

CIV/T/357/97
IN THE HIGH COURT OF LESOTHO

In the matter between:

ELIZABETH LIKELELI THATHO	PLAINTIFF
and	
'MANNETE FLORENCE NTSANE	1st DEFENDANT
THE LAND COMMISSIONER	2nd DEFENDANT
THE REGISTRAR GENERAL	3rd DEFENDANT
THE ATTORNEY GENERAL	4th DEFENDANT

JUDGEMENT

Delivered by the Honourable Mrs Justice K.J. GUNI On the 12th Day of September, 2000.

The plaintiff in this matter, issued out of this court the summons in which she claims:-

- (a) A declaratory Order that Plaintiff is the heiress by Basotho Law and Custom of the estate of late ELLIOT BULARA SOLOMON THATO and his late wife 'MAMPHUNYETSANE 'MAMAHLAPE THATHO.

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- b) A declaratory Order that Plot No. 0647-030 situated at Mafeteng Urban area form part of the estate of the late ELLIOT BULARA SOLOMON THATO.
- c) Cancellation of the deed of transfer registered under No. 22928 in the Deeds Registry on the 17th December, 1991.
- d) Ejectment of the First Defendant from Plot No. 0647-050.
- e) Costs of Suit and Second to Fourth Defendants pay costs only in the event of contesting this claim.
- f) Further and/or alternative relief.

There are four (4) defendants. Only one, that is the 1st defendant, has entered an Appearance to defend and has complied as required by Rule 19(1), 22(1) HIGH COURT RULES, Legal Notice No. 9 of 1980. The other three defendants have not in anyway indicated their desires as regards the result of this action. Therefore this court may safely assume that they will abide by whatever decision is made by this court.

The plaintiff is ELIZABETH LIKELEDI THATHO (born MORERJANE). She is described further as an adult pensioner and widow of NEW EUROPA in MASERU URBAN AREA, in the MASERU district . The 1st Defendant is 'MANNETE FLORENCE NTSANE (born THATHO). She is a female adult

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business woman and widow of MASERU WEST in the MASERU URBAN AREA, in the MASERU district. These parties are closely related. The plaintiff is the 1st defendant's sister-

in-law who is married to her only brother because there are only two children born of MR and MRS ELLIOT BULARA SOLOMON THATHO. Those two children are MPHUNYETSANE, a boy and the late husband of the plaintiff herein and MAHLAPE, 'MANNETE FLORENCE NTSANE, the 1st defendant in this matter.

The subject matter of the dispute between these two parties, is the deceased estate of the late ELLIOT BULARA SOLOMON THATHO and his also late wife 'MAMPHUNYETSANE, 'MAMAHLAPE FRANGENIE THATHO. The question of whether or not these two parties were married in community of property was neither raised or discussed. Since evidence of the plaintiff shows that they lived together on the property in question and the wife remained there after the death of her husband, may be it can be assumed that their marriage was in community of property. Their two children in due course got married and the 1st defendant moved to her matrimonial home. The brother, MPHUNYETSANE THATHO married the plaintiff herein on 5th December 1956, in JOHANNESBURG, in the PROVINCE of TRANSVAAL then, now known as . GAUDENG, in the REPUBLIC OF SOUTH AFRICA. The plaintiff and her

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husband entered into civil marriage, in community of property and of profit and loss as shown in EXHIBIT 1 - copy of their marriage certificate. After the solemnisation of their marriage plaintiff and her husband came to Lesotho, on the 19th December 1956. They lived with plaintiff's-in-laws, on the property in question at MAFETENG here in Lesotho. Plaintiff's husband was employed by the Department of Agriculture, here in MASERU. He therefore came to live in Maseru, while his wife - plaintiff remained resident with her father and mother-in-law in MAFETENG still on the property in dispute.

Later, plaintiff joined her husband in MASERU where they both worked. Plaintiff applied for and was granted the citizenship [EXHIBIT 2]. In 1958, the young couple left Lesotho for SCOTLAND, U.K. where the plaintiff's husband went to study. In 1963, while the couple was in U.K. plaintiff s father-in-law died. Plaintiff returned to LESOTHO to attend his funeral. plaintiff's husband returned in 1965. He returned to their home in MAFETENG where he lived with his mother 'MAMPHUNYETSANE 'MAMAHLAPE FRANGENIE THATHO. He did so as a customary heir and successor of the property of his father ELLIOT, BULARA SOLOMON THATHO.

From 1965 to 1967 while living on the property in dispute with his mother

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who was now a widow, plaintiff's husband carried out some improvements on the property. According to the plaintiff's evidence which is not contradicted or challenged in anyway, MPHUNYETSANE, built a block of flats. These flats were built solely for the purpose of renting them out. The rentals were to be received by the plaintiff's mother-in-law. These rentals were to assist the plaintiff and her husband to meet their obligation to maintain the plaintiff's mother-in-law as the dependant of the deceased estate of her late ELLIOT BULARA SOLOMON THATHO, the estate which this plaintiff's husband had become the customary law heir.

The plaintiff's husband was then employed by The Agricultural College which provided him with the residential accommodation there at the college, in MASERU. Plaintiff moved into the college accommodation with her husband. She also worked here in Maseru as the manageress of SALES HOUSE STORE. It is the plaintiff's evidence that at no stage in their lives did her husband indicate any desire to remove permanently from the site in dispute in MAFETENG. Taking up residences at MASERU and SCOTLAND, in U.K. was purely for the purpose of work and study because convenience demanded that one lives near a place of work and/or study.

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While the plaintiff and her husband lived and worked in MASERU, they nevertheless paid regular visits to MAFETENG to see how plaintiff's mother-in-law was getting on. Despite having left her those flats which she rented out and the income so generated being for her maintenance, plaintiff, whenever she went to visit her mother-in-law, brought her some groceries and other gifts.

plaintiff's husband died in 1977 leaving her with their two children, one boy named Tsosane who was born in 1959, an one girl named LINEO. Tsosane also died in 1996. The THATHO family had a meeting after his funeral and appointed the plaintiff, his mother to take care of the estate on his behalf because at the time TSOSANE was still single and regarded as minor. It is still a Sesotho tradition which regards unmarried male adult as incompetent to administer an estate. Plaintiff was to be assisted in the administration of the deceased estate by one TLANYA THATHO who is an adult male and member of the deceased family. This kind of practice is resorted too regularly, [see MATETE v MATETE CIV/APN/217/90 (unreported)].

TSOSANE is MPHUNYETSANE's customary heir. According to section 11(1) of LAWS OF LEROTHOL PART 1. It is the first born male child of the first wife who becomes his customary heir. Unfortunately, the girl child, does not

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feature anywhere as a customary heir. She is at all times considered only as a dependant on the estate. [See CIV/APN/217/90 MATETE v MATETE and Another] unreported. See also A.M. THOKA v T.R. HOOHLO 1978 DECISIONS OF THE COURT OF APPEAL and THE HIGH COURT at page 325 where the plaintiff was the first born child of the first wife. The brother, the defendant was the first born child of the second wife whose marriage was in fact found to be invalid.

While the plaintiff was acting as an appointed administrator of the deceased's estate on behalf of her son - TSOSANE, he died in 1996 when he was still single. Therefore he had no son of his own to succeed him. His mother, the plaintiff herein was still acting as an appointed administrator of his estate. She therefore claims that she is entitled to succeed her late son. The estate according to her argument, must now be inherited by her as the customary heir. The 1st defendant, recognising and accepting, that under the Sesotho Customary Law she can only be a dependant, she claims to be the testamentary heir of her late parents' estate. It is argued on her behalf that her late mother -'MAMPHUNYETSANE 'MAMAHLAPE, FRANGENIE THATHO, made a will in which she left the estate to the 1st defendant. 'MAMPHUNYETSANE

'MAMAHLAPE remained on the dispute site, after the death of her husband, in terms of section 5 (2)(a) of The LAND (Amendment) ORDER 1992, The relevant portion thereof reads as follow:-

"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 remarriage the land shall not form part of any community of property.

Subsection 8(1) of The Land Act No. 17 of 1979 provides as follows:

8. (1) Subject to subsection (2) and section 11, a grant of title under this Part, if made in respect of land which is not the subject of a registrable title, shall not be transferable and shall, subject to the conditions laid down in the allocation and to the power or revocation, entitle the allottee to use or to use and occupy the land for the purpose stated in the allocation for a period which

- a) in the case of a body corporate or unincorporate may be a limited or indefinite period;
- b) in the case of an individual, may be a limited period or his lifetime but shall not endure beyond his lifetime. [My underlining]
- c)

(2) Notwithstanding subsection (1) where an allottee of land referred therein dies, the chairman of the Land Committee having jurisdiction shall record in his register the passing of the interest in the land of the deceased allottee to –

- a) the first male issue of the deceased allottee (who shall share

with his junior brothers in accordance with the advice of the family) unless the deceased allottee had designated otherwise;

- b) where paragraph (a) does not apply, the person nominated as the heir of the deceased allottee by the surviving members of the deceased allottee's family; or
- c) where paragraph (a) and (b) do not apply within twelve months. from the date of the death of the allottee, the State.

It is argued on behalf of the 1st defendant that her brother, MPHUNYETSANE, plaintiff's husband did not become the heir to his late father ELLIOT BULARA SOLOMON THATHO according to the argument, . The deceased estate of Bulara ELLIOT SOLOMON THATHO according to the argument, remain that of 'MAMPHUNYETSANE. The argument continues to the effect that plaintiff's husband had no ownership rights over ELLIOT BULARA SOLOMON and 'MAMPHUNYETSANE FRANGENIE'S estate. This argument flies in direct conflict with section 11 (1) Laws of Lerotoli Part 1 which specifically provides that the deceased's heir is his first born male child from the first wife. The argument presumes that

where there is no evidence dispute regarding the heir and the family does not therefore meet to resolve such dispute, there is no heir. The meeting of the family to appoint heir or an administrator in place of the heir does not create the heir. Even where the families have met and appointed heir if such appointment ignores the provisions of section

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VI Laws of Lerotholi Part I such appointment is illegal. *Ndlebe v Ndlebe CIV/T/256/78* (unreported). The heir is there by right of birth. Great reliance is placed on the fact that when MPHUNYETSANE himself died, his widow, plaintiff herein was appointed to act as heir in place of her son TSOSANE who was still single and regarded incapable to be the heir.

There is a distinction between the two positions. When Bulara ELLIOT SOLOMON THATHO died, MPHUNYETSANE was a major and married. The question of appointing an administrator of the deceased estate while the rightful heir was still incapacitated never arose. There was no need to appoint MPHUNYETSANE heir to his late father's estate. He was already on heir. He is the first born male child of Bulara and 'Mamphunyetsane THATHO. There is no argument about MPHUNYETSANE's position, as the eldest and the only son of Bulara THATHO.

The law relating to customary heir specifically addresses the question of the heir as the first born son of the 1st wife because the Sesotho customary law recognises polygamy. Bulara and 'Mamphunyetsane had not contracted polygamous marriage. There is no evidence that 'MAMPHUNYETSANE had her own property, separate from that of her husband. She could not inherit what is

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termed her husband's property against her son - MPHUNYETSANE. The interest which passed on to her after the death of her husband, the allottee, does not give her the right of ownership to dispose of the property as she pleased.

The same LAND ACT No. 17 of 1979 at section 8 (1) recognises the customary heir as announced in Part 1 Law of LEROTHOLI. It shows in very clear terms that the interest of the deceased allottee in the land passes first to the first male issue of the deceased allottee. It is an established fact, the B MPHUNYETSANE, plaintiff's husband is the first male issue of the deceased allottee - Bulara THATHO. Bulara THATHO's widow-'MAMPHUNYETSANE was entitled in her lifetime to remain on the land and use the land as her late husband did. She could not bequeath it by will to her daughter contrary to the customary law of succession on that point. Bulara's widow in customary law is one of the dependants of the deceased Bulara's estate. *KHATALA v KHATALA. 1964 COURT OF APPEAL*. In this case the widow of the deceased Mrs Francina Khatala had to hand over to Bolei Khatala, the son of the deceased, the deceased's saving book which had the balance of (£300) three hundred pounds and to claim maintenance from heir Bolei Khatala as the first born male issue of the deceased.

In our present case, the widow of Bulara Thatho had no right to inherit the

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deceased's property and to dispose of it by will to her daughter. May be Bulara could, in terms of the provision of the present LAND ACT, deprive the heir of his right to succeed him. There is no evidence that he had delegated his powers to deprive the customary heir of his right and title to succeed.

In this circumstances plaintiff must succeed in her action. Judgement is granted in favour of the plaintiff in terms of prayers (a) (b) (c) (d) and (e).

K.J. GUNI
JUDGE

For Plaintiff: Mr Mda
For 1st Defendant: Mr Mosae