

IN THE HIGH COURT OF LESOTHO

In the matter of

NODOLLY MBANGAMTHI

Plaintiff

V

ASHTON MBANGAMTHI
JOEL LEBAJOA MOTSOAHAE
REGISTRAR OF DEEDS

1st Defendant
2nd Defendant
3rd Defendant

J U D G M E N T

Delivered by the Hon. Acting Judge Mr. J.L. Kheola
on the 9th day of April, 1984.

On the 5th February, 1981 the plaintiff issued a summons against the defendants seeking the following orders

1. An order setting aside the deed of sale entered into between the First Defendant and the Second Defendant in respect of the premises situate on site number 87 in the Maseru Reserve,
2. An order directing the Third Defendant to expunge from his records the registration of the aforesaid premises on site number 87 in Second Defendant's name,
3. An order directing the First Defendant to pay the costs of this action and, in the event of opposing the same jointly and severally with the second Defendant;
4. Further or alternative relief.

In her declaration the plaintiff has stated that her father, Jabavu Mbangamthi, who died in Maseru during May 1976 married her (plaintiff's) mother, Jane Mbangamthi (born Malumbazo) by christian rites in Methodist Church in Maseru

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on the 9th May, 1950. Prior to his aforesaid Marriage plaintiff's father had married by customary law in the Cape Province, Republic of South Africa, one Irene out of which marriage First Defendant was born.

Plaintiff's parents, during the subsistence of their aforesaid marriage, built a home at site number 87 in the Maseru Reserve where they lived until their respective deaths and where plaintiff lived ever since her birth to date hereof.

On or about the 12th April, 1979 the First Defendant wrongfully and unlawfully purported to sell plaintiff's aforesaid parents' home, in which live plaintiff, her two minor children and plaintiff's father's other minor dependants, to Second Defendant in consequence of which purported sale Second Defendant, on or about the 12th day of April, 1979, caused the said immovable property to be registered in his name in the office of the third Defendant.

The aforesaid sale is void and of no force and effect in as much as at the time it was concluded First Defendant was not the lawful owner of the immovable property the subject matter thereof.

On the 24th April, 1981 the First Defendant filed a plea in which he denies that the site at number 87 Maseru Reserve was built as a home solely for the plaintiff's parents and puts plaintiff to proof thereof. He says that before the start of the Second World War, the late Jabavu

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Mbangamthi had already established a home at site number 87 Maseru Reserve where he had erected a hut which was a home in which he (First Defendant) grew up. He avers that later on during the Second World War, the late Jabavu Mbangamthi brought plaintiff's mother and lived with her and their offspring on site number 87 Maseru Reserve where First Defendant was already living. In consequence site number 87 is as much home for plaintiff as it is for First Defendant.

First Defendant avers that as first born son of the late Jabavu Mbangamthi he is the lawful heir of his late father and succeeded in the death of his father to his father's estate-

He admits that he sold site number 87 to the Second Defendant but says the sale was lawful. He has provided adequately for plaintiff and her minor children, setting aside his property at Motimposo comprising of five rooms and a shop that contained stock for the use of plaintiff and her children.

In support of her case the plaintiff gave oral evidence in which she said she was born on the 18th May, 1942 here in Maseru on site number 87. She handed in a copy of a marriage certificate of the marriage of her father and mother (Exhibit A). Prior to her mother's marriage the late Jabavu was married to 1st Defendant's mother. She and the First Defendant used to live together on site No. 87 but when she was about 10 years old the First

/Defendant

Defendant went to Port Elizabeth and lived there till the death of her father in 1976. Under cross-examination she denied that the First Defendant lived on site No. 87 even before her parents were married. She has never married, she admits that the First Defendant gave her the immovable property at Motimposo to be her own property.

Abraham Marumo Tleletsı (PW.2) testified that he and Jabavu Mbangamthı arrived here in Maseru in 1940. He came from Bloemfontein while Jabavu came from Matsieng. He is the next door neighbour of the late Jabavu Mbangamthı. When they arrived in Maseru in 1940 'Mangomo (plaintiff's mother) was the wife of the late Jabavu. He does not know the First Defendant's mother but he saw that First Defendant was living on site No. 87 with plaintiff's parents.

Florina 'Mamafuthoane Moletsane (PW.3) testified that she first knew the First Defendant when they (the children) were fetched to come and live on site No. 87 with 'Mangomo. She also does not know the mother of 1st Defendant, she would have known her if she ever lived on site number 87 because the Jabavu's family are her neighbours, plaintiff was already a girl of about 6 or 7 years when her parents arrived at site No. 87.

The First Defendant gave evidence in which he confirmed most of what is in his plea. His mother and father were living at Palama's in the Maseru district when his mother went to Kingwilliamstown where she died. He was about 12 years old when she died. (He handed in his title deed for

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site No. 87 (Ex.B), his father's title deed for site 87 (Ex.C) and the Second Defendant's title deed (Ex.A).

Senkolo Maqathatsane (D.W.2) testified that when the mother of the 1st Defendant died the late Jabavu Mbangamthi married the mother of the plaintiff, 'Mangoma, as a person who would bring up the children. When he went to the Second World War in 1941 the 1st Defendant's mother was already dead and when he returned from the war in 1945 he found that Jabavu had married 'Mangoma. He says that when Irene died he was working in the mines and his father wrote a letter to him to inform him about the death.

The issue in this action is whether the late Jabavu Mbangamthi was a polygamist or not. If he was not a polygamist but merely married the mother of the plaintiff after the death of the mother of the First Defendant then his estate is governed by Section 7(7) of the Laws of Lerotholi (1959 edition) which reads:

"On the death of a person who has been allocated the use of a land for the growing of vegetables or tobacco, or for the purpose of planting fruit or other trees, or for residential purposes, the heir, or in the absence of the heir, the dependants of such deceased person shall be entitled to the use of such land so long as he or they continue to dwell thereon."

(See Molatoli Ramontsoe v Molefi Ramontsoe 1980(2) LL.R. 438). The First Defendant would be the sole heir whose only duty would be to see to it that the dependants of his late father are adequately provided for.

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If the late Jabavu had two 'houses' then the axiom "malapa ha a jane" would apply. The heir would not have the right to take the property of the second "house" and use it for the benefit of the senior house leaving the dependants of the second house inadequately provided for.

The onus was on the plaintiff to prove that her mother was married during the lifetime of the mother of the First Defendant. In her declaration and oral evidence she has stated that "prior to his marriage to her (Plaintiff's) mother plaintiff's father had married by customary law in the Cape Province, Republic of South Africa, one Irene out of which marriage First Defendant was born." Mr. Sello, for the plaintiff, has submitted that this statement shows that the late Jabavu was a polygamist. He asked this Court to reject the evidence of the First Defendant that plaintiff's mother was married after the death of the First Defendant's mother. He contends that such evidence is in conflict with the plea of the 1st Defendant and that it is something new which has taken the plaintiff by surprise. He goes on to say that if the 1st Defendant had not understood the summons he ought to have asked for further particulars.

Mr. Kolisang, for the 1st and 2nd Defendants has submitted that there is no averment in the plaintiff's declaration that her mother's marriage was polygamous. Even in her evidence she never stated that her father was a polygamist. I have read the statement quoted above

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from the plaintiff's declaration as well as her evidence and I entirely agree with Mr. Kolisang that there is nothing in the plaintiff's case to show that when her mother was married the mother of the 1st Defendant was still alive. At the end of the plaintiff's case it was still not clear to me on what grounds the plaintiff was basing her claim because under Sesotho customary law an unmarried daughter is not normally entitled to inherit anything when her father dies. She remains the dependant of the heir from whom she is entitled to claim maintenance if she is in need of support. The statement that prior to her mother's marriage her father had married 1st Defendant's mother does not necessarily mean that when her mother was married the first marriage was still in existence. In my view the Plaintiff had to aver that the first marriage was still in existence when her mother was married.

The evidence of the plaintiff's witnesses tends to support 1st Defendant's case in that they both say that though they lived with the late Jabavu as his neighbour they do not know the mother of the 1st Defendant. When they first knew the Jabavu family 'Mangoma, plaintiff's mother was the only wife of the late Jabavu who was living with both the Plaintiff and the 1st Defendant.

It was during the cross-examination of the 1st Defendant when I heard for the first time that the plaintiff was basing her case on the axiom "Malapa ha a jane." I do not think that the plaintiff was justified

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to surprise the 1st Defendant in Court especially because in her declaration she alleged that the 1st Defendant was not the lawful owner of the property at site number 87 in Maseru Reserve. This allegation is wrong in law because as soon as the late Jabavu died the heir "stepped into his shoes." In his plea the 1st Defendant clearly stated that he is the heir. The plaintiff has not refuted this statement but she says 1st Defendant is not the lawful owner of the disputed property. Now who is the owner of that property? The answer can be found in Section 7(7) of the Laws of Lerotholi (supra).

The evidence of First Defendant's witness, Senkolo Maqathatsane has been challenged on the ground that it is hearsay. It seems that when 1st Defendant's mother died he (Senkolo) was working in the mines. He received a letter from his father informing him of the death of 1st Defendant's mother. I agree that that was hearsay but he eventually came home and is sure that when he went to the war in 1941 1st Defendant's mother was already dead. I think that the second part of his statement is admissible, I think he was in a position to know this because the orphans of Irene had to live with his sister before they were brought to Maseru after 'Mangoma was married.

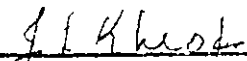
The plaintiff has admitted that the 1st Defendant has given her another property at Motimposo comprising some three flats and a shop. It means that the 1st Defendant did not only order plaintiff to vacate site 87

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but provided alternative accommodation for her. As heir to the estate of his father the 1st Defendant was under an obligation to adequately provide for the plaintiff who is his dependant. But I must point out that the plaintiff as a dependant cannot stop the heir from disposing of the property for as long as adequate provision has been made for her.

I stated earlier on in this judgment that the onus to prove that the late Jabavu was a polygamist is on the plaintiff. She has failed to discharge this onus on a balance of probabilities. I reject the suggestion that the 1st Defendant had his defence up his sleeve; on the contrary I am of the opinion that it was the plaintiff who failed to clearly state the basis of his claim.

For the reasons stated above the claim is dismissed with costs.



A C T I N G J U D G E

9th April, 1984.

For the Plaintiff Mr. Sello

For the Defendants 1 & 2 Mr. Kolisang.