

IN THE HIGH COURT OF LESOTHO

In the application of :

'MACOBA MOFOKA

Applicant

v

1. MOSIUOA MAJORO
2. MOSALA MAJORO

1st Respondent  
2nd Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai  
on the 21st day of February, 1983.

This application is for an order of this Court declaring applicant the rightful heir to the estate of the late Anna Mofoka. The respondents oppose the application.

In his founding affidavit, the applicant deposes that before his death at Maseru in 1947, Libe Moiloa Mofoka had married two wives, Anna Mofoka and 'Masebaki Mofoka, according to Sesotho customary law.

There were no children out of the marriage between Anna and Libe. By her marriage to Libe, 'Masebaki gave birth to the late Sebaki Mofoka, who is the present applicant's father. The applicant is therefore the grandson of Libe.

As Anna had no children of her own, the applicant was given to her and he has lived with Anna since his childhood. They lived in Maseru until 1950, when they moved to Lithabaneng in the district of Maseru. On 7th September, 1981 Anna passed away and applicant contends that he is the sole heir to her estate.

However, after the death of Anna on 7th September, 1981, her brothers, the two respondents, wrongfully occupied her house at Lithabaneng claiming that she was never married and consequently her estate belonged to the Majoro family.

Wherefor applicant prays for an order of this Court as aforesaid.

Two other affidavits were filed in support of the applicant's averment that Anna was married to Libe. They were

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the affidavit of 'Masophia Makoanyane and that of Teboho Petrus Bale. In her affidavit, 'Masophia desposes that she was born in 1910 and is the sister of Anna, who was born in 1902. 'Masophia further avers that around 1918, Anna eloped with one Ntebejane Pepenene and they lived together at Popa for several years. Around 1927, Anna and Ntebejane Pepenene separated. Around 1929, 'Masophia was at Marquart in the Orange Free State, where Anna and Libe (who was already married to 'Masebaki) met and got married. Libe paid eight (8) head of cattle (through 'Masophia) to her parents, who were then living at Popa, towards the bohali for Anna. This is denied by the affidavits of 1st respondent and Abia.

In September 1981, 'Masophia attended the funeral of Anna at Lithabaneng and was surprised to hear her brother, 1st respondent, saying Anna had not been married. She told him that Anna had in fact been married but 1st respondent refused to listen to her simply because he wanted the Majoro family to have a share in the estate of the late Anna.

In his supporting affidavit, Teboho Petrus Bale deposes that he is the rector of the Catholic Church at Senekal in the Orange Free State and as such in-charge of baptismal registers of that parish and its outstations.

According to the baptismal registers in his custody Johannes Libe Mofoka and Anna Maliau Majoro (married Mofoka) were baptised in the Catholic church on 27th February, 1938 at Marquart. At the time of the baptism there was already a Sesotho marriage, which was accepted without any further blessing.

The opposing affidavits were filed by 1st respondent, Ramoneuoa Pepenene and Abia Tohlang. In his opposing affidavit confirmed by those of Ramoneuoa and Abia, 1st respondent makes very important averments, firstly, that prior to her purported marriage to Libe, Anna was already married to Ntebejane Pepenene in accordance with Sesotho customary law and ten (10) head of cattle had been paid by the family of Pepenene towards the bohali for Anna. In 1933, and during the subsistence of the marriage between Anna and

Ntebejane Pepenene, Libe ran away with Anna to the Free State. As the marriage between Anna and Ntebejane Pepenene had not been dissolved and still subsisted, no valid marriage could ever have been concluded between Libe and Anna.

I say this is an important averment because, in my opinion, the order which applicant is seeking before this Court depends entirely on whether or not Anna was in fact validly married to Libe his grandfather. It seems to me there is a real dispute of fact as to whether Anna was in fact married to Libe and this is a matter that cannot be properly decided on affidavit papers that have been filed before this Court. There is need for, viva voce, evidence that can be subjected to a test by cross-examination in order to arrive at the truth and a just decision in this matter.

Secondly, in his opposing affidavit, 1st respondent avers that he, and neither the applicant nor the family of Pepenene to which he contends that Anna was validly married according to Sesotho customary law, is entitled to succeed to the estate of the late Anna by reason of her last Will and Testament dated 27th July, 1981 - Annexure A - which appoints him the heir to the estate.

In my opinion, the validity of any written disposition purporting to have been executed by Anna inseparably hinges on the question whether or not she was married woman according to Sesotho customary law. Any attempt to debate the validity of her will before the question of Anna's marital status has been finally resolved would be premature and purely academic.

In the premises, I come to the conclusion that this is a proper case where absolution from the instance should be granted and it is accordingly granted.

Before the commencement of the hearing of this applicant, the parties requested a short adjournment with a view to deciding whether leave of the court could be sought

to lead, viva voce, evidence. I was informed that the parties had decided that because of the nature of the papers filed before the Court, there was no need to lead, viva voce, evidence and the application should therefore proceed on the affidavits.

No award is made as to costs.

B.K. MOLAI

21st February, 1983.

For the Applicant : Mr. Maqutu.  
For the Respondents : Mr. Kolisang.