

IN THE COURT OF APPEAL OF BOTSWANA HELD AT LOBATSE

CIVIL APPEAL NO. 26/96

In the matter between:

BERNARD KAOTE - Appellant  
and  
THAMAGA SUB-LAND BOARD - 1st Respondent  
and  
PATRICK S. KAOTE - 2nd Respondent

Mr. Attorney Y.S. Moncho for the Appellant  
Mr. Advocate S.T. Pilane for the Respondents

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J U D G M E N T

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CORAM: SCHREINER, J.A.  
STEYN, J.A.  
LORD COWIE, J.A.

SCHREINER, J.A.:

The Respondents seek an order dismissing an appeal to this Court in terms of Rule 20 of the Rules of the Court of Appeal which allows for the dismissal of an appeal in the event of an Appellant not complying with the terms of Rules 18 and 19. These rules deal with payment by an Appellant for preparing the record and security for costs of appeal. The Appellant in an informal application asks for an order postponing the appeal to the next session. It is based upon Rule 8. The reason for seeking this relief is so that he might have an opportunity to sell either cattle or land which he owns to enable him to make payment of the costs of the record and provide security for the costs of the appeal.

The history of the matter commences in 1991 when the Second Respondent obtained an order which effectively declared him to be the owner of a certain piece of land. The Appellant was aware of the order but only took proceedings to have the position altered four years later in 1995. There followed another application in 1996. Both failed. It would seem that the Appellant, having not taken any steps to deal with the 1991 proceedings with expedition, was intent upon pursuing what he considered to be his remedies with the result that the Respondents have been embroiled in litigation ever since.

A court should be slow to make an order which would deprive an individual of access to the Courts because of his poverty. Rule 30 gives a remedy to a pauper so as to enable him to litigate. It must be clear that it was not applicable to the present case. The Appellant is not a pauper. As will be seen he has assets which could have been alienated or encumbered in order to put him in funds so as to be able to pursue the protection of his alleged rights.

It is, however, also important to remember that litigation should not drag on indefinitely. The interests of the successful party in the 1991 proceedings must not be ignored. He is also entitled to consideration.

In his affidavit filed in opposition to the application for dismissal of the appeal in terms of Rule 20 the Appellant agrees with the facts as stated in the affidavit of the Respondent's

Attorney and states that he opposes the application on the grounds that he is not a rich man though he has assets in the form of cattle and land from which he wants to provide the security but has not been able to find buyers for his property. He says that he has a reasonable prospect of success in the appeal. For these reasons he says that the appeal should not be dismissed but merely postponed.

This Court is of the view that no adequate reason for merely postponing the appeal has been shown. A plea ad misericordiam and nothing more would be inadequate reason for refusing an application for dismissal of the appeal in terms of Rule 20. A prospective appellant with small means should either avail himself of the provisions of Rule 30 if he can or ensure that he can pay the costs of the record to the extent required by Rule 18 and provide security for costs as fixed by Rule 19. He cannot allow the Respondent in the appeal to incur costs in the expectation that some of them will be covered by the security required by Rule 20 and then throw himself on the mercy of the Court of Appeal and ask for an indulgence to enable him to pursue the appeal if and when he is able to find the security.

In the present case the Appellant has assets. He says that he is not able to realise them at anything like their real value. He does not say that market conditions will improve before the next session but even if he did make this prediction, little weight could be attached to it.

The Appellant says that he has a good prospect of success in the appeal. I do not pretend to be able to express any final opinion on this. Suffice it say that it seems prima facie that the defence of prescription by virtue of the provisions of section 4 of the Local Authorities Proceeding Act has validity notwithstanding the allegation that the running of prescription was suspended. The merits of the Appellant's claim to set aside the award of the land to the Second Respondent appears to have little prospect of success in view of the consistent history of failure of the Appellant's litigious efforts.

I conclude therefore that the request for a postponement of the appeal by the Appellant should be refused. The application by the Respondents for dismissal of the appeal should be granted. The Appellant is to pay the costs of the proceedings.

Delivered in open court this 28<sup>th</sup> day of January, 1997.

*W.H.R. Schreiner*  
 .....  
 W.H.R. SCHREINER  
 JUDGE OF APPEAL

I agree.

*J.H. Steyn*  
 .....  
 J.H. STEYN  
 JUDGE OF APPEAL

I agree.

*W.L.K. Cowie*  
 .....  
 LORD W.L.K. COWIE  
 JUDGE OF APPEAL