

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) NO.31/2013

In the matter between

‘MAPHEKO PHEKO

1ST APPELLANT

TSIKANE PHEKO

2ND APPELLANT

ESTATE MOTHETHE PHEKO

3RD APPELLANT

TŠEPO MOTSAMAI

4TH APPELLANT

And

‘MATOKELO PHEKO

RESPONDENT

CORAM: HOWIE JA
 FARLAM JA
 THRING JA

HEARD: 8 OCTOBER 2013

DELIVERED: 18 OCTOBER 2013

SUMMARY

Customary marriage – divorce – subsequent claims by wife in the High Court – exception – successful in respect of some prayers in declaration – where unsuccessful, High Court granting other prayers without defendants having pleaded and without evidence from either side – High Court also remitting certain issues to be determined by a Central Court – orders for relief and remittal wrongly granted.

JUDGMENT

HOWIE JA

[1] A Local Court ordered dissolution of the customary marriage between the respondent and her husband Mothethe Pheko, at his instance. The respondent sought to appeal to the Central Court but her husband died before the appeal could be heard.

[2] The respondent (to whom I shall refer as the plaintiff) subsequently brought an action in the High Court citing as first to fourth defendants respectively, the deceased's estate, his purported heir and two other members of his family. (There were also two nominal defendants to whom it is unnecessary to refer.)

[3] In the declaration the respondent sought relief in terms of the following prayers:-

1. For an order directing the second to fourth defendants to release the death certificate, mortuary letter, post mortem report, police report and passport of the deceased to the plaintiff to process the death benefits “at the insurance”.
2. For an interdict restraining the same defendants from disposing, alienating or selling the property of the joint estate of the deceased and the plaintiff.
3. For an order “appointing” the executor of the joint estate to effect its division.
4. For division of the joint estate.
5. For costs in the event of opposition.

[4] The defendants excepted to the claim as lacking averments to sustain a cause of action. They did not plead over. The grounds of exception were that the dispute was one pending within the jurisdiction of the Central and Local Courts, that it was not properly before the High Court without the latter’s leave and that division of the joint estate is not a remedy known to customary law.

[5] The matter came before Mahase J. The learned Judge concluded that issues pertaining to the joint estate were not competently before the High Court without its leave having been sought but that the court did have jurisdiction to grant prayers 1 and 2. The Judge therefore dismissed prayers 3 and 4 and to that extent the exception succeeded. However, she did not dismiss the exception in regard to prayers 1 and 2 but granted them (adding some qualifications which are not relevant now). The defendants, of course, had not yet pleaded and the matter had not yet proceeded to trial.

[6] The Judge also made an order that the following issues, not raised by the exception, be “remitted” to the Central Court for it to determine:

- (a) Whether the death of the deceased put an end to the proceedings in that court “thereby restoring the status quo ante”; and
- (b) Whether anyone could have “a legal qualification” to alienate any of the properties of the deceased.

[7] The defendants have appealed against the grant of prayers 1 and 2 and the so-called remittal. There is no cross-appeal against the dismissal of prayers 3 and 4.

[8] Plainly, prayers 1 and 2 could not have been granted without the defendants having pleaded and the matter having gone to trial.

[9] The Judge having found that the issues which were before the Central Court or had been before the Local Court had not properly been brought before the High Court, there was no basis on which the latter could remit them or give directions for their determination by the Central Court.

[10] It follows that the appeal must succeed. Counsel for the defendants fairly acknowledged that the dispute being essentially a family one, there was good reason to make no order as to the costs of appeal. I agree. (The Judge made no costs order in the proceedings a quo.)

[11] This Court's order is as follows:-

1. The appeal is allowed.
2. The orders contained in paragraphs 1,2 and 3 of the order of the High Court dated 16 May 2013 are set aside.

3. The matter is referred back to the High Court for further pleadings and eventual trial.

C.T. HOWIE
JUSTICE OF APPEAL

I agree

I.G. FARLAM
JUSTICE OF APPEAL

I agree

W.G.G. THRING
JUSTICE OF APPEAL

For the Appellants : K.K. Mohau KC

For the Respondent : K.J. Nthontho