IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/APN/166/2008**

In the matter between

THABO MOTSAMAI	Applicant
And	
'MANEO MOTSAMAI	1ST Respondent
TEBOHO THABANE	2nd Respondent
MASERU CITY COUNCIL	3rd Respondent
COMISSIONER OF LANDS	4th Respondent
REGISTRAR OF DEEDS	5th Respondent
ATTORNEY GENERAL	6th Respondent

JUDGEMENT

Delivered by the Hon. Mr. Justice T. E. Monapathi

on 23rd Day of February 2011

1. This is an application that was sought on a notice of motion and an interim order was granted. This application is vehemently opposed and after pleadings were closed, the

matter was then ripe for hearing. Then parties filed their Heads of Arguments.

2. In this application the Applicant is asking for a declaratory order and interdict on the registration of a certain property situated at Maseru East described as Plot No. 13281-325. It is common cause that the Applicant is the first born son of the late Dr. Leoatle Motsamai in the deceased's first marriage. There is no male born in the second marriage of the late Dr. Motsamai, but only a girl. Before he died the deceased married the First Respondent by civil rites. He had built a house in Maseru East on the said plot.

3. It is also common cause that the deceased Dr Motsamai, died intestate and that he only married the First Respondent after he had divorced the Applicant's

mother. The issue for determination by this court is, who between the Applicant and the First Respondent, is the lawful heir to the estate of the late Dr. Motsamai.

4. In determining who should be the lawful heir, the court should look at which law is applicable to the present matter, namely. Whether it is the European Law or the Customary Law. Factors that can help the court in determining which law to apply are inter alia, whether the parties to a marriage have abandoned the customary mode of life in favour of the European mode of life. The so-called mode of life test. There is a plethora of authorities to assist the court in this regard; see ***Khatala v Khatala 1963 HCTLR 92 Mokorosi v Mokorosi 1967-20 HCTLR 1***, and ***Hoohlo v Hoohlo 1967-70 HCTLR 318***. See also section 3 (b) of ***Administration of Estates Proclamations 1935;*** which reads in part:

> "This Proclamation shall not apply to 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 estates of Africans who have shown to the satisfaction of the master to have abandoned trial custom and adopted a European Custom and adopted a European mode of life and who if married have married under European Law (my underlining)."

In further determining which law should apply the court should also have recourse to the provisions of the ***Land (Amendment) Order, 1992*** in particular section 5 (2) which categorically states that where a widow has married her deceased husband in community of property she has the same land rights as that of her late husband.

5. The law in this regard is further enunciated and quoted with approval in ***Lithebe Makhutla and another v 'Mamokhali Makhutla (C of A (CIV) No. 7 of 2002)*** wherein the said order provides, in section 5 (2) (a) that:

> "where 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 of property and where a widow re-marries, on the widow's death, title shall pass to the person referred to in paragraph (c) (my emphasis)."

At this juncture it is appropriate to turn to the arguments presented by both counsel in this case, namely, Mr Khauoe for the Applicant and Mr Thoso and Ms Thabane for the Respondents.

Counsel for the Applicant argues in his heads of argument that the law of inheritance to be applied *un casu* is the Basotho customary law of inheritance. He argues further that this court in deciding this case, should follow the laws of Lerotholi, which is the p2… of Basotho customary law. This law says the heir is the first male child of the first married wife.

Counsel for the Applicant also vehemently argues that the decision that the First Respondent has the same right as the late Dr. Motsamai, which is based on part II of the ***Land Act 1979*** as amended is bad in law. He argues that in Lesotho inheritance is governed by law of Inheritance Act No. 26 of 1873 or Basotho Customary Law. He therefore argues that the right of inheritance is governed by customary law and as such the Applicant is the heir.

Counsel for the First and Second Respondents for their part argue in their heads that the First Respondent and her late husband are not subject of customary law. This submission is based on the fact that they argues, they have both abandoned the customary mode of life in favour of the European way of life. That the First Respondent was married to her late husband in community of property in a civil marriage.

Their submission is that the Applicant's argument in seeking p3... to Basotho customary law, is bad in law because he raises customary law issues where such law does not feature and they argue this court has no option but to dismiss this application.

In my view, this court has no option but be inclined to be persuaded by the argument for the Respondents. It is now

a well-established rule of our law that where a widow was married to her deceased husband in a civil marriage and in community of property, she has the same land rights as those of her late husband.

This court is indeed fortified in its view in agreeing with counsel for the Second Respondent's submission that the Applicant has no right thereto by the general rule initiated in the ***Land (amendment) Order, 1992*** section 5 (2) wherein it lays down the general rule that where a widow was married to he deceased husband by civil rites and in community of property such a widow has the same land rights that her late husband had.

Of course this court is mindful of the fact that there are two exceptions to this general rule namely; where the widow re-married, that land will not constitute part of the

joint estate of that marriage and where the widow dies, her title will pass to a different person. None of these exceptions exist *in casu* as will be re iterated later on.

In my view, therefore Applicant's Counsel's argument will not see light of day. The above arguments by Applicants are of no help in the instant case.

Further, Counsel for the Applicant cites that case of ***Pillay vs Krishma 1946 AD 946*** (and rightly so in my view), wherein the principle that who alleged must prove. Indeed, I cannot agree with him more. This is a trite principle of law that has evolved over may years. At page 951, Davis A.J.A Succintly puts it thus, (to which I whole heartedly agree);

> "It consequently becomes necessary at the outset to deal with the back rules which govern the incidence of the burden of proof-the *onus*

> *probandi* – for upon them the decision of this case must ultimately rest. And it should be noted immediately that this is a matter of substantive law and not a question of evidence". The learned Judge goes on; "The first principle in regard to the burden of proof is thus stated in *Corpus Junis: Semper necessitas probandi incumbit ili qui agit (D.22.3.2.1).* If one person claims something from another in a court of law, then he has to satisfy the court that he is entitled to it."

In my respectful view, to the Counsel for the Applicant he has failed dismally to prove that the Applicant is entitled to the application sought.

Having stated the law on this regard then, it is appropriate at this juncture to apply the law to the situation on case.

6. This court is fortified and has no doubt in its mind that the First Respondent is entitled to her late husband's right to land and the Applicant has no right thereto. There are of course exceptions to the position of the law under the above section. These are; where the widow re-married in which case the land shall not form part of any community of property and also where the widow dies, to my mind theses exceptions do not exist in case therefore rendering this section in applicable.

7. To Applicant's Counsel's argument that the appropriate law to govern the estate of the deceased is the Basotho Customary Law, where the deceased died intestate and was married by civil rites, this court need only conclude that on the basis of the law state above, the

only applicable law is the received law as enunciated above.

8. This court need only emphasize that mode of life test and all the relevant cases and statutes cited above only point to the First Respondent as being the sole heir to the estate of her late husband. Lastly, thus court need only thank both Counsel for their useful heads of argument.

9. The application is therefore dismissed with costs.

T. E. Monapathi
Judge

For Applicant : Mr Thoso
For Respondents : Miss Thabane