C of A (CIV) No. 10/07

IN THE COURT OF APPEAL OF LESOTHO

Held in Maseru

In the matter between:

THE EXECUTOR, ESTATE OF The Late Florina Likomo Khakale	APPELLANT

and

MOKOTO KHAKALE	FIRST RESPONDENT
MAKETEKETE KHAKALE	SECOND RESPONDENT
MASTER OF THE HIGH COURT	THIRD RESPONDENT
THE COMMISSIONER OF LANDS	FOURTH RESPONDENT
THE ATTORNEY GENERAL	FIFTH RESPONDENT
MASESHEA THABANA	SIXTH RESPONDENT

CORAM:
RAMODIBEDI, JA
GROSSKOPF, JA
GUNI, JA

Heard : 17 October 2007
Delivered : 24 October 2007

Summary

Interdict – The appellant as executor alleging that the respondents threatened and obstructed him from discharging his responsibility in respect of the deceased's estate – The court a quo holding the view that the first respondent as the heir was entitled to defend his turf – Sections 3(b), 29, 31, 34,

38, 44 and 68 of the Administration of Estates Proclamation No. 19 of 1935 considered – Challenge to a will – Appeal allowed.

JUDGMENT

RAMODIBEDI, JA

[1] A will executed by the late Florina Likomo Khakale ("the deceased") on 19 November 1993 is the central focus of this appeal. In terms of the will, the deceased bequeathed all her movable property to the first respondent. She further bequeathed to the sixth respondent her immovable property situated at plot number 13284-079 Lower Thamae held by her under lease number 13284-079.

[2] It is not disputed that following the deceased's death, and by letters of administration dated 4 December 2001, the Master of the High Court ("the Master") duly appointed the appellant as executor of the deceased's estate. This appointment was made under sections 31 and 34 of the Administration of Estates Proclamation No. 19 of 1935 ("the Proclamation").

[3] In view of their singular importance to this appeal, the sections referred to in the preceding paragraph merit quotation:-

> "*31. (1) The estates of all persons dying either testate or intestate shall be administered and distributed, according to law, under letters of administration granted by the Master in the form "B" in the First Schedule to this Proclamation. Such letters of administration shall be granted to the executors testamentary duly appointed by persons so dying or to such persons as, in default or executors testamentary, are appointed, as in this Proclamation described, executors dative to the persons so dying.*
>
> *(2) Letters of administration shall authorise the executor to administer the estate wherever situate.*
>
> *(3) Letters of administration may be issued to a woman, but shall not, without the consent in writing of her husband, be granted to a woman married in community of property, or to a woman married out of community of property when the marital power of the husband is not excluded.*
>
> *:*
> *:*
>
> *34. (1) Whenever –*
>
> *(a) any person has died without having by any valid will nominated any person to be his executor;*
>
> (b) *any person duly nominated to be the executor of any deceased person has*

predeceased him or refuses or becomes in capacitated to act as executor or within such reasonable time as the Master deems sufficient fails to obtain letters of administration;

the Master shall cause to be published in the Gazette and in such other manner as he thinks fit a notice calling upon the surviving spouse (if any), the heirs, legatees, and creditors of the deceased to attend before him, or, if more expedient, before any District Officer, at a time and place to be specified in that notice, for the purpose of proposing some person or persons to be appointed by the Master or, as the case may be, recommended by that District Officer to the Master for appointment as executor dative.

(2) The Master shall appoint such person as he deems fit and proper to be executor dative of the estate of the deceased and shall grant letters of administration accordingly, unless it appear[s] to him necessary or expedient to postpone the appointment and to publish another such notice as aforesaid."

[4] On 19 January 2002, the appellant duly proceeded to Lower Thamae in Maseru where he read deceased's will to the first and second respondents who are father and son respectively. He says he was accompanied by the police officer commanding Thamae Police Station

due to the hostile reception he had received from the two respondents on a previous visit when he had informed them that he would be coming to read the deceased's will. After reading the will, the appellant duly took an inventory of the property which belonged to the estate. This, it may be observed, was in terms of section 44 of the Proclamation. This section reads:-

> "*44. Every executor shall, as soon as letters of administration have been granted to him, make, subscribe and transmit to the Master, an inventory showing the value of all property belonging to the estate; and if he comes to know thereafter of any property which is not contained in any inventory lodged by him with the Master he shall make, subscribe, and transmit to the Master an additional inventory showing the value thereof and shall find such further security as the Master may direct under section thirty-nine of this Proclamation.*"

[5] The appellant's version as deposed to in paragraph 6 of his founding affidavit, read with paragraph 6 of his replying affidavit, is that on a subsequent date to the reading of the will, he, together with the expert he had

secured for purposes of evaluation tried to have the deceased's house evaluated but were both threatened by the first and second respondents. As a result the premises have not been evaluated to date. The two respondents did not, in point of substance, deny in their opposing affidavits the allegation that they threatened the appellant. It follows that the appellant's version on this issue must be accepted as correct. After all, the appellant is an officer of the court and the court would ordinarily be entitled to rely on the correctness of his sworn averments.

[6] It is thus the appellant's case that he is unable to discharge his responsibilities as executor of the deceased's estate "due to the first and second respondents' hostile and obstructive actions". He adds further that they unlawfully remain in full possession and control of the estate and will not allow him to discharge his responsibilities. They continue to collect rentals from tenants at the rented quarters belonging to the deceased's estate.

[7] In these circumstances, the appellant says that "in

exasperation", and in a bid to interdict the two respondents from obstructing him from discharging his responsibilities as executor, he filed CIV/APN/46/2002 in the High Court against these respondents. That application was, however, dismissed for non-joinder of the present sixth respondent.

[8] Undaunted, the appellant launched another application in the High Court. He sought an order in these terms:-

> "1. *Directing the first and second Respondents to provide the applicant with a list of all creditors and debtors to the estate of the late* ***FLORINA LIKOMO Khakale*** *that might have come to their knowledge while they were in possession of the said estate, such list to include the names of all tenants to the late* ***FLORINA LIKOMO Khakale****'s estate's rented flats at plot number 13284-079, Lower THAMAE;*
>
> 2. *Interdicting the first and second Respondents herein from demanding and or receiving rentals due from tenants to the rented flats on plot number 13284-079 belonging to the estate of the late* ***FLORINA Khakale;***
>
> 3. *Interdicting the first and second Respondents from obstructing and or interfering with the Applicant herein in the discharge of his*

functions as the executor of the estate of the late ***FLORINA Khakale;***

4. Interdicting the fourth respondent from processing and effecting the transfer of plot under 132-079 (sic) (Lower THAMAE) into the names of the first and or the second Respondents;

5. Directing the first and second Respondents herein to pay costs hereof."

[9] After hearing the matter, the High Court dismissed the appellant's application essentially on the ground that the first appellant as the heir was entitled to defend his "turf," evidently by resisting the appellant as alleged and that the will in question was invalid. Regarding the latter point, the court a quo said this:-

> "*I have already said that the Reverend Khakale drew a customary will and the testatrix participated in customary institution of first respondent as heir to the estate of Reverend Khakale. I am consequently not able to say that in terms of the Administration of Estates Proclamation 1935 the testatrix in drawing her will she led European mode of life having abandoned tribal custom."*

Against that decision, the appellant has now appealed

to this Court. It should be noted that the other respondents did not oppose the proceedings both in the court a quo and in this Court.

[10] It is no doubt convenient at this stage to turn to the two respondents' defence in the matter. In outline, the first respondent says that he had "no intention to obstruct anybody but to protect my rights and interests". He stresses that the property in question vests in him as the heir. Furthermore, so he says, the will is invalid because the deceased was "not competent to make a will". I observe at the outset, however, that no particulars are given on why it is alleged that the deceased was not competent to make a will.

[11] The respondents' contention that they may

obstruct the executor from discharging his statutory duties merely because the first respondent is the heir falls to be rejected. Similarly, the court a quo's conclusion that the first respondent was entitled to defend his "turf" is, with respect, both unsound and incorrect in law. It is the type of self-help notion that cannot be countenanced as it is a recipe for chaos and lawlessness. It is contrary to the notion of the rule of law. It is well-established in law that the heir does not acquire dominium in the estate before the executor has discharged his duties under the Proclamation and has accordingly issued a liquidation and distribution account to the satisfaction of the Master. In this regard it is useful to bear in mind what this Court said in **Mokhutle N.O. v MJM (Pty) Ltd and Others 2000-2004 LAC 186** at 188-189, namely:-

> "*Whatever leases appellant purported to enter into with Adams and/or Bus Stop were concluded at a*

> *time before his appointment as executor of the deceased's estate. His only interest in the property was as heir. However, in that capacity he had no right to enter into leases in respect of the property. Although the property vests in an heir on the death of the deceased, the heir does not acquire dominium in it. He merely had a right to claim the property from the executor when the latter is appointed. See Estate Smith v Estate Follett 1942 AD 364 at 367; Commissioner for Inland Revenue v Estate Crewe 1943 AD 656 at 692. Until the estate is wound up after the appointment of an executor and until he receives dominium in the property, an heir has no control over it. Appellant accordingly had no interest in protecting the alleged right of occupation of either Adams or Bus Stop which he had purported to grant to them prior to his appointment as executor and at a time when, as heir, dominium in the property had not yet passed to him".*

[12] The notion that the heir is entitled to all of the deceased's estate is equally absurd, in my view, both in terms of customary law and under the Proclamation. The heir's entitlement in terms of customary law is at least half of the deceased's estate. See **Tšepo Mokatsanyane and Another v Motsekuoa Thekiso and Two Others C of A (CIV) No.23 of 2004.** **Under the Proclamation, the heir merely gets the balance of what is left after the executor has paid the creditors and the other legatees**

what is due to them. In short, the estate vests in the executor until he has discharged his obligations by filing a liquidation and distribution account with the Master. It will thus be seen that the Proclamation embodies the principles of Roman-Dutch law which in turn evolved from the Canon law on this subject as one seems to recall.

[13] In the light of the aforegoing it will be seen, therefore, that what the first respondent seeks to do is in effect to give himself a preference over the creditors to their detriment. This cannot be right in law. Section 68 (1) of the Proclamation enjoins the executor to administer and distribute the estate according to law and the provisions of any valid will relating to that estate. Section 46 specifically enjoins every executor, "so soon as he has entered on the administration of the estate", to publish a notice in the Gazette and in a newspaper calling upon all creditors of the deceased or his/her estate to lodge their claims with that executor.

This is plainly designed to protect the creditors ahead of the heirs. Section 48 (2) is further proof that the creditors are given first preference. It reads as follows:-

> "*If the estate be solvent, the executor shall pay the creditors so soon as funds sufficient for that purpose have been realised out of the estate, but subject always to the provisions of section sixty-eight.*"

[14] Other than his attempt to jump the creditors' queue, It is difficult to appreciate the first respondent's real complaint in the matter. This is so because, as pointed out earlier, the will in question is actually in his favour. The deceased has bequeathed all her movable property to him. The onus is on him to show that he was deprived of more than half of the estate. He has failed to discharge such onus.

[15] In any event, it is only after the appellant has not

only assessed the value of the estate but has also filed a liquidation and distribution account with the Master that it may become apparent whether the first respondent has been deprived of more than half of the estate. The first and second respondents have unlawfully prevented the appellant from discharging his duties in this regard. They have paid no regard to section 29 of the Proclamation which provides as follows:-

> "*29. Every person, not being the executor or curator of the estate of a deceased person duly appointed by the Master, who has in his possession or custody any property belonging to that estate, shall forthwith either deliver that property to the executor or curator duly appointed and authorised to administer the estate, or report the particulars of the property to the Master; and if any such person fail[s] to do so or part[s] with any such property to any person not authorised by the Master by letters of administration or other direction to receive the same, he shall, apart from any other liability he may incur thereby, be liable for all duties, taxes, or fees payable to the Government in respect of that property."*

[16] Before completing this judgment, it is necessary to

point out that the first and second respondents rely on section 3 (b) of the Proclamation. This section reads as follows:-

> "*3. This Proclamation shall not apply -*
>
> *(a) ....*
>
> *(b) to the estates of Africans which shall continue to be administered in accordance with the prevailing African law and custom of the Territory : Provided that such law and custom shall not apply to the estates of Africans who have been shown to the satisfaction of the Master to have abandoned tribal custom and adopted a European mode of life, and who, if married, have married under European law."*

It is then sought to persuade the Court that the deceased was not competent to make a will and that, therefore, the deceased's estate falls to be administered in accordance with customary law. As pointed out in paragraph [10] above, however, no particulars are given for this allegation. The closest

that the first respondent comes to in providing such particulars is in paragraph 16.4 of his answering affidavit. Therein he says the following:-

"*16.4 My grandfather's family mode of life was customary, his estate is not entitled to be administered in terms of the proclamation. I say this for various reasons:*

(a) *After the death of my late grandfather, the estate was never reported to the 3rd respondent. It was administered in accordance with our custom. This is also evidenced by* ***ANNEXURE "A"*** *attached herein.*

(b) *Our family had always observed customary rituals and believes (sic). Even at the funeral of my grandfather they were observed for example, order of who is to put dirt or soil in the grave, we wore morning (sic) cloth and all its rituals. My grandfather's wishes were acknowledged and it was agreed that I am the heir.*

(c) *Such estate had already been dealt with customarily as way back as 1985 and 1987. I had already been allotted same by my grandfather and same was confirmed by the family in the presence of my grandmother.*

(d) *The testatrise (sic) purported to abandon the customary way of life but had been in possession of the said property due to customary law and agreements made by*

the family due to our custom."

It is thus self-evident then that the first respondent does not address the mode of life of the deceased herself. He merely addresses the mode of life of the "family" of the deceased's husband. This, notwithstanding the fact that the deceased's husband admittedly died as long ago as 1985. There is no attempt to address the deceased's mode of life from 1985 until 1993 when she executed the will in question. In any event, it is common cause that the deceased's husband was himself a church minister of the Lesotho Evangelical Church.

[17] In paragraph 13 of his replying affidavit the appellant has deposed to the fact that the constitution of this church expressly forbids customary practices. He is undoubtedly correct. For example Article 232

outlaws polygamy. Article 234 is in these terms:-

"234. Inheritance of one's marriage rights is against the teachings of the church, and whoever does it is regarded as disloyal."

Article 236 outlaws elopement. Similarly, Article 237 outlaws circumcision. Finally, Article 238 provides as follows:-

> *"238.The church expects all its members to live a clean <u>christian life</u>, and to obey God's commandments and the rules of the Church." (Emphasis added.)*

[18] In my view, it is strictly not necessary to express a concluded view on the deceased's mode of life at this juncture. Three observations will suffice:-

(1) The question of the mode of life is one that falls within the purview of the Master. As section 3 (b) of the Proclamation shows, proof of a mode of life as laid down in the section must be made to the satisfaction of the

Master. It would be idle to suggest that the Master was not so satisfied in this case. Once again, she is an officer of the court and as such the court is entitled to expect that she will act with a full sense of responsibility.

(2) If the respondents seriously intended to challenge the validity of the will it was open to them to launch court proceedings in that regard or to raise the issue with the Master. In this regard Section 38 of the Proclamation may provide useful guidance. It reads:-

"38. (1) Letters of administration granted to any person as executor testamentary may at all times be revoked and annulled -

(a) by the Court, on proof to its satisfaction that the will, in respect of which those letters had been granted to that person, is null or has been revoked either wholly or in so far as it relates to the nomination of that executor, or that such person is not legally qualified for the appointment;

(b) by the Master, upon production to him of a will of later date than the will in respect of which those letters were

> *granted, if application be made by an executor nominated in that later will, who is then capable, and qualified, and consents so to act.*

(2) Letters of administration granted to any person as executor dative may at all times be revoked and annulled by the Master on production to him of any valid will by which any other person who is then legally capable, and qualified, and consents to act as executor has been legally nominated testamentary executor to the estate which the executor dative has been appointed to administer:

> *Provided that if the non-production of the will prior to letters of administration having been granted to the executor dative has been owing to the fault or negligence of the person therein nominated executor testamentary, the last mentioned executor shall be personally liable and may be compelled, at the instance of the Master or any person interested, to make good to the estate all expenses which have been incurred in respect of and with reference to the appointment of the executor dative."*

[19] It should further be noted that subsection 68 (5) provides that every executor's account shall lie open for inspection at the office of the Master. More importantly, subsection 68 (8) provides that any person interested in the estate may lodge with the Master in

writing any objection to the executor's account giving the reasons for such an objection. Subsection 68 (9) empowers the Master to direct the executor to amend the account, giving him directions, if the Master is of the opinion that any such objection ought to be sustained. Once again, any person aggrieved by the Master's direction may apply to the High Court for an order setting aside the direction. It is plain, therefore, that the first and second respondents are not without a remedy after all.

[20] As alluded to in paragraph [18] above, the third observation which requires to be made is this. In the light of what is stated in paragraph [4] above, the respondents must be taken to have been aware of the will in question at least on 19 January 2002 when it was read to them. It is common cause that they have done nothing to challenge the will, a period now spanning more than five years. In these circumstances the conclusion is inescapable that they are simply being obtrusive. As I venture to say, they have no colour of right to prevent the appellant from discharging his statutory duties under the Proclamation.

[21] The result is that the appeal is upheld with costs.

Such costs to be paid only by the first and second respondents jointly and severally, the one paying the other to be absolved. The judgment of the court a quo is set aside and replaced with the following order:-

> "**The application is granted as prayed with costs. Such costs to be paid only by the first and second respondents jointly and severally, the one paying the other to be absolved."**

M M RAMODIBEDI ____________________

Justice of Appeal

I agree: ____________________

F H GROSSKOPF

Justice of Appeal

I agree: ____________________

K J GUNI

Justice of Appeal

For Appellant: Adv E.T. Potsane
For First and Second Respondents: Adv R. Thoahlane
For Third to Sixth Respondents : No Appearance