

IN THE HIGH COURT OF LESOTHO

In the matter between

MPUKU MASEELA

Applicant

and

**MINISTER OF HOME AFFAIRS
COMMISSIONER OF LANDS
LUCAS MOTHABI MASEELA
MOTHEBESOANE RAMABELE
ATTORNEY-GENERAL**

**1st Respondent
2nd Respondent
3rd Respondent
4th Respondent
5th Respondent**

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi
on the 25th day of September 1997

In this matter the Applicant seeks an order on Notice of Motion in the following terms:

- “(a) Declaring the transfer of site No 12284-314 from 3rd Respondent to 4th Respondent as null and void.
- (b) Directing that any further transfer of site No 12284-314 should take into account the interests of the Applicant.

- © Directing 4th Respondent to pay costs in the event of opposing this Application.
- (d) Granting Applicant any further and/or alternative relief.”

The application is opposed by Third and Fourth Respondents only.

The Applicant and 3rd Respondent are daughter and father respectively. The following scenario is indeed common cause: The Applicant is the eldest daughter of 3rd Respondent and the late Dalida Mampuku Maseela. She is a spinster. There is no male issue born of the said marriage between 3rd Respondent and the late Dalida Mampuku Maseela. Hence the Applicant claims to be the heir to 3rd Respondent. This indeed is the crux of her case.

I imagine that the litigants have always lived happily for years as families normally do. At least there is no evidence to the contrary. Then something transpired which was to shake the family to its roots hence the instant application - the father namely the 3rd Respondent sold the family site No 12284-314 to the 4th Respondent for ten thousand Maloti (M10,000-00). The daughter namely Applicant has seen red and has accordingly objected to this sale on the ground that she is the heir to 3rd Respondent and that she has to be consulted in the sale of the site.

The 3rd Respondent on the other hand submits that he is the registered owner of the site in question and indeed this is common cause. For my part I observe that Annexure “LMM1” is the lease in respect of the site in dispute. It bears the names of the 3rd Respondent. Accordingly I am satisfied that the 3rd Respondent is indeed the Registered owner of the site in question.

It is Applicant's case that she is presently living on the disputed site together with her own children and those of her sister. There are two tin shacks and a cafe run by 4th Respondent on the site. She occupies one of the tin shacks.

Applicant's whole complaint is best summarised in paragraph 13 of her founding affidavit in the following words:-

"13.

It is my humbly (sic) submission that any sale or transfer of the said site which is my only hope of a home for me and my children and those of my younger sister is illegal if it does not consider my interests as heir who has to be consulted first."

On the other hand the 3rd Respondent's answer to this claim is best captured in paragraphs 5 and 6 of his answering affidavit in the following terms:

"5.

.....It is my respectful submission that the Applicant had no right in law to stop me nor to interfere with me in any manner whatsoever as she does not have any title to the said site and therefore I am entitled to sell the property to which I have a lawful title.

6.

Ad para 13 and 14

I humbly wish to state that the property in question belongs to me and I am therefore the rightful owner, and as such there was no obligation upon me to consult the Applicant concerning the sale and transfer of

the said site as she rightfully points out that she is my child. I categorily deny that the Applicant is entitled to be consulted first in this matter, and she is accordingly placed to the proof thereof.

The Applicant is an emancipated woman who is working for herself at Lesotho Sun Hotel to support her children, while I am an old man who needs support as I am no longer working and yet need to survive.”

Significantly the Applicant has not denied the latter allegation in her replying affidavit namely that she is an emancipated woman who is working for herself at Lesotho Sun Hotel to support her children while the 3rd Respondent is an old man who is not working and is in need of support in order to survive. Accordingly I shall proceed on the basis of the correctness of this allegation. What this then means is that the Applicant is not a dependant of 3rd Respondent nor are her children and those of her sister. After all she is working and obviously she is not in need of support. There is therefore no legal obligation for 3rd Respondent to provide accommodation or a home for Applicant and the children.

I am satisfied from the undisputed facts of this case that the 3rd Respondent on the other hand is in need of support. I consider therefore that he is perfectly entitled to sell his own property in order to “survive.”

I must confess that I have found Applicant’s case novel indeed. There can be no doubt that our society is patrilineal and as such it does not recognise a woman as heir in her father’s estate. In this regard it is always necessary to bear in mind Section 11 of the Laws of Lerotholi which provides that:

“11. (1) The heir in Basutoland shall be the first male child of the first married wife, and if there is no male in the first house then the first born male child of the next wife married in succession shall be the heir.

(2) If there is no male issue in any house the senior widow shall be the heir, but according to the custom she is expected to consult the relatives of her deceased husband who are her proper advisers.”

One has sympathy with the plight of unmarried women as far as succession is concerned in this country. There is certainly need for legislation in the matter conferring inheritance rights on women. A law that discriminates against women will become increasingly difficult to justify with the passage of time. Regrettably, until that has happened, the courts must continue to apply the law as it stands namely that only male issues are entitled to inherit from their fathers within the terms of Section 11 of the Laws of Lerotholi.

Indeed W.C.M. Maqutu (as he then was) puts the issue succinctly in the following terms in his book Contemporary Family Law of Lesotho at p 182:

“Single women under indigenous law cannot inherit from their fathers.” I agree.

I should mention that the position of widows with regard to land has now been partly answered by the Land Act 1979 as amended by Section 5(2) of the Land (Amendment) Order 1992 in the following terms:-

- “(2) 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 re-marriage the land shall not form part of any community property and, where a widow re-marries, on the widow’s death, title shall pass to the person referred to in paragraph (c);
 - (b) where there is no widow - a person designated by the deceased allottee;
 - © where paragraphs (a) and (b) do not apply - a person nominated as the heir of the deceased allottee by the surviving members of the deceased allottee’s family; or
 - (d) in any other case - the State,
And the Chairman of the relevant Allocating Authority shall record in his register the passing of that title.”

It is interesting to note that even though the widow is given “the same rights in relation to the land as her deceased husband” she loses such rights upon remarriage. Her inheritance rights are thus limited in nature.

In fairness to Mr. Fosa for the Applicant, admittedly pressed by myself; he did not feel able to assert that Applicant is the heir in terms of the law. He could not refer me to any authorities nor could my own researches reveal any. In the circumstances he properly conceded that the Applicant has no valid claim as heir under custom.

Mr. Fosa was then constrained to argue that the Applicant had a valid claim under common law. In support thereof he cited the following passage from W.C.M.

Maqutu's book on Contemporary Family Law of Lesotho at page 182:-

“Under common law both male and female children are entitled to be heirs ad intestatum. Although males remain heads of families, this does not happen at the expense of unmarried women.”

The problem with this argument, as I see it, is that Applicant obviously did not base her claim under common law. On the contrary she states in paragraph 1 of her founding affidavit that she is “a Mosotho spinster of Thibella Maseru.” Nowhere does she show that she has abandoned a customary mode of life and has adopted the European way of living. The onus was clearly on her to establish these facts. She has failed in that regard.

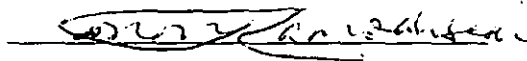
I find that the Applicant who is merely a daughter and not the wife of the registered owner of the disputed site is in a worse position than the widow was in Choolo v Choolo 1976 LLR 250 in which Mofokeng J (as he then was) held at p 256 thereof that a widow possesses no right in law to transfer her late husband's site and thereby depriving the rightful heir. The latter was held to be the first male born of the marriage in terms of Section 11 of the Laws of Lerotholi.

Mr. Fosa has then argued that the Applicant is entitled to maintenance and therefore accommodation from the 3rd Respondent. I do not agree. I think the true position is clearly the other way round. This is so because, as earlier stated, the Applicant is admittedly emancipated and she is working and earning a salary while the 3rd Respondent is in his own words undeniably “an old man who needs support as I am no longer working and yet need to survive.”

In view of the conclusion at which I have arrived in this matter it is strictly unnecessary for me to determine the allegation whether the 3rd Respondent had a second wife or whether the latter is merely a concubine. I am of the prima facie view however that the Applicant should have anticipated a dispute of fact in this respect. Accordingly she took a risk by proceeding by way of a Notice of Motion.

In all the circumstances of the case therefore I have come to the conclusion that the Applicant has failed to make out a case for the relief sought in the Notice of Motion.

Accordingly the application is dismissed with costs.



M.M. Ramodibedi

JUDGE

25th September 1997

For Applicant : Mr. Fosa

**For 3rd and 4th
Respondents : Mr. Sethathi**