CIV/T/30/82

IN THE HIGH COURT OF LESOTHO

In the matter of :

REGINALD THEBE TLALE	Plaintiff
V	
THOMAS MOFOLO	1st Defendant
TSEGISE TLALE	2nd Defendant
SEOBI TLALE	3rd Defendant
NTSIE TLALE	4th Defendant
LESENYEHO TLALE	5th Defendant
MASTER OF THE HIGH COURT	6th Defendant
THE REGISTRAR OF DEEDS	7th Defendant
THE P.S, FOR INTERIOR	8th Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 20th day of June, 1986.

On 18th August, 1982 plaintiff herein filed with the Registrar of this Court summons commencing action in which he claimed against the defendants :

1. (a) A declaration that the will of the late Thahaki Tlale is null and void on the grounds that during his life time the late Thahaki Tlale had never abandoned Sesotho Law and Custom

(b) A declaration that the estate of the late Thahaki Tlale be administered according to Sesotho Law and Custom.

(c) A declaration that the first and final Liquidation and Distribution Account is accordingly invalid and that the sixth defendant be directed not to give effect to it.

(d) A declaration that site 23 Cathedral Area site 110 Stadium Area were properly given

/by the

by the late Thahaki Tlale during his life time to the plaintiff.

2. Costs of suit.

3. Other alternative relief."

The 2nd, 3rd, 4th and 5th defendants filed notices of appearance to defend intimating their intention to oppose this action. Although mention was made, in the minutes of pre-trial conference, that 1st defendant should be called upon to state clearly whether or not he wished to defend the action there is no indication that he, in fact, filed any notice of appearance to defend. I shall assume that he, together with 6th, 7th and 8th defendants who have also filed no notice of appearance to defend do not intend to oppose this matter and are, therefore, prepared to abide by the decision of this Court.

It is common cause that plaintiff and 2nd defendant are, respectively, the eldest and the younger sons of Thahaki Tlale. During his life time Thahaki Tlale (hereinafter referred to as "Testator") made a will dated 15th April 1975. In that will the testator declared himself to have abandoned the Sesotho Customary way of life for the European type. Wherefor, he gave instructions for the administration of his estate in accordance with the provisions of the Administration of Estate Proclamation No. 19 of 1935 (as amended) in the following terms.

"2. I bequeath to my son Thebe Reginald Tlale my dwelling house and other improvements situated at residential site number 110 Stadium Area Maseru Reserve and I further reaffirm that the business premises known as Tlale Store remains his.

3. I bequeath to my son Tsegise Petros Tlale all the buildings, out buildings and other improvements or business site number 23 Cathedral Area Maseru Reserve.

4. I bequeath to my grandsons Seobi Tlale, Ntsie Tlale and Lesenyeho Tlale in equal shares, all the money that shall remain in my estate after payment of my debts including burial expenses.

5. I appoint Thomas Mofolo, the counsellor of Homes Trust Maseru to be the executor of this Will and administrator with power of asumption without being required to give security for the due performance of his duties in either of the said capacities."

A codicil to the will was also made on 11th August, 1978 directing that in addition to the legacies, as set out in the will, the bequeaths to the plaintiff and the 2nd defendant were subject to the condition that upon their deaths, the sites bequeathed to them would devolve upon their sons. Both the will and the codicil were duly registered in the Deeds Registry under numbers 130/75 and 10/78, respectively.

The evidence of P.W.2, Hendrick Jacobs Styn, an attorney of long experience in the field of administration of estates, that the will and its codicil were properly drawn by the testator was not really disputed by the plaintiff. What the plaintiff did dispute was the testator's capacity to make a will. His reason therefor was that, in his life time, the testator did not, as he claimed. abandon the Sesotho customary way of life and live like Europeans. As proof thereof plaintiff told the court that in his life time, the testator referred his sick children to traditional doctors and paid "bohali" for the marriage of his sons (plaintiff and 2nd defendant).

2nd defendant denied that his parents ever referred him to traditional doctors when he was sick. As regards

/the

the plaintiff, he told the court that he (plaintiff) was brought up by his aunts outside Maseru and only came to live with the testator when he was already a grown up.

Be that as it may, the evidence of D.W.4, Mr. M.A. Siddique, a surgery specialist at Queen Elizabeth 11 hospital, that on 25th April 1979 the testator was ill when he was admitted in hospital was not really disputed. D.W.4 testified that as a specialist he was a consultant and did not normally admit patients at the hospital. However, according to hospital records, when he was admitted the testator was suffering from vomitting and his liver was not functioning properly. D.W.4 personally had the occasion to examine the testator only on 25th May, 1979. He found that the testator had some obstructions at the mouth of his stomach for which he recommended surgery or an operation which was duly carried out on 31st May, 1979. It was only then that the testator showed some signs of improvement until 5th June, 1979 when, according to the hospital records, he became confused and could no longer take even anything fluid. On 9th June, 1979 the testator became some what drousy and passed away on the following day, 10th June, 1979.

It was never, at any time, suggested that when he became ill the testator went to consult traditional doctors. I find it highly improbable that he would have referred his sick children to traditional doctors whom he himself could not consult when he was ill. It seems to me, therefore, that, on a balance of probabilities, the evidence of the 2nd defendant that the testator did not take his sick children to traditional doctors is more likely

/than

than plaintiff's evidence that he did and I am inclined to accept it as the truth.

2nd defendant conceded that the testator did pay "bohali" when he (2nd defendant) and the plaintiff entered into their respective marriages. The question is, however, whether the testator had any choice in the matter. "Bohali" in this country is normally demanded by the bride's parents unless, of course, they are prevented to do so on religious grounds. If the father of the groom, be he a mosotho or not, declines to pay "bohali" he runs the risk of his future daughter-in-law failing to obtain the requisite parental consent and the parties to the marriage ending up in no marriage at all, depending, of course, on the age of the bride to be. I do not think that many fathers-in-law, even if they have abandoned Sesotho Customary way of life, would consider non-payment of "bohali" worth the risk it entails.

Be that as it may, plaintiff himself could not dispute the evidence of 2nd defendant corroborated, to some extent, by D.W.3, 'Malesenyeho Tlale, that the testator was a christian; attended school after which he worked as a civil servant for a living; entered into a christian marriage for which no "bohali" was paid (presumably on religious grounds); sent his children to school for their education; upon his retirement from the civil service operated shop, restuarant and transport businesses; owned and lived in houses built in European style; always lived in Maseru and owed no allegiance to any chief outside the Reserve and finally drew up a will in which he unequivocally stated that he had abondoned the sesotho customary way of

/life

life for the European type.

On this evidence there is no doubt in my mind that it can be accepted that the testator had, by and large, abandoned the sesotho customary way of life and lived like Europeans. He had, therefore, the capacity to make the will and its codicil which cannot, for that reason, be declared null and void.

It was contended on behalf of the plaintiff that even if it were found that he had abandoned the Sesotho Customary way of life for the European type and had, therefore, the capacity to make the will and its codicil, the testator had, subsequently and during his life time, donated site No.23 to him thus revoking the will and its codicil by adamption. The contention was based on certain inscriptions made on the title Deeds of sites Nos. 23 and 110 as well as the evidence of both P.W.2, Mabote Namane, (the Reserve headman), and the plaintiff himself.

First as regards the evidence, plaintiff told the court that on 25th May, 1979 the testator wrote a letter in which he declared him his customary heir. He also wrote the following inscriptions on the title Deeds of sites Nos. 23 and 110, to which inscriptions he attached his signature: "I, Thahaki Tlale transfer this Title Deed to my son Reginald Thebe Tlale." However, it later on emerged that the inscriptions were in fact, written in the handwriting of, and signed by, the plaintiff himself and not the testator. The inscriptions purport to have been witnessed by Tseko Tlale, Tlali Tlale and a hospital matron by the name of Maile. None of them, however, testified before this court.

/Be that

Be that as it may, plaintiff went on to say the testator then gave the letter and the Title Deeds to him for onward transmission to P.W.2 to facilitate processing of the transfer of the sites to him (plaintiff). This plaintiff did. Sites Nos. 23 and 110 were accordingly transferred to him on 6th June, 1979 and 9th November 1979, respectively. During the funeral of the testator the original Title Deeds for sites Nos. 23 and 110, however, got lost and could not be produced at this trial. Only photostat copies, which, nevertheless, bear the inscriptions described above, were produced. The letter in which the testator allegedly declared plaintiff as his customary heir was also not produced in this trial.

In his evidence P.W.2 testified that during one of his visits to the testator at the hospital the latter told him that he wished to transfer sites Nos. 23 and 110 to plaintiff. He also told him that he had made a will before a Judge but was of the opinion that the will could be changed during his life time. I doubt if this is what the testator told P.W.2 for there is no indication on the will that it was made before a Judge nor do I think it is necessary for will to be made before a Judge. Be that as it may, P.W.2 went on to say the testator was in his sound and sober senses as he said all these things. Subsequently the testator completed certain forms for the transfer of sites Nos. 23 and 110 to plaintiff. The forms were, however, completed in the testator's own handwriting and were definitely not those appearing on pages 35 and 36 of the typed record. The forms and the letter declaring plaintiff the testator's

/customary

customary heir were brought before him by the plaintiff. He endorsed or signed and date stamped the documents with which he referred plaintiff to the Ministry of Interior to initiate the processing of the transfer of the sites to his name.

At first P.W.2 denied that the Title Deeds of sites Nos. 23 and 110 were ever brought to him by plaintiff. But when he was confronted with the date impression of his office and his own signature on these documents he had to concede that they were in fact brought to him.

It is significant to bear in mind that it is the plaintiff in this case who claims that the testator has donated site No.23 to him. The onus of proof that the testator did, in fact, do so, rests squarely on his shoulders on the well known principle that he who assets bears the onus. In his evidence plaintiff has not told the court that when he said he was donating site No. 23 to him the testator was anticipating death. On the contrary P.W.2's evidence was that when he told him that he wished to transfer sites Nos. 23 and 110 and change the will that he had made before the Judge the testator was in his sound and sober senses. That does not in my view, imply that at the time he made the statements the testator was anticipating death. That being so, what the testator is alleged to have said to both plaintiff and P.W.2 amount to hearsay evidence. It does not fall within the armpit of the exceptions to that rule and, therefore, remains inadmissible evidence which cannot be of assistance to this Court.

Although initially plaintiff tried to tell the Court that the inscriptions on the two Title Deeds for sites

/Nos.

Nos. 23 and 110 were written and signed by the testator it later imerged that plaintiff was not being very candid with this court when he said so, for he himself and not the testator had, in fact, written those inscriptions.

The original letter and the forms allegedly written and/or completed by the testator and on which documents plaintiff relied for his contention that the testator declared him his customary heir to whom site No. 23 should be transferred, could not be produced before this Court. Indeed, the title Deeds for sites Nos. 23 and 110 produced before this Court were, themselves, photostat copies of the original Title Deeds which plaintiff said went missing during the funeral of the testator.

How the plaintiff has managed to obtain photostat copies of title Deeds that have been lost remains a puzzel to me. It cannot be seriously suggested that the copies of these title Deeds were obtained from the Deeds Registry because the inscriptions which are supposed to have been made on the originals are reflected on these copies of Title Deeds.

I can only say plaintiff's genuiness of his failure to produce the original Title Deeds, in the circumstances, leaves me with some doubt.

It is trite law that a court of law is entitled to the best evidence. If it were true that the testator did write a letter in which he declared plaintiff his customary heir and completed, in his own handwriting, forms to facilitate transfer of sites Nos. 23 and 110 to plaintiff who was referred to the Ministry of Interior with those original documents, then the documents are, in all

/probabilities,

probabilities, still at the Ministry of Interior from where they could have easily been produced to this Court.

By and large, I am not convinced that plaintiff has, on a balance of probabilities, satisfactorily discharged his onus of proof that the testator had, in his life time, donated site No. 23 to him and thus revoked the will and its codicil by adamption.

Plaintiff has admitted that he used for himself all the money that was left in the estate of the testator. He had site No. 110 transferred to him, and rightly so, in my opinion, because this was bequeathed to him by the testator. He now wants to have site No. 23, which was bequeathed to 2nd defendant, transferred to him leaving the latter with nothing to gain from the estate of their father. This the plaintiff has, in my view, no right to do, be it under the Sesotho customary law or in terms of the provisions of the Will made by the testator.

From the foregoing it is obvious that the view that I take is that plaintiff's claim cannot succeed and it is accordingly dismissed with costs.

J U D G E.

20th June, 1986.

For the Plaintiff : Mr. Kolisang
For the Defendants : Mr. Mphalane