IN THE APPEAL COURT OF LESOTHO

C of A (CIV) NO 15/2016

CIV/APN/31/2014

HELD AT MASERU

In the matter between:

'MAKHOMO 'MAMOSALA RAMATLAPENG
(nee JESSIE) **APPELLANT**

v

MOHAPI JESSIE **RESPONDENT**

CORAM: CLEAVER, AJA
CHINHENGO, AJA
SAKAONE AJA

HEARD: 17 October 2016
DELIVERED: 28 October 2016

SUMMARY

*Inheritance- whether a married woman has right, during subsistence of her marriage and after the death of her parents to return and live in the natal home and be maintained by a brother who has inherited deceased parents' home – whether such woman is a dependant of the brother- sharing of deceased parents' property relates only to movable property and not land which is governed by the Land Act- practice of '**ngala**' does not confer a legal right in such circumstances - on facts married sister not dependant and not entitled to return and live in natal home as of right.*

JUDGMENT

CHINHENGO, AJA

[1] The issue for decision in this appeal is whether a male heir who has inherited his deceased parents' home has a duty to maintain his sister who has become estranged from her husband.

[2] The appellant was the first-born child of the late Mr and Mrs Jessie. Mr and Mrs Jessie had three children. The second born child is the respondent and the third born is 'Maneo. She is married and lives with her husband in rented accommodation in Maseru. Mr Jessie died on 24 February 2003 and Mrs Jessie on 19 April 2010.

[3] The appellant married Keaboka Ramatlapeng in 1992. She was already married and living with her husband when the parents died. She has three sons out of her marriage.

[4] After the last of the parents died in 2010 the Jessie family council appointed the respondent as heir to the estate of the parents. There was no demur from the other siblings. The respondent is also married and has two children. He has been living in the late parents' home since 2013. He has another house in Masowe.

[5] Around 2013 the appellant was living alone in rented and sparsely furnished accommodation in Ladybrand because she had had problems in her

marriage. She has not been forthcoming about her marital problems to the respondent or his wife. To date the respondent has no knowledge about them. While she stayed in Ladybrand the respondent occasionally visited her just to check on her welfare. In February 2013 he and his wife took the appellant into their house, the same that the respondent inherited from his parents. They intended her stay to be for a short time. By August 2013 the respondent had had so much trouble living with the respondent that he called in some of their relations to intercede and help to resolve the problem. First he invited their uncle Rangoane Jimmy Jessie to help. He says the appellant refused to be involved the family meeting. He then arranged a second meeting and invited another uncle Ntate Thoahlane to help them solve the problem. Again the appellant refused to be part of the discussion. The appellant admits that a meeting was called on 16 August 2013 and Ntate Thoahlane was present. She however says that she did not attend that meeting because it had been called without consulting her, and that in any case, she had other personal engagements on that day.

[6] The appellant gives other details of what she observed on the day that the meeting was to be held. She noticed some "village boys" drinking beer at the premises while the respondent was making a *"tyre cable"*. These *"village boys"* returned the following day purportedly to drink beer again. On this day, 17 August 2013, the respondent asked her to go and see a doctor because he believed that she was sick. She refused because, as she said, she was not sick. Upon her refusal the respondent and the "village boys" tied her up with the "tyre cable", bundled her into a motor vehicle and took her to a doctor at T'sepong Memorial Hospital. She says that the respondent was alleging that she was mentally unsound. The doctor examined her and was satisfied that she was mentally stable. The respondent was however sceptical about the doctor's evaluation and so he took her to Mohlomi Hospital for another examination. The doctor at Mohlomi Hospital referred her to a social worker and advised her to take a rest at her sister's home.

[7] The respondent does not accept the appellant's version of the events in its entirety. He says that after

the respondent refused to participate in the meeting with uncle Thoahlane, the family agreed that it was necessary to take her for mental examination. Some men who were nearby helped him to force her into a car and he took her to the hospital. He explained to her that he was taking her to a doctor because her behaviour around the house showed that she was no longer mentally sound. The doctor at T'sepong Memorial Hospital noted that the appellant had was "a known psychiatric patient who had been out of treatment for a year now" and that, although she was well oriented, she suffered from stress. These observations appear on Annexures MR1 and MR2 attached to the appellant's founding affidavit. The respondent says that the doctor at T'sepong Memorial Hospital was of the opinion that the appellant should be referred to Mohlomi Hospital for psychiatric observation. It was upon referral that he took the appellant for the second examination. The doctor at Mohlomi Hospital recommended that the appellant should continue to receive psychotherapy treatment and counselling.

[8] The factual disputes as what exactly happened at home before the appellant was taken to hospital and what the doctors said or recommended are not material to a consideration of this appeal. The important facts, which are not in dispute, are that the respondent experienced considerable difficulties in living with the appellant under the same roof. He invited relatives in an endeavour to resolve the problems and that did not bear fruit. He was constrained to force the appellant to be examined by medical practitioners who confirmed that the appellant had a psychiatric problem, was suffering from stress and required counselling. The fact that there were problems between the appellant and the respondent is also not in dispute. The appellant sets out in his answering affidavit the nature of the problems at paragraphs 6.7 and 6.8 which the appellant did not dispute:

> *"6.8 Living under one roof with the applicant and her son made life for my family unbearable. Applicant sat in the house from morning to night doing nothing but to cook meals for herself and her son only and to eat in the presence of my 5-year old child telling her that my spouse would come and feed my child when she comes back from work.*

> *6.8. Exchange of bad language emerged when applicant would watch one of the television sets in our house with her son, who despite being of school going age and not in school, would be watching another in yet another room. My spouse and I found this unacceptable. Reprimand to applicant's son led to the making of utterances by the applicant such as "… this is my parents' house" when putting to her son that he may not be reprimanded by either myself of my spouse."*

[9] It is also not in dispute that after the hospital visits the appellant went to her younger sister for a day or so and that when she went back to the respondent house, she was denied entry and has since not been permitted to live at the deceased parents' home.

[10] This is the background against which the appellant instituted proceedings in the High Court by way of urgent notice of motion seeking the following relief that the respondent –

(a) be interdicted from denying her access to or entry and accommodation in her maiden home, being the the deceased parents' house;

(b) account "for all monies collected as rentals pertaining to the estate of the late Teboho and Mamohapi Jessie and make sure that he assists and/or takes care of his other siblings in need";

(c) pays all the monies should the account reflect a shortfall.

In the alternative she prayed that the respondent be evicted from the deceased parents' house to stay in his house at Masowe or that he be ordered to lease a house for the appellant.

[11] The High Court dismissed her application 6 May 2014. She did not immediately lodge an appeal. This she did in April 2016. She accordingly applied for condonation of the late filing and noting of the appeal. Although the respondent delivered a notice opposing the condonation application, he did not persist with it. His counsel did not oppose the granting of condonation at the commencement of the hearing. Condonation was accordingly granted by consent.

[12] The appellant appealed on three grounds: that "the judge erred in holding that the respondent had no duty to share with the appellant but only with his junior brothers if they were in existence;" in finding that she is not the respondent's dependant even though it is established that she has marital problems and "has nowhere to go and was therefore destitute", and in finding that she has a place to live when it was established that she was staying alone in rented accommodation in Ladybrand when the respondent took her into his house. At the hearing of the appeal the appellant's counsel said that they were not pursuing the relief set out in paragraph (c) of the notice of motion, which was that the respondent should account account for rental income deriving from the estate. By necessary implication they also abandoned prayer (d) requiring the respondent to pay monies reflected as a shortfall in the account. Counsel however said that the only relief that the appellant was now seeking is that set out in paragraph (b) of the notice of motion, namely that the respondent be interdicted from denying her access entry and accommodation in the house. It should be noted that the appellant did not identify what property

she contended should be shared or should have been shared. A reading of s 14 of the Laws of Lerotholi and s 8 of the Land Act shows that sharing relates only to movable property and not to land. *Adv. Thabane* correctly submitted that only movable property may be shared because the provisions of the Land Act govern land. In this connection therefore no issue of sharing the house arises and as such the first ground of appeal cannot be sustained. It was in any event ill-formulated regard being had to the relief that the appellant now wants.

[13] The appellant is not correct that it was established as a matter of evidence that she had nowhere to go or that she was destitute. To the contrary at paragraph [14] of the judgment, the judge found as a fact that since was legally married and her husband has the duty to take care of her, she has her own matrimonial home to live in. The fact that she was taken from the rented house Ladybrand was not regarded by the court as any proof that she had no place of residence.

[14] In dismissing the appellant's application the judge rejected the submission made on her behalf that the respondent, as heir was obliged at law to support her and that he "cannot chase the applicant out of their parental home because she is one of the deceased's dependants and him being the heir, has the obligation under custom to look after (her)." The judge accepted the respondent's contention that he had no such duty.

[15] The customary law on this subject appears to fairly clear. The judge states that it is trite that an heir has the right to take charge and acquire property in the deceased estate and that property becomes his own and may merge it with other property he already owns. In this regard he refers to **WCM Maqutu**, *Contemporary Family Law: The Lesotho Position* at p. 168-169 where it is stated-

> *"The first born son of the first 'house' is the universal heir and head of the family and all unallocated property vested in him."*

[16] The respondent was the only male child and so, after the family council nominated him as heir, he

inherited his parents' estate and the inherited property, including the house, became his. Section 14 of the Laws of Lerotholi quoted by **De Villiers ACJ** in **David Maoka Maseela v Enea E Maseela** LLR 1971-1973, 132 at 133 E- 134 B supports this position. Section 14 goes on to say that the heir at customary law who inherits the property is obliged to use it for the maintenance of the dependants of the deceased. He is also obliged to share the property with his junior bothers and, as held in ***Maseela*'s** case, the heir shares the property as he thinks fit. There is no requirement for him to share it equally with his brothers. In **Lefulebe Majoro v Motlalepula Majoro & 2 Others** LC/APN/115/2014 **SAKOANE AJ** observed at paragraphs [37] and [38] of the judgment that although pursuant to enactment of the Land (Amendment) Order No. 6. of 1992 women are now entitled to inherit land, once the land has been inherited in terms of s 8 of the Land Act 1979, only the widow and minor children of the deceased allottee are entitled to remain in occupation of the land. In that case the respondent's aunt, 32 years old at the time of her parents' death who was claiming that she was entitled to remain on her deceased parents' site, since inherited

by her brother and on his death passed on to her nephew, the respondent therein, was not entitled to sue the nephew because she was not a minor and therefore did not have any right to the deceased parents' site.

[17] The respondent's inheritance of the parties' deceased parents' house is not in issue here. What is in issue is whether the appellant has any right to the house and whether the respondent has any duty to maintain her. From what I have said in the immediately preceding paragraphs the right to be maintained by the heir depends on whether the person seeking to be maintained is dependant or a minor. The appellant is a married woman and therefore an emancipated adult. It is her husband who has the responsibility to maintain her. The learned judge a quo made this clear in paragraph [14] of the judgment where he said-

> *"… I am of the view that the respondent has done what he could to help the applicant but it is the applicant that has proved to be uncooperative. At any rate, what is important is the fact that applicant is still legally married as there has never been any decree of divorce between her and her and her spouse. That being the case, she is legally a major and emancipated and it is her husband that bears the responsibility to*

> *take care of her and she still has a place to stay at, which is her matrimonial home."*

[18] The appellant seems to me to have misconceived the customary practice of *ngala* as conferring a right. *Ngala* custom is a practice whereby a married goes to her maiden home to seek solace from ill treatment by her husband. She is then accommodated at her parents' home in the expectation that the husband would follow her there and be reconciled over their differences. It is not divorce but merely a custom that enables her to obtain solace and protection pending return to her husband. See **Masilonyane v Masilonyane & Others** CIV/APN/24/2004 and **Rex v Tseliso Makau** CRI/T/36/03. In the present case when the respondent took the appellant into his home that was in the spirit of *ngala* custom and the appellant was not entitled to construe what he had done as conferring her a right to remain in the natal home indefinitely and as of right. The submission at paragraph 13.1 of the appellant's heads of argument that the appellant has a duty to take care of his female siblings during their time of refuge at

the natal home cannot be stretched to mean, as thereat implied, that the the female siblings have a right to live in the home.

[19] The issue in this appeal is whether the respondent is legally obliged to maintain the appellant and to take him into his house in the circumstances. The answer is that the respondent has no such obligation: the appellant is a married woman and the duty to support and maintain her is upon her husband. The Deserted Wives and Children Proclamation, 1959, as amended by Order No 29 of 1971 and Act No. 1 of 1977, makes it an offence for a person, such as the appellant's husband, to neglect to maintain her. This emphasises the point that the husband has the primary obligation to look after the appellant. The decision of the High Court cannot be impugned on any grounds. The appeal must therefore be dismissed.

[20] I would like, in passing, to observe that counsel did not at all deal with a point, which on its own could have disposed of this appeal. The relief sought by the appellant in her notice of motion in paragraph (b)

thereof was an interdict. She prayed that the respondent be "interdicted forthwith from denying applicant access or entry and accommodation in her maiden home, being the parties deceased parents' matrimonial home". In order to obtain the final interdict the appellant would have had to establish a clear right, an injury actually committed or reasonably apprehended and the absence of similar protection by any other remedy. See **Setlogelo v Setlogelo** 1914 AD 221. On the facts of this case it was hardly possible for her to establish these requirements. Her case would have fallen on this basis.

[21] The respondent did not pray for costs. It would not have been prudent to do so in this case. Accordingly I make no order of costs.

In the result the appeal is dismissed with no order as to costs.

_____

M. H. CHINHENGO

ACTING JUSTICE OF APPEAL

I agree

_____

R. B. CLEAVER

ACTING JUSTICE OF APPEAL

I agree

_____

P. SAKOANE

ACTING JUSTICE OF APPEAL

For appellant: Miss T.A.Lesaoana

For respondent: Misss N.G. Thabane