

SWAZILAND HIGH COURT

Mabel Myrtle Horsley NO

Applicant v

Attorney General

Registrar of Deeds

Respondents

Case No 1808/02

Coram Sapire, CJ

For Applicant

For Respondent

JUDGMENT

(10/03/2003)

The Applicant seeks an order in the following terms

1. Directing the Minister of Natural Resources and Energy in the Government of Swaziland in terms of Section 5 of The Concessions Partitions Act No 28 of 1907 (formerly Section 7 of the Concessions Proclamation (Volume II of the Laws of Swaziland, read with The Vesting of Land in King Order No 45/73) to issue to the Concessionaires/Grantees, viz the Estate of the Late Mary Christabel Groening, Mabel Myrtle Horsley and Dorothy Do Amaral, (they being the successors in title to the original Concessionaire/Grantee, viz Christian Groening and the subsequent holder, viz Joseph Gourlay Young) in equal undivided shares, freehold title by way of Government Grant in respect of the following immovable property namely:

CERTAIN Portion "A" of Land Concession No. 3P

situate in the Lubombo District;

MEASURING 14885,1573 (One Four Eight Five Comma One Five Seven Three) Hectares; as more fully appears on diagram No. S.G. S5/15 relating to Deed of Cession Nol2/1915 HELD under Deed of Cession No 2/1947 and No.8/1952

2. Directing and authorising the Registrar of deed for Swaziland to register the Government Grant so issued by the Minister of Natural Resources and Energy in favour of the Late Mary Christabel Groening, Mabel Myrtle Horsley and Dorothy Do Amaral in respect of the aforementioned properties.

3 Alternative Relief

4 Costs of the suit only in the event the Respondents oppose the application.

The Applicant presently holds her portion of land by what has been referred to as Concession Title. Her right to the relief claimed by her, namely to have her title converted to Freehold has to be determined by reference to successive legislative instruments promulgated legislation affecting tenure of such land.

The applicant has argued that her right to "convert her Title Deed" from concession Title to freehold Title first vested in her when the Swaziland Concession Commissioner determined that her holding of Portion A of Land Concession 3P was a "grant of land " in terms of section 7 of Part II of the Concessions Proclamation (volume II of the laws of Swaziland) now Section 5 of the Concessions Partition Act No 28/1907.

In support of this she has attached a copy of a letter addressed to her by the Government secretary dated 20th February 1962. The Government Secretary in this letter drew her attention to the provisions of section 7, to which I have made reference earlier, which read in part

"7. If a concessionaire has under a land concession been granted -

(a) title to the ownership of land; or

(b) a lease of land which with or without rights of renewal is of not less than ninety nine years duration; there shall be issued to such a concessionaire freehold title in respect of any portion of land held under such title",

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and observed that.

"It appears that you are affected by the provisions of this section in respect of your holding of concession No. 1P was described by the Swaziland Concessions Commissioner as a grant of land."

The meaning of this is not clear It does not appear from the documents and information presented by the Applicant that the nature of the concession (ownership or a long lease) granted to Groening, from whom Applicant derived her title, was such to have entitled her, as of right, to freehold in terms of the Section.

The Secretary went on to request that the Applicant furnish him with certain requirements to enable freehold title to be issued in Applicant's name. It would be misleading to treat the contents of this letter as a vesting of any rights in the Applicant. Her rights, if any, flowed from the terms of the legislation. It does not, without knowing the terms of the grant, seem possible to determine whether section 7 conferred any rights upon the applicant to have her title converted to freehold.

The application was, however not contested upon this ground. The respondent raised a point of law in terms of Rule 6(12) (c), which it formulated in the following terms.

"The Applicant's rights to have the land converted to freehold title lapsed with the promulgation of The Land Concession Order No. 15/1973. In particular sections 3 and 4 thereof. The Act did not provide any exemption/exception to concessions that had already been approved for but not converted to freehold title."

The wording of the sections appears to support the argument raised by the respondent. Section 3 provides in clear language that notwithstanding anything in any other law any land held in Swaziland by a concessionaire, whose concession title or lease is still in force, shall be so held at the will and pleasure of the King on such terms as he may determine.

Section 4 makes it even clearer in providing that notwithstanding any other law a concessionaire shall not be entitled as of right to be issued with freehold title in respect of any land or portion of land held by him under a concession title or lease.

The Applicant's answer to this is based on the provisions of Section 94 (1) of Chapter VIII of the Constitution (repealed with savings) which provides that all land which is vested in the Ngwenyama in trust for the Swazi Nation shall continue to so vest subject to subsisting rights and interests which before the 6th September 1968

have been granted to or recognised as vested in any person. (My italics) The applicant argues that the Land Concession Order in Council No. 15/1973, which is deemed to have come into force on 6th September 1968, is to be properly read, so as not to be in conflict with the provisions of Section 94(1) of the constitution.

The words quoted and italicised do not mean any thing more than that concessionaries are to continue to enjoy their subsisting rights as, presumably, are set out in their title deeds. Ownership in the land, however, is to continue to vest in the Ingwenyama in trust. This in itself would seem incompatible with freehold of the property being registered in the name of the concessionary.

The legislation, which long pre dated independence, and on which the applicant relies gave concessionaries in certain circumstances the right to have their title converted to freehold. Unless and until this right was exercised the concessionary continued to enjoy only such title as was reflected in the deed of grant. In this sense it cannot be said that freehold title had been granted to, or recognised as vesting in, any person at the time of independence. The right to convert to freehold established by legislation, in so far as it had not been exercised by registration, could at any time either before or after independence, be withdrawn by legislation.

The term "vesting" has more than one meaning depending on the particular context in which it is used. In cases concerning rights of succession it is normally used to designate a right that has become unconditionally fixed and established in a beneficiary, as opposed to a merely contingent or conditional right. The same distinction seems apposite in relation to rights in and to fixed property. In the present case it would be incorrect and misleading to say of the applicant's right to freehold that it had vested. Such right only became vested when it became fixed and unconditional on registration. The legislation that thereafter deprived concessionaries of the right to have freehold registered did not deprive the concessionaries who had taken advantage of the provisions of Section 7, of their freehold title registered.

I was referred to a number of cases, where orders, such as that sought by the applicant, were granted unopposed without any considered judgment. They do not assist the applicant as the relief claimed is now contested and the point now raised by the Respondent has not been dealt with and rejected.

The application is accordingly dismissed with costs