CIV\APN\267\91

IN THE HIGH COURT OF LESOTHO

In the Application of :

GONZAQUE MACHAI	Applicant
vs	
PITSO MACHAI	1st Respondent
LESOTHO BANK	2nd Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 13th day of June, 1995

This is an application brought by the applicant by way of Notice of Motion filed and heard ex-parte by Kheola J, as he then was, on 4th September, 1991.

The file covers do not reflect any jotting down of any directives made by that Judge on the day in question. Nothing in the file reflects any extensions, if any, of the rule that was granted ex-parte till I was seized of the matter for final arguments on 1st June, 1995.

I am therefore dealing with this matter on the assumption that the original file covers and or any original manuscripts on which the original order was granted ex-parte went missing.

On papers placed before court it is reflected that the applicant sought a rule nisi calling upon the respondents to show cause why :-

(a) the 1st respondent shall not be interdicted forthwith from withdrawing the monies presently standing in his savings account with the 2nd respondent pending the outcome of this application;

(b) the 2nd respondent shall not be restrained from paying to the 1st respondent the amount presently standing to the credit of the 1st respondent's savings account pending the outcome of this application;

(c) the 2nd respondent should not be ordered to pay to the applicant the sum of M15 620-83 of the amount standing to the credit of the aforesaid savings account in the name of the 1st respondent;

(d) normal periods and times provided for by the High Court Rules should not be dispensed with on grounds of urgency of this application;

(e) the 1st respondent shall not be ordered to pay costs of this application;

(f) the applicant shall not be granted any further and\or alternative relief.

The 2nd respondent has not entered any notice of intention to oppose this applicant. It can therefore be assumed that it is prepared to abide the decision of the court whichever way it may go.

The applicant relies on averments set out in his founding and replying affidavits in support of the prayers and relief set out above.

He sets out in Paragraph 5 as follows :

"I am the First male issue of my late father Peter Seseinyane Machai from his second marriage following dissolution by death of his first marriage to 1st respondent's mother in 1950"

In paragraph 6 he proceeds thus :

"Following his marriage to my mother in 1951 my aforesaid late father established a cafe business at Mikaeleng Ha Nobi for his second house on or around 1955 for the benefit of the family of his second marriage to which I am the heir".

In Paragraph 7 he says :-

"From around 1956 to around 1969 the aforenamed cafe was hired out to different people".

The people in question are set out by names in paragraph 6 of the applicant's replying affidavit. The dates are also supplied showing the periods of occupation per each of the four tenants in question.

In Paragraph 8 he says :

"My aforenamed late father was prior to marrying my late mother Makosaka Machai residing at Mikaeleng Ha Machai where he had established a home for his first wife Mapitso Machai. After marrying my aforenamed mother by civil rites as evidenced by Annexure "GM1" hereto my late father built a residential house for my mother's family some short distance away from 1st respondent's family"

The applicant further avers as follows in Paragraph 9"-

"Since around 1976 I assisted my late father and mother in running the said cafe and for ploughing the family fields while the 1st respondent was at the mines in South Africa and not contributing a thing"

This averment is in an attempt to rely on a well-worn Sesotho customary principle that an heir does not just inherit without having contributed to the development of the estate. But I must hasten to say that this principle where successfully invoked is in relation to the situation where the deceased has himself excluded his natural heir from inheritance by invoking the weapon of disinheritance. The present proceeding does not involve any such thing.

The applicant further avers in paragraph 10 as follows

> "The profit from the cafe business was deposited in my late father's personal savings account and his last account number was 2000 353564. Upon my father's demise the said savings account was closed and from the amount therein of M16 401-23, M10 000-00 was used for my late father's burial while M6 401-23 was transferred into my mother's savings account number 2000 298056 at Lesotho Bank"

The applicant's mother died within a week of the applicant's father's death. He further states that his mother had M9 219-60 in her savings account being an amount derived from proceeds resulting from agricultural ventures jointly undertaken by him and his mother. The sum of this amount and the M6 401-23 footed up to M15 620-23 all in the applicant's mother's savings account.

It is not clear from the papers when exactly Peter Seseinyane Machai is alleged to have died much less when the applicant's mother did save that it is said this occurred within a week of her husband's death. One can only surmise that the two

events occurred before 25th April, 1991 which marks the day on which the 1st respondent sought and obtained an order CC 444\91 against the applicant in the Maseru Magistrate's Court interdicting the present applicant from disposing of the property of the parties' late father Peter Seseinyane Machai; and further interdicting the present applicant from carrying on the business of General cafe, the property of the parties' father pending distribution in accordance with custom. This interim order has not been finalised yet.

However on 18th May 1991 according to the applicant

> ".....the Machai and Lephoto families met and purported to appoint 1st respondent as the heir of my father as it appears more fully in Annexure "GM3" hereto. When I refused to endorse the said appointment on the ground that 1st respondent cannot be the heir to my late father's second house, I was forced by one IFO LEPHOTO to endorse the appointment and thereafter challenge it in court if I so wished".

It is not clear nor has it indeed been revealed how old the applicant was when he was forced in 1991 to endorse a document appointing the 1st respondent heir in the estate of the applicant's father's second house. But if in 1976 he was of an age that he could assist his parents in running their cafe as set out in Paragraph 9 of his founding affidavit he couldn't have still been a minor in 1991. This has a bearing on how he could have been duped into virtually signing his rights away. May I add that this is not the only consideration that has exercised my mind in this proceeding. More of that later.

In Paragraph 14 the applicant avers:-

> "It will be readily observed from the said annexure "GM3" that first respondent purported to distribute the property of my late father's estate on 18th May, 1991. First respondent purported to distribute even the property of my late father's second household of which I am the heir. First respondent allocated to himself the aforementioned cafe and my late mother's Lesotho Bank savings book."

He goes further to complain that the first respondent transferred the amount of M15 620-83 which was in the applicant's mother's account into his own account at the Lesotho Bank whose number is unknown to the applicant. He further avers that the 1st respondent has on a number of occasions threatened to withdraw the amount referred to above from his savings account at Lesotho Bank and utilize it for his own personal benefit. Thus he craves this Court's intervention lest his worst fears be confirmed. The 1st respondent denies all these averments and puts the applicant to proof thereof.

The applicant also submits that he is the person legally entitled to the said amount of M15 620-83, to the cafe and other property left by his father in the second household on grounds that he the applicant is the heir in that 2nd household. The 1st respondent strongly denies this averment and adds that

> "there is an application pending in the Magistrate's Court Maseru relating to the relief applicant is seeking. It is CC 444\91 sued out by me because applicant was squandering and disposing of the estate of late father unilaterally"

While on the one hand it is fitting that the 1st respondent has brought to the Court's attention this vital piece of evidence which had been concealed by the applicant, the Court

on the other hand holds the conduct of the 1st respondent questionable that while such a case as he says is pending before the Magistrate's Court, he should proceed to distribute the deceased's estate (Peter Machai's) before finalisation of that case in the subordinate court. His conduct is all the more reprehensible regard being had to the fact that he has an interim Court Order in the one hand and is "sitting on it" while purporting on the other hand to deal with the property, by way of distribution, the subject matter of an incomplete court proceeding sought by him in the first place. Thus leaving the applicant no option but to resort to the action that brought him before this Court, although I wonder if the rule of convenience wouldn't have entitled him to seek relief from the court which in part has part of this dispute pending before it, for relief as to issues restricted to within the jurisdiction of that court.

The applicant maintains that in marrying his mother his father created a second household. See paragraphs 6 and 8. In paragraph 8 he avers that the late Peter Machai built a residential house for the applicant's mother's family some short distance away from the 1st respondent's family. With regard to averments in the applicant's paragraph 6 the 1st respondent does not admit the contents and puts the applicant to proof thereof. But with regard to the applicant's averments in paragraph 8 I find the 1st respondent's denial that 'Makosaka's residential house was built some distance away from 'Mapitso's residence really spurious because the 1st respondent in the version that he wishes to be preferred also says Makosaka's residence is

separated by a road from Mapitso's. Thus I find that there are two physical entities even if they are on the same site. One clearly belonged to 'Makosaka while the other belonged to 'Mapitso. But the mere existence of these physical structures should not be used as a basis for reading into the late Peter's estate two houses as understood in the customary Law of Basotho. Such houses are better appreciated where a second marriage takes place during the subsistence of the first marriage. Thus where a man remarries because the first marriage has been dissolved by the death of his spouse even though he builds the remarried wife a separate house where she would live with her family apart from the family of the deceased spouse he does not thereby create a second household.

Mr. Nathane though raised a point of some interest in his submission that according to Basotho Custom a marriage still prevails even if one of the parties to it has died and accordingly submitted that Pitso is not entitled to inheritance in the estate accrued to Peter and his remarried wife. He submitted that the 1st respondent is debarred from doing so on the score of the customary principle that "Malapa ha a jane" meaning families don't eat (or gobble) up each other. But in my view this principle would be applicable where two houses were created in the manner I referred to shortly before.

With regard to the submission that marriage according to custom does not come to an end even after the death of a wife, I think this concept falls under the category or practice of

marriage to non-existent or fictitious persons the results of which are not satisfactory and therefore unacceptable in modern age.

Mr Nathane having competently outlined the facts in this case invited the court to determine the regime governing the marriages between the litigant's mothers and their common father. This indeed is the crucial question.

On papers it is clear that the applicant's mother was married by civil rites to her late husband. On this ground Mr. Nathane submitted that Makosaka's marriage and consequences flowing from it stand to be determined in terms of the Received Law.

He pointed out that from the papers it appears that both litigants seem to have laboured under an impression that the remarriage constituted a house in terms of customary law i.e. the applicant's mother's house by virtue of her marriage to Peter Machai. Indeed the applicant as indicated earlier referred to this marriage as having constituted a second house; so the contention went. It was also contended for the applicant that the 1st respondent's view also is that the 2nd marriage was a resuscitation of the marriage between his father and mother i.e. a rebuilding of the 1st house.

Mr. Nathane accordingly submitted that by marrying the applicant's mother civilly the late Peter made a choice.

Therefore the choice he made was that his remarriage should be subject to Civil jurisdiction. He submitted further that by marrying Makosaka civilly Peter created a different entity between his "two wives".

Learned Counsel stated that if this is the correct position then the question of houses doesn't and shouldn't feature at all because in civil law the question of houses is unknown as it is foreign to that type of law.

He sought further to buttress his argument in favour of the applicant by pointing out that even the facts of the case themselves belie any allegation that there was a single house. In this regard he referred to Annexure "GM3" to the founding affidavit showing that there were two sites and homesteads to each house.

Indeed Annexure "GM3" says with reference to what 1st respondent purported to do in effecting distribution of property:

> "I gave Kosaka (the applicant) the homestead where he is still living and I take the one above".

Learned Counsel submitted that this supports the applicant's view that his father had two distinct sites on which were two distinct homesteads. Thus he submitted that even assuming that the customary law applied the intention of the late husband shows he was creating two separate houses.

Learned Counsel submitted further that even though the

1st respondent alleges that the marriage of the applicant's mother was a rebuilding of the 1st house he seems not to have been part of that house. I have already dealt with this argument and felt that it should not be used as a valid basis for demolishing the 1st respondent's view that if he is Peter Machai's heir who has not been disinherited by his father his claim to inheritance should enjoy the support of the law. Indeed Mr.Mohau for the 1st respondent submitted that all the 1st respondent's younger brothers including his step or half-brothers in developing their common father's estate do so as the 1st respondent's arms in the deceased's estate. Thus even if the 1st respondent took no interest in the "rebuilt house" and notwithstanding his admission that he took no part in the running of that house his lack of interest should not affect his position as heir in the deceased's overall estate.

Mr Nathane's reply to the formula that the applicant in assisting their father to develop this estate in running the shop and ploughing the fields was doing all this on behalf of the heir in accordance with custom, is that the 1st respondent should at least have shown he knew of these things.

Mr Nathane insisted that the cumulative effect of the 1st respondent's attitude towards the second household manifesting lack of interest therein as indicated by the fact that he didn't even participate as he should have done in the burial of his step-mother (the applicant's mother) belies his contention that there ever was any rebuilding of the 1st house.

He accordingly invited the Court's attention to the fact that in his answering affidavit the 1st respondent's responses are bare denials. This was said particularly in reference to the 1st respondent's response to the applicant's averments in paragraphs 17 and 18. But these responses cannot be regarded as bare denials when the respondent is basing his case on the validity of "GM3" furnished by the applicant and on a matter concealed by the applicant that he was restrained from disposing of property by a Magistrate's order.

Mr Nathane accordingly submitted that whatever disputes of fact there may be on papers are not so fundamental as to affect the root of the application. He further submitted that whatever regime is applicable to the administration of this estate the applicant has a better title than the 1st respondent.

In responding to these submissions Mr Mohau pointed out that in order to succeed the applicant has to clear two hurdles. The fundamental point is that in motion proceedings an applicant stands or falls by his founding affidavit.

The first hurdle relates to Annexure "GM3" attached to the applicant's founding papers. Ex-facie "GM3" the applicant seems to have been a party and co-author with sixteen other family members who stated on 18-5-1991 that

> "We members of the family, whose names appear underneath hereby announce Pitso Machai as the first heir of the late Peter Seseinyane Machai and his younger brother is Kosaka Machai and elder sister is Malephoto Machai. Pitso then distributed as

follows....."

What the applicant is seeking in this Court is the undoing of this document on the grounds that he was forced by Ifo Lephoto to sign it and protest later if he so wishes.

The question arising is whether the applicant can in motion proceedings succeed in establishing that grounds exist on whose basis the existence of Annexure "GM3" can be undone.

Mr Mohau submitted that the applicant ought to have foreseen that a serious dispute would arise in any attempt to discredit "GM3" and that such dispute is not such as can be resolved on papers. Thus aware of this real possibility of dispute and all that it entails, if the applicant made a choice to proceed by way of motion he did so at his own peril.

There is no dispute that the applicant appended his signature to a document that plainly showed that in doing so he was signing away whatever title he had to the estate left by Peter Machai when he died.

Nothing on this document suggests that the applicant signed it under duress. I need not speculate on why he was the last i.e. the 17th person to append his signature on "GM3" because if 17 people agreed to sign it anyone of them could be number last or number 17.

Mr Mohau's submission has merit therefore that one

would expect a man in the position of the applicant not to do anything that runs counter to his perceived interest without protest. This view is all the more compelling when regard is had to the fact that the applicant had already been restrained by an interim court order from doing as he saw fit with the property he perceived as belonging to him.

Indeed if the applicant's contention is to pass muster he should have registered his protest on that very document in such a way as to make it more probable than not that he disagreed with the phrase that designated Pitso Machai as heir in direct conflict with his own interests.

The submission is not baseless therefore that the applicant is now bound by this document which he signed without indicating in it where his protest was noted. Thus he cannot repudiate his signature on the allegation that he was coerced when nothing shows he had indeed been so coerced. The other option he had was just to refuse to sign that document.

Rather than risk proceeding by way of motion in a matter where a serious dispute would no doubt arise regarding his challenge to the validity of the document he signed, he should have sought some form of interdict for the immediate protection of his interest pending finalisation of an action to be instituted within reasonable time.

The second hurdle referred to by Mr Mohau relates to

the mode of life led by the parties' late father together with the law governing the deceased's estate.

Learned Counsel pointed out that the applicant should satisfy the Court that the Received Law is the proper law for governing succession in the late father's estate.

It is significant that it is not canvassed on papers that according to the Received Law the applicant is to succeed his father as heir. The line being now adopted in argument namely that applicant is entitled to succeed as heir in terms of the Received Law is different from what is reflected in papers at paragraph 17 of the applicant's affidavit that he is entitled to succession as the heir in the "second household". This is a weakness in the applicant's case usually referred to as blowing hot and cold or attempting to ride on two horses at once.

Mr Mohau submitted that at the end of the day one would not find fault in the distribution reflected in "GM3" whether the approach adopted is by custom or by the Received Law because according to the Received Law all the deceased's offspring are regarded as his heirs. It is only Customary Law which designates first male issue as the heir.

Indeed unless there was proof that Peter and Makosaka had abandoned tribal custom and adopted a so-called European mode of life it cannot be argued that their estate stands to be administered according to Civil Law for every Mosotho is subject

to customary law as far as the deceased estate is concerned unless there is proof to the contrary. A will for instance.

It would therefore be imprudent to adopt any other approach than what is provided in the Administration of Estates Proclamation 19 of 1935 which in the words of Maqutu J in Contemporary Family Law of Lesotho at page 171

> ".....provides that only estates of Africans who have abandoned the African way of life and adopted a European one are to be administered according to the common law. Those of other Africans should be administered according to indigenous law. As already stated, in Lesotho the question concerning an African's way of life is inquired into only after his death. In his lifetime such a question is never asked".

It is stimulating just in passing to observe at page 170 of Maqutu J's invaluable works, the following in reference to Khatala vs Khatala 1963-1966 HCTLR 97 by Schreiner JA as he then was :

> "In the Khatala case, the heir was the deceased's son by his first marriage and the widow was the heir's step-mother. The widow transferred R300 from the deceased's account to her own banking account. The heir appeared to be the wronged party and was seen by the courts as a good man whose rights were being usurped by a greedy step-mother".

Suffice it to say the Khatala case clearly shows that a widowed step-mother who transfers sums of money to her personal account from that of her husband upon the latter's death encroaches upon the rights of her step-son to inheritance if that step-son is the first male child of the deceased in the first house. But needless to say the applicant's mother in the

applicant's own words did just this prohibited act. The applicant subsequently wishes to benefit by it. I doubt if there would be any wisdom in the law countenancing any such act.

Mr Mohau reiterated that in the present case there is no question of two houses. There is just one which was established after the death of Peter's wife prior to remarriage. One can't therefore say the "Malapa ha a jane" doctrine applies here. Moreover it is not known if Peter utilised assets in the first estate accumulated in the first marriage to develop the estate in the second marriage.

Mr Mohau reiterated that the charge that the 1st respondent admitted not to have contributed in the running and improvement of the second house cannot hold. First because he is a miner. Next because his half-brothers being his arms do what they do for his welfare as heir.

The learned Counsel referred the Court to Section 1(1) of the Laws of Lerotholi specifying that that the heir shall be the 1st male child of the first married wife,

Indeed in my view one cannot be heard to say there are more houses than one where one wife is married after the death of another in the pre-existing marriage. There can't be any mention of two houses in such a situation. Thus there is only one heir, in my view, to the late Peter Seseinyane Machai. His has not been shown to have been a polygamous marriage.

One other thing which the applicant chose not to be candid about in his founding affidavit is the fact that "he ran the cafe with my wife (1st respondent's)" after the death of the applicant's parents. In paragraph 12 he creates an inaccurate if not a deliberately false impression that he (alone) continued to run the cafe business until its closure. He hasn't indicated that there was an agreement whereby the respondent's wife joined him in running this cafe. The reason one can think of for this concealment is that the applicant is averse to revealing that even though the 1st respondent had earlier shown no interest in the affairs of that house, when his father and step-mother died he did not hesitate to manifest that he was then coming to his own. It seems the applicant felt his claim to the estate in question would be compromised if he revealed this.

However I feel that both in the merits and technical aspects relating to points of law raised this application stands to fail.

While in my judgment I find that the 1st respondent is the heir to the late Peter Machai and as such entitled to the entire estate regardless of which wife he accumulated it with, I cannot be blind to the fact that in purporting to distribute the property before finalisation of his application before the Magistrate's Court, regarding which I have good reason to believe he obtained the interim order on the basis, in part, that pending finalisation of that case no distribution could be effected it is wrong that there was that purported distribution :

(a) I order the purported distribution of the property that was in the custody of 1st respondent or his mother including any forming the subject matter of "GM2" which has not perished or been worn out with use or rendered useless through wear and tear or been totally consumed or which is no longer of any economic or material value, suspended till finality of the matter pending before the Magistrate's Court Maseru.

(b) Otherwise the application before this Court is dismissed and the rule discharged.

(c) With regard to costs, and taking this Court's disapproval of the 1st respondent's attempt to by-pass due process of the law I would award him only 80% of his costs against the applicant.

(d) The second respondent is ordered to withhold release to 1st respondent of whatever moneys there are in the savings account of Peter Seseinyane Machai and Makosaka Machai pending 1st respondent's compliance with the order in (a) above.

J U D G E
13th June, 1995

For Applicant : Mr. Nathane
For Respondents: Mr. Mohau