she should swear it in childbed, or otherwise; but, if he admits connection, the woman is to be believed in her identification of the father, even though she has had connection with others."

Schorer's note on this passage is as follows:—

> "It is also very unjust that a woman, whether married or unmarried, should be believed when she asserts that she is with child by Titus, if he once admits that he has had connection with her, though that may have been more than

a year before or only a month before. This rule is carried so far that the girl is believed even though she may have had connection with others, nor is it necessary for her to prove either good fame or seduction. But however this may be, it has been more equitably enacted at Mechlin that the man is to be absolved if he is prepared to declare on oath that he has not had connection with the woman for a year before the birth of the child, and he is further allowed to prove by circumstantial evidence that the woman has lived the life of a prostitute."

In the case of *Ngqunguza Ngxagana v. Mkapi Halam,* N.A.C. (C. & O.) 1940, at page 59, the judgment states: " Moreover even if it be accepted that another man had intercourse with the girl, her indication of the father is accepted by our law once the plaintiff admits sexual intercourse with the girl, though he may deny having emitted semen into her—see *McDonald v. Stander,* 1935 A.D., page 325, where the Roman Dutch authorities are assembled and the rule followed that this is so even if the girl gives birth one month after intercourse or one year thereafter."

In view of defendant's admission, the onus thus passed to him to show by satisfactory evidence that he was not, in fact, the cause of Grana's pregnancy. In other words without that evidence her testimony is to be accepted in preference to that of defendant.

Let us examine the evidence adduced to discharge that onus. Defendant's sister Ellen states that one William Sekweyiya used to visit her aunt's house in Langa and that one night when Grana was also visiting the house, he slept in a room with her and a girl Notandayana. Grana admits she used to visit that house, that she knows William, but denies that he ever slept in the house when she was there. Ellen proceeds to say that in November, 1947, she saw Grana and Notandayana exchanging notes in the dining room of this house when other people were present. She says that after everybody had left the room she found these notes, which were on a single sheet of paper, lying on the table. Later she says she found the notes when she was tidying up the rooms. She read the notes, then placed them in her suitcase and handed the document to defendant's father after issue of summons.

A translation of these notes is reproduced here.

EXHIBIT " B ".

Translation of Exhibit B.

Part 1.

Dear Cousy,

I do not know what the matter is this month; I have not seen my monthly periods and my usual days for menstruation are over, even if I had " bevaed " I do not miss my date. It is now the 21st and I have no hope of getting my periods.

Part 2.

No, don't be frightened, it does happen that someone misses a month, yet there is nothing, you will get your period.

Part 3.

William is responsible for my condition, I think he did it intentionally.

After I " bevaed " with him he did what he has done, yet above all he knows what he has always said to me, saying I am going to be pregnant.

Parts 1 and 3 are alleged to have been written by Grana and, it is common cause, Part 2 by Notandayana.

Under cross-examination Ellen states that on an occasion prior

to the writing of these notes she heard a conversation between these two girls in which Grana said:—

> "I am pregnant. I have written to William informing him of my condition. William has written back denying that he was responsible for my condition."

Grana denied having written the above notes.

Ellen gives no reason why it was necessary for Grana and Notandayana to exchange notes instead of leaving the room and having a discussion outside. Moreover, it is most improbable that Grana should write in this strain after the frank disclosure already made to Notandayana in regard to her condition and who had caused it.

There is no apparent reason for Ellen having retained these notes. She does not say that at that time she knew that her brother and Grana were sweethearts nor does she indicate that she was even aware of the fact that they were friends.

In view of these unsatisfactory features of Ellen's evidence we feel that, if it is unsupported, it must be rejected.

In support of her evidence a handwriting expert was called who gave it as his opinion that Parts 1 and 3 of the notes were written by Grana. He based this opinion upon a comparison of the writing in these notes and a specimen of Grana's writing, written in the presence of the two attorneys appearing at the trial. There are similarities in certain of the letters of both documents, e.g. some of the "a's" and "d's". There are, however, other "a's" which are not similar. The expert also relies upon the similarity between some of the letters "b". In this he was wrong and the Native Commissioner correctly rejected his evidence on this point, although he accepted his opinion that the notes 1 and 3 were written by Grana. In our opinion the expert was also wrong in stating that a similarity existed between the "2" and "st". We have examined the writing under a magnifying glass and the important feature is that there are many dissimilarities in the two writings. We feel, therefore, that the evidence of this expert is not sufficiently convincing to show that Grana's denial of having written these notes was false. Sight must also not be lost of the fact that the expert's conclusions should not be accepted in the absence of corroboration.

In addition to the evidence of Ellen, that of Notandayana, who is a cousin of defendant, could have been secured. The fact that she was in Durban at the time of the trial does not relieve him in any way of the burden of discharging his onus, particularly as her evidence could have been taken by interrogatories or on commission.

The defendant gave no evidence to show that he could have had no access to Grana between the time of intercourse in August and when she conceived. Indeed. his evidence leaves the impression that they remained on the friendliest terms until the pregnancy was reported to him.

In our opinion, defendant had failed to prove that he could not be the father of the child. In law, therefore, we must believe Grana in preference to him.

The appeal is allowed with costs and the judgment in the Court below is altered to one for plaintiff as prayed with costs.

Sleigh (President):—

I agree with the judgment delivered by my brother Pike, but there is one observation I wish to make. In this Court it was contended that there was no onus on defendent to prove that he was not the father of the child, that he need only rebut the evidence of intimacy at the time the woman conceived. Reliance was placed on *Boyana v. Dyamani* [1946 N.A.C. (C. & O.) 74]. In that case there was no admission of intimacy. Moreover, it appears from the Assistant Native Commissioner's reasons that

he was misled by what I said in *Piliso v. Gcwabe* [1 N.A.C. (S) 123]. That judgment is not as clear as it should have been and I am not surprised that the Native Commissioner was misled. In that case it was strongly contended that if sexual intercourse is established, not by an admission of the man, but by evidence, the woman's oath as to paternity must be preferred. In support of this contention reliance was placed on *Nojantsholo v. Nkosana* and another [1941 N.A.C. (C. & O.) 81]. In that case there was also an admission of intercourse. In *Piliso's* case, I intended to convey that the rule that the man must prove that it was impossible for him to have been the father, applies only where the man had admitted intercourse or where the court had found as a fact that intercourse had taken place, as e.g. in a prior action for simple seduction. It clearly follows that where there is only *prima facie* evidence of intimacy at the time of conception as opposed to an admission, the man is merely required to rebut such evidence.

For Appellant: Mr. Barnes.
For Respondent: Mr. Stanford.