

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

MAKALO NKHABU

Appellant

v

'MATHOTHO NKHABU

Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 14th day of February, 1990.

The present appellant who was plaintiff in the Court of first instance sued the respondent who was the defendant in that court claiming three cattle, three donkeys, four fields and a portion of the fifth and thirteen sheep which were the property of the parties' father Mafa Mosalemane before he died.

The appellant is the deceased's heir in the deceased's first house by 'Mamakalo. The respondent is the deceased's heir in the 2nd house by the deceased's 2nd wife 'Makhoboso.

The local court which is the court of first instance partly found for the present appellant. He appealed to the Central Court which found for him in whole. The respondent appealed to the Judicial Commissioner's Court which reversed the results of the Central Court and made an order absolving the present appellant from the instance; hence his appeal to this Court.

His grounds of appeal are that

- (1) The learned Judicial Commissioner misdirected himself in accepting Nyatso's statement that the animals were dowry cattle for Khoboso (a daughter of the respondent's mother), because neither the respondent nor his witness said this is evidence, this having been said by Nyatso in his address to the Court after evidence had been led.
- (2) The learned Judicial Commissioner erred in holding that the appellant did not prove that the animals belonged to his father as it was shown that they bore his deceased father's earmarks and that the respondent's mother did not have any earmark.
- (3) The learned Judicial Commissioner erred in interfering with the judgment of the local court which saw the witnesses and believed the evidence of the appellant and his witnesses.
- (4) The respondent never denied that the animals were used or had been taken by his mother and as the heir in the second house he is liable for his mother's delicts.
- (5) The respondent was not represented by Nyatso Nkhabu during the proceedings.
- (6) The learned Judicial Commissioner erred in quashing the judgment of the lower courts concerning the award of the fields to the appellant as the respondent never disputed that the appellant was entitled to the same and he never appealed against the local court's decision in awarding them to the appellant.

The record of proceedings shows that the respondent did not dispute the existence of the property involved in these proceedings. The respondent said the property was in the hands of his mother and that he was looking after the animals on behalf of her.

The respondent did not dispute the appellant's heirship to their late father's estate.

In the proceedings before the local court it was shown that the respondent was using the property in dispute for the benefit of his mother in his late father's 2nd house.

/Evidence

Evidence which was not disputed showed that the late Mafa never ear marked any animals for his 2nd house. Neither the appellant nor his witnesses were taxed in cross-examination about the ear-marks possibly being those allotted to the 2nd house.

It is common cause that after the evidence was led the parties were given an opportunity to address the court.

However Nyatso to whom the respondent had resigned the task of addressing the court on his behalf seized that opportunity to give fresh evidence in the guise of addressing the court. It was in this event that bewyses were produced and allegations made that the animals reflected therein constituted Khoboso's dowry. Needless to state the appellant was never given an opportunity to rebut this new evidence. Worse still it appears it was this piece of evidence on which the Judicial Commissioner's Court relied in deciding that there should be an absolution from the instance. I need but just state that absolution from the instance is granted when the plaintiff has not made out his case as thoroughly as he should have, and the court feels that it would be inappropriate to dismiss his case without giving him an opportunity to start his case afresh if he wishes.

In the instant case the basis upon which the plaintiff had founded his case was not breached nor was it appropriate to allow factors which had not been canvassed in the evidence to influence the court in favour of the party raising them during addresses. The appellant was not even advised that he could reply to them new as they were when raised at the wrong stage even.

In view of the fact that the appellant's evidence that the respondent's mother was allocated no ear-mark was unchallenged it would seem the Judicial Commissioner's Court erred in holding that the appellant failed to prove that the animals existed for the animals were in fact brought before the local court and it observed that they

/bore

bore ear-marks corresponding to the deceased's reputed ear-mark. Thus the allegation that these animals were dowry cattle cannot hold because no evidence showed that their ear-marks were altered from Khoboso's in-laws's ear-mark into Mafa's ear-mark which later, as the respondent would wish the court to infer, was allotted to his mother's house.

In my view it cannot be sustained that the respondent should divest himself of his customary obligation towards his mother and seek to say that he was wrongly sued for his mother's wrongs. In custom he is his mother's guardian.

He as the heir in the deceased's 2nd house is responsible for his mother's delicts. He thus was rightly sued by the appellant even though he sought to say he was only his mother's herdboy. It is to be observed that he did not even bring his mother along to support him in his defence at trial yet he wishes to be heard to say he is not liable because he was using the property for his mother's benefit in no other capacity than as her herdboy.

With regard to the fields no evidence was led showing that they were re-allocated to the respondent's mother after the death of the respondent's father.

The local court found for a fact that the fields were allocated to the deceased Mafa and not to any of his wives

It would appear then pending the decision by the chief to re-allocate to whomsoever he deems fit the appellant had a legitimate expectation that those fields formed part of the unallocated estate of the deceased therefore as the heir to the deceased's estate he would have first priority to use them or together with his uncles suggest to the chief how the fields are to be re-allocated regard being had to the respective needs of the deceased's widowed houses.

/Nyatso

Nyatso never disputed that the fields belonged to the late Mafa nor did any of the parties who came before the local court. It would seem therefore that the Judicial Commissioner's Court erred in upsetting the local court's decision in this respect.

It is true that fields are not capable of being inherited according to the customary law applicable to land allocation in rural areas but the law clearly sets out the procedure to be adopted in the event of the allottee dying i.e. his heirs are to be given priority before the deceased's lands can devolve on the chief of the area for re-allocation outside the members of the deceased's household.

It was argued for the respondent that the respondent being a layman should not be expected in conducting his case to approximate the proficiency of a trained legal practitioner. But in C of A (CIV) No. 5 of 1988 Letlatsa vs Letlatsa (unreported) at 5 Schutz P. reacting to a more or less similar submission said :

"On the record damning answers were simply allowed to stand. Mr Magutu claimed that this happened because of the inexperience of the cross-examiner. This may or may not be so, but if he was inexperienced that fact should not be visited upon the plaintiff."

This Court makes a ruling confirming the order made by the Central Court. Judgment is entered for the appellant with costs, both in this Court and the Judicial Commission's Court.

The decision of the Judicial Commissioner's Court is accordingly set aside.

J U D G E.

14th February, 1990.

For Appellant : Miss Ramafole

For Respondent: Mr Pitso.