CIV/APN/183/94

IN THE HIGH COURT OF LESOTHO

In the matter of :

WINNIE MUTUA	Applicant
and	
MARTIN HLALELE MATHOLOANE	1st Respondent
THE PROPRIETOR, LESOTHO FUNERAL SERVICES	2nd Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 27th day of July, 1994

On the 6th June 1994 (the First day of hearing) the parties reached a settlement, the contents of which were as follows:

"With a view to curtailing the proceedings herein and without any prejudice whatsoever to either party arguing any point of law or fact raised by the affidavits the parties agree as follows:

1. That the corpse of the late Lilian Mutua be released to Winnie Mutua for burial in

Kenya.

2. <u>The prayers pertaining to property and costs be stood over for determination by this Honourable Court."</u>

It was on this basis that the matter was argued on the other days that followed.

The first Respondent (hereinafter called the Respondent) raised a point-in-limine, that this Applicant who is a sister of the deceased had no capacity (locus standi) to claim the body of her deceased sister, for burial in the country of Kenya, where both the deceased and the Applicant come from, being their country of birth. The family would bury the body as suggested in the papers.

The deceased LILIAN TUTTI MUTUA was during her lifetime married to the Respondent by civil rites in community of property. Their marriage was dissolved by Order of this Court, on the 27th September 1993. There are conflicting accounts as to how this marriage came to be dissolved. The Respondent (who was Defendant) says that he was not aware that the case was set down for hearing on the 27th September 1993, nor on the previous days the matter had been set down for hearing. It looks like as

at the time when the matter was finally heard the then counsel for the Respondent Mr. Malebanye had withdrawn as Counsel for the Respondent.

Mr. Mohau has indicated that it would be unwise to proceed on the basis that the order of divorce (questionable as he felt it was) was invalid. He was therefore proceeding on the basis that he would not have opposed the order for the burial rights of the deceased had there not been a prayer for costs against the Respondent. Had the Order for Costs been formulated to say for example: "costs are claimed only in the event of opposing the application," the Respondent would not have opposed the prayer for release of the body for burial in Kenya. Mr. Mohau has urged me in my award of costs to consider that the Respondent in removing the body of the deceased to the second Respondent mortuary was acting not *mala fide* but was actuated by such good spirit and large handedness as a husband would, who did not know that there was an order of divorce already made against him. I have also been asked to consider the probabilities of whether the Respondent is genuine in claiming that he could not have known that there was an order of divorce issued against him in favour of the deceased. I am not inclined to believe that he Respondent could not have known of the Order. It cannot be correct, in my view, that the attitude of the Respondent has been to oppose the orders sought merely because costs were applied for by the

Applicant in the manner I have described earlier in the judgment. This as after thought in all probability. His attitude can be gathered from his papers and the argument. Mr. Mohau has very wisely conceded that he would not have been on a firm ground, in opposing the order for burial of the deceased, for the very reason that the deceased and the Respondent were divorced at the time of the death of deceased.

It is important to note that except for the first prayer in the notice of motion which was concerned with the relaxation of rules of Court and the prayer for restraining the Respondent from removing the deceased's body to any person other than the Applicant and the prayer seeking for release of the body to Applicant and for removal of the body for burial in Kenya by the Applicant's family, there was also this prayer (d) for restraining the Respondent from removing or in any manner interfering with the deceased's assets pending the finalization of the application and any directives which may be given by the Registrar of Deeds for disposal of the deceased's assets. The importance of this prayer concerning the property of the estate lies in the fact that there had to be argument whether the Applicant herself had any interest in the property and furthermore whether she had the capacity (*locus standi*) to claim in Court. Equally important would be the question whether the same grounds on which the Applicant claimed she had capacity to

claim for release of the body of the deceased would be available to her as regards this prayer (d) concerning the property.

The Applicant is a sister of the deceased. The deceased died intestate. Mr. Mohau was correct in conceding that the Respondent is not an heir of the deceased by virtue of the said divorce order nor would the Respondent be entitled to claim the right of burial of the deceased's body. But I do also observe that the Respondent would however still have an interest in the estate of the marriage. This is so despite that the Court Order of the 27th September 1993 whose clause 2 thereof reads thus: "The Defendant forfeits the benefits arising out of the marriage in community of property." The interpretation given by the Courts to such an order has not been that the party against whom an order of forfeiture has been given loses everything. In some instances the effect of such an order could be that of division of the estate (see the remarks in S. MONAPATHI v M. MONAPATHI C of A (CIV) 18 of 1989 dated 26/01/90)

It is correct that the capacity to sue normally depends on and follows the specific interest that one has in the matter that one seeks to protect. Being an heir and or a potential heir is one of the interests. The relationship of a person and a deceased relative is of a sentimental nature giving one a specific interest. Being an heir to a deceased person casts a

duty on the heir to bury the deceased. It is along this line in that the question of the capacity of the applicant to claim in this application was debated. The Respondent argued that the Applicant did not have the capacity to sue or file this Application in this Court.

Mr. Mohau for the Respondent argued that it was not enough that the Applicant made the following statements in her affidavit:

(a) That she is a female adult and a younger sister of the deceased. - without stating who are her brothers (if any) and other relatives who would be heirs of the deceased.

(b) That she is making the affidavit in her capacity as the younger sister of the deceased - without explaining why that relationship per se would give her title to sue.

(c) That it is by authority of her mother who sent her to Lesotho - without explaining why her mother would be empowered to sent her to

Lesotho and to claim as she has done and without written evidence.

(d) That the Applicant's mother and father are long divorced and the whereabouts of the father are not known.

Mr. Mohau has asked the Court to note that in all the claims or facts upon which the Applicant seeks to base her entitlement she has no written evidence or authority whatsoever. That there is nothing in a form of writing is true. But would that by itself (if it is a requirement) defeat the Applicant's claim. Secondly the Applicant does not claim to represent her family. There is no allegation that Applicant has consulted her family and why she has not done so. Thirdly, in as much as the Applicant and Applicant's father would be the heir and be possessed of duty to bury the deceased, it was important to inform as to what steps have been taken to find him by way of a diligent search. In the absence of that information it should be safely concluded that no such attempt has been made. Fourthly, the statement in the Applicant's replying Affidavit, and the facts that before she left Nairobi there was a family meeting in which her mother, her uncle (Phillip Mutua) and the Applicant decided that the Applicant should come to Lesotho and arrange for removal of the deceased's body and that the said

Phillip Mutua did arrive two days after the filing of the Application, to confirm the meeting and the decision, did not carry the matter any further. It is on the basis of this set of facts that Mr. Phoofolo argued in asking for the award of costs that it is only on the basis of the interest that the applicants has, based on the duty to bury that the Applicant derived her right and title to sue.

I agree with Mr. Mohau that in the event that the Applicant claimed that she was acting or entitled to act in terms of Kenyan law (which is a foreign law) the terms of that law have to be proved by expert witness, and in the absence of such evidence,, the Court will presume that the foreign law in the issue the same as local law (see Maserabele Serobanyane vs Teboho Serobanyane & Another CIV/APN/290/91 (unreported) per Mr. Justice Kheola). It is also trite law that the heir of the deceased person is the one who has the right to determine where and when the deceased may be buried (see Litsitso Chokobane vs Joshua Noabambi and Another CIV/APN/251/89 (unreported) per Mr. Justice M. L. Lehohla and Mojela Thaele & One vs Tsoloane Thaele & Two Others CIV/APN/318/91 (unreported) per Mr. Justice B. K. Molai).

The following statements of the law regarding the rights of burial are correct. That where the deceased dies without leaving

any male issues, his father becomes heir, if the father is late then the deceased's grandfather becomes the heir. Furthermore if the grandson is also late, the deceased's brother becomes heir. This is also supported by the learned author S.M. Poulter in his Family Law and Litigation in Basotho Society at page 232. But then is not the question much more complicated? As the Applicant's Counsel rightly asked, much as the Respondent himself is not entitled to bury the deceased what would happen the body of the deceased if Applicant decided not to take action? Is not this fact that she is a sister of the deceased enough to cloth her with authority (herself) should the Court find that she was not rightly authorised on the grounds of the reasons (of heirship) put forward by Mr. Mohau? Mr. Phoofolo submitted that in the least there is firstly the question of the relationship, secondly the fact that there was no will, thirdly the fact that she was divorced from the Respondent (making it unlikely that she would have preferred the Respondent) and fourthly and most importantly a sense of what is right that gives the Applicant the right to sue. In my mind, following on the concession by Mr. Mohau (that the Respondent would be ineligible), I am persuaded by the following factors in finding for Applicant on this aspect:

(a) The Applicant is the nearest relative of the deceased in the circumstances of this case. This is not a case of competing heirs. It is just important to add on this note that the Applicant would be an heir of the

deceased according to common law. But the Applicant has only claimed for herself the right of removal of the body (see Applicant's prayer (e)) Even this one I would not deny the Applicant.

(b) According to Sesotho Customary Law the Applicant would neither be an heir and neither would she have a right to bury the deceased. But what we are concerned with here is her right to remove the body for burial by her family, so that the right to bury remains that of her family (see Applicant's prayer (e)). I would nevertheless not deny her the right to bury the deceased for the reasons I have already stated.

(c) Applicant also speaks of having been instructed by her mother to seek to remove the body to Kenya for burial by the family. I would in accordance with common law find that the deceased mother had a right of burial. But this would not be so according to the law of Lesotho where a female adult has to be a widow (where she is an heir) or a widow as a guardian of a minor heir or instructed by the heir. I cannot profess to have had a very close look into and to seek to distinguish the cases of Human vs Human and Others 1975(2) SA 251(E) Tseola & Another vs Maqutu 1976(2)

SA 418(T), Mbanjwa vs Mona 1977 (4) SA 403(T) and T. Motloki vs E. Lenono & Another 1978 LLR 391 and as to how the instant case would be treated. But these have been cases of competing heirs. I am influenced mostly by the finding that the Applicant is the closest relative of the deceased. It is against public policy that there could have been no one to take care of the interests of the deceased (including her burial) and that a sense of what is right seems to dictate that the Applicant can properly take charge of the interests of the deceased.

Despite my above finding I cannot help but refer to the following matter in passing. I would agree with Mr. Mohau that the absence of a written instruction or authority would normally make the applicant's word in most instances unreliable and difficult to disprove. It is not on that account alone prejudical. It is also prejudicial in this context that the party tendering in the evidence obtains an unfair advantage by its admission. Even if I decide (as I do) that such writing was not required for the purpose of my decision in this matter; but the dangers are there to see. This means that looked at from a strictly technical point the statements would amount to hearsay. I would however find the statements cogent by analogy to the case of Rossv Ellison, 1970 AC 1 wherein Lord Buckmaster said that

declarations of intentions had to be "..... examined by considering the person to whom, the purpose for which, and the circumstances in which they are made." I would say that there are exceptional circumstances such as in the instant matter.

The prayer (d) to the Applicant's Notice of Motion reads:

> First Respondent should not be restrained from removing or in any manner interfering with the deceased's assets whether movable or immovable and wherever may be situated pending the finalization of the application and any directive which may be given by the Registrar of Deeds for disposal of the deceased's assets"

I would use the same reasons adopted earlier on that the Applicant had an interest to the removal of her sister's body for burial, to say that she has an interest in the property of her sister. I thought the prayer was not only inelegantly drawn but that it did not make sense. The are two clear reasons, namely:

(a) The property of the deceased, as matters stand, is not in the hands of the Registrar of Deeds nor the Master of the High Court. I reject the submission. Where property of an estate is subject to an order of

forfeiture the various items of property may be found all over the place including and also in possession of the party against whom an order has been given. To the extent that the matter has not been finally disposed of either by a final liquidation or a distribution by agreement. The impression I had was that the estate is still in the hands of the Court or that it is a subject of the Order of Court. Counsels were not able to disabuse me of that impression (if it was mistaken). My further impression was that where a liquidator is appointed, that liquidator is an officer of Court or subject to the powers or Order of Court. It means therefore that the property is not and cannot be in the hands of the Master or Registrar of Deeds in the circumstances. I do not think that much was made in the affidavits to support the submission. I would consequently have had a problem in confirming the Order as it stood.

(b) Besides the obvious problem of the interim order the prayer posed a clear problem as to what its limitations would be. It would become a permanent order unless it was reframed. That is, if the Order was only given pending the finalization of this application why would the Respondent continue to be

restrained if not for a clear and definite purpose? In as much as the Respondent has an interest in the matter of the estate, any restraints imposed by this Court in his connection with the property of the estate should take into account this interest.

It is clear therefore that the Order in prayer (d) ought to have been discharged. In my discretion I allowed the order to be amended. But I would not give the costs in the prayer to the Applicant. On the 6th June 1994 the parties entered into a deed of settlement as aforesaid. It also became clear that anything concerning the parties' estate (property) could only be dealt with to the extent of the order of forfeiture (and to facilitate it) and not beyond.

There is yet another question. In the light of the death of the deceased, who would be in the place of the deceased respecting the interest of the deceased in the property? I took the view that the Applicant would naturally (in the circumstances) be the proper person to act as a curator with all the powers that a curator would have, in the place of all the other heirs of the deceased.

I made the following orders:

1. The prayer 1 (a) of the Notice of Motion is confirmed.

2. It is recorded that prayers (b) (c) (e) of the Notice of Motion have been dealt with by way of the parties' agreement contained in the Deed of Settlement dated the 6th June 1994.

3. Prayer (d) of the Notice of Motion is amended to read:

"The First Respondent is restrained from removing or in any manner interfering with the deceased's assets wherever they may be situated pending liquidation of the estate (pursuant to an order of forfeiture)."

4. The Applicant is appointed curator in the place of the deceased on behalf of the heirs of the deceased for the purpose of facilitating the order in paragraph 3 above.

5. Attorney Mr. Michael M. Ramodibedi or his substitute is appointed as liquidator of the estate of the deceased and the First Respondent and shall have all appropriate powers.

6. The Applicant is awarded only two thirds of the costs of this Application which shall exclude the costs of the 1st day of hearing (which the First Respondent shall not pay).

T. MONAPATHI
JUDGE

27th June, 1994

For the Applicant : Mr. E.H. Phoofolo

For the First Respondent : Mr. K. Mohau