

IN THE HIGH COURT OF LESOTHO

In the matter between:

DAVID THEKO KHOABANE MOTEANE

Applicant

and

MOHLALEFI MOTEANE
MOSUOE MOTEANE
LETEKETA MOTEANE
MATJATO MOTEANE

1st Respondent
2nd Respondent
3rd Respondent
4th Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice J.L. Kheola
on the 23rd day of March, 1994.

This is an application for an order in the
following terms:

1. Dispensing with the forms and provisions of the Rules of Court and dealing with the matter as one of urgency, as is contemplated in terms of Rule 8 (22) of the Rules of Court;
2. Authorising the issue of a rule nisi calling upon the Respondents to show cause (if any) on a date to be determined by the above Honourable Court, why:

- 2.1 Respondents or anybody else should not be restrained from removing, selling, administering, distributing or in any other manner dealing with the movable or immovable assets of Estate late MAKHOABANE MERIAM MOTEANE.
- 2.2 Applicant should not be appointed as sole heir of the Estate of the late MAKHOABANE MERIAM MOTEANE;
3. Respondents should not be ordered to pay the costs of this application.
4. That the aforesaid rule nisi operate as a temporary interdict restraining Respondents or any other persons in terms of paragraph 2.1.

It is common cause that the applicant and respondents are brothers. Their mother, the late 'Makhoabane Meriam Moteane, died on the 3rd March, 1993 without leaving any will. The applicant is living in the United Kingdom. He has lived there for many years and has even acquired the citizenship of that country. He came to Lesotho for the burial of his mother. On the 14th day of March, 1993 a family meeting was held. The applicant alleges that the reason for the holding of the family meeting was to

determine who the sole heir was of the movable and immovable assets in the estate of his late mother. He claimed that he was the sole heir. He alleges that his uncle, one Abner Rataunyana Moteane agreed with him that he was the sole heir of the estate of his late mother.

The respondents were not happy with the decision that the applicant was the sole heir. The applicant alleges that the respondents will attempt to administer the estate of his late mother for their own gain during his absence because he is presently residing in the United Kingdom.

He alleges that during the lifetime of his late mother the respondents repeatedly confronted his late mother to draw a will. She refused to do so. One Limpho Lesoli confirms that the respondents repeatedly asked the late mother of the applicant to draw a will. These requests were made in his presence.

In his opposing affidavit the first respondent denies that the meeting of the family held on the 14th March, 1993 was for the purpose of appointing the applicant as the sole heir of the estate of their late

mother. The applicant had requested the holding of the said family meeting on the pretext that he was going to address the immediate family after a long period of absence in Lesotho. It would have been unusual to make final arrangements regarding the estate during the one month mourning period prescribed by custom.

The first respondent deposes that during the said meeting the applicant never claimed that he was the sole heir. He claimed to be interested in addressing matters pertaining to the estate at Sehonghong and that arrangements for the Mashai Store would be made after his inspection of the said property. The fourth respondent made reference to the house at Sehonghong when he explained to the applicant that under custom estates do not evolve upon female children and that a family house would rather go to the youngest son in the family.

He denies that their uncle, Abner Rataunyana Moteane agreed with the applicant that he was the sole heir because that was never discussed.

At the said meeting the applicant had indicated

that he had decided that their sister 'Mapholiso should remain looking after the family home, livestock and fields at Sehonghong until he (the applicant) came back to Lesotho during the course of the year. The respondents felt that the decision he took was contrary to customary principles of dealing with estates. The said 'Mapholiso is a married woman who under customary law cannot inherit anything from their late mother's estate. The first respondent deposes that neither he nor the other respondents had any intention to administer the estate for their own gain nor to distribute the assets as no agreement had been reached as to how the estate was to be administered.

The first respondent admits that as the second son of their mother who had remained with him while the applicant was abroad, he did advise their mother to make a will. She promised to attend to the matter but did not do so until she died. She never hinted that the applicant would be the sole heir.

On the 29th October, 1993 Mrs Kikine, attorney for the respondents, raised certain points of law in limine. The first of such points was that any dispute in inheritance matters must be settled within the

family before they are brought to court. Section 14 (4) of Part 1 of the Laws of Lerotholi reads as follows:

"Any dispute amongst the deceased's family over property or property rights shall be referred (for arbitration) to the brothers of the deceased and other persons whose right it is under Sesotho law and custom to be consulted. If no agreement is arrived at by such persons, or if either party wishes to contest their decisions, the dispute shall be taken to the appropriate court by the dissatisfied persons."

She submitted that even where a dispute has not yet arisen the role of the surviving members of the family is significant and should not be undermined. The Provisions of the latest Land (Amendment) order 1992 which amends The Land Act 1979, reinforces the role of the family in designating an heir. A single member of the family may not declare himself the "sole heir".

Section 8 (2) of The Land Act 1979 (as amended)

reads as follows:

"2 Notwithstanding subsection (1), where an allottee of land dies, the interest of that allottee passes to;

(a) where there is a widow
- the widow is given the same rights in relation to the land as her deceased husband but in the case of re-marriage the land shall not form part of any community property and, where a widow remarries, on the widow's death, title shall pass to the person referred to in paragraph (c);

(b) where there is no widow
- a person designated by the deceased allottee;

(c) where paragraphs (a) and (b) do not apply - a person nominated as the heir of the deceased allottee by the surviving members of the deceased allottee's family."

In the present case there is a serious dispute of fact as to what transpired at the family meeting which was held on the 14th March, 1993. It is a well established principle of law that where there is a dispute of facts a final interdict should be granted on notice of motion proceedings if the facts as stated by the respondent together with the admitted facts in the applicant's affidavits justify an order (Stellenbosch Farmers' Winery Ltd. v. Stellenvale Winery (Pty) Ltd. 1957 (4) SA. 234).

In the present case applicant admits that the meeting of the 14th March, 1993 was held; that their sister 'Mapholiso was allowed to remain looking after the estate at Sehonghong. The fact that a caretaker was appointed seems to suggest that no final decision was taken as to who should be the "sole heir".

The letter of the first respondent (Annexure "A" to the opposing affidavit) dated the 16th March, 1993 also confirms that the respondents never had an intention to administer the estate of their late mother for their own gain.

I am of the opinion that the version of the respondents should be taken as the one that is correct. It is that no final decision was taken as to how the estate should be administered. A family meeting must be held in terms of Section 14 (4) of Part 1 of the Laws of Lerotholi or in terms of section 34 (1) of Administration of Estates Proclamation No.19 of 1935.

If the applicant is of the opinion that there is a dispute between himself, on the one hand, and the respondents, on the other, he must follow the provisions of section 14 (4) of Part 1 of the Laws of Lerotholi. If no agreement is reached at such a meeting only then can the applicant take the dispute to an appropriate court.

I have come to the conclusion that the applicant has failed to prove that there is any dispute between

himself and his brothers. He has prematurely decided to bring this matter to Court before the family has been given the first chance to decide the matter in terms of section 14 of the Laws of Lerotholi.

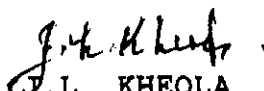
I do not know what the applicant means by saying he should be declared as the sole heir. If he means that he alone must inherit his late mother's property and exclude all his younger brothers, that cannot be done because the law is very clear that the heir must share with his brothers.

Mrs Kikine submitted that the applicant is disqualified to hold title to land in Lesotho in terms of section 6 of The Land act 1979 (as amended) which provides that a person who is qualified to hold title to land is a citizen of Lesotho who is a Mosotho. The applicant has lost that right by taking British citizenship. Furthermore Aliens Control Act of 1966 does not permit dual citizenship.

I do not agree with this submission because in terms of section 6 (3) of The Land Act 1979 (as amended) the question of whether a person is a citizen of Lesotho who is a Mosotho shall be decided by the

Minister. It seems to me that this Court is not the proper forum to decide whether the applicant is a citizen of Lesotho who is a Mosotho. The Minister shall decide that when the question arises. In any case we were told that in addition to immovable property there is movable property including livestock and household goods which can be inherited by the applicant even if he has lost his Lesotho citizenship.

In the result the rule is discharged with costs.


J.L. KHEOLA
JUDGE

23rd March, 1994.

For the Applicant - Mr. Mare
For the Respondents - Mrs. Kikine.