

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

COMMISSIONER OF LANDS

4th Respondent

REGISTRAR OF DEEDS

5th Respondent

ATTORNEY GENERAL

6th Respondent

JUDGEMENT

Delivered by the Hon. Mr. Justice T. E. Monapathi
on 30th Day of September 2011

1. In this application, the Applicant sought for a declaratory order and interdict on registration of certain property (where a house was built) situated at Maseru East and described as Plot No. 13281-325.

2. The said property was registered in the name of and was owned by the late Dr. Leoatle Motsamai (Deceased), the Applicant's father and the First Respondent's husband though a second marriage. Applicant is the first born and only son though the Deceased's first marriage. Deceased had died intestate and had not "during his lifetime allocated his property amongst his "various

houses” according to the ***Laws of Lerotholi***. Respondents contended that this part of the ***Laws of Lerotholi*** would not be pertinent.

3. The First Respondent who was married by civil rights only begot a girl. The Respondent was married in community of property to the Deceased after the Deceased had divorced his first wife. It became clear to the court that if the application succeeded it would amount to disinheritance of the First Respondent or a forfeiture of some kind. If it was lawful.

4. The Applicant was represented by Mr Khauoe in these proceedings. The Second Respondent was represented by Adv. N. Thabane. Adv. Thoso represented the Second Respondent in whose favour the First Respondent had intended to transfer the said property.

5. It appeared to be common cause that a meeting had been called by the Third Respondent where a decision was reached that the Second Respondent was entitled to receive transfer of the said plot by the First Respondent. Applicant herein disputes this decision. He contends that First Respondent is not member of Applicant's family and cannot be heir despite that she was lawfully married to Deceased. That furthermore the First Respondent ought not to inherit because she is a citizen of South Africa.

6. It had not been said that First Respondent had abandoned her husband's domicile. This is so because "as in law a wife follows her husband's domicile. "...See **SA Divorce Handbook** C. J. Nathan, page 47.

7. Applicant contended that the said decision by the City Council was reached on the mistaken understanding or interpretation that the First Respondent had the same rights as her late husband on the basis of **Part II** of the **Land Act 1979** (as amended) Counsel argued that this was not so in law. Otherwise "assets forming part of the joint estate are owned by the spouse in undivided shares". See **South African Law of Husband and Wife**, HR Hahlo, Fifth Edition, page 337.

8. Applicant's Counsel also argued that irrespective of whether First Respondent was married to the Deceased by civil rights the law of inheritance to be applied is Basotho Customary Law on inheritance. That the **Inheritance Act No. 26 of 1873** does not affected or alter the laws of inheritance of **Basotho Customary Law**. He said the Applicant had become the principal heir who may inherit on death of his father's widow.

9. While conceding that inheritance in Lesotho was governed by the **Law of Inheritance Act No. 26 of 1873** or **Basotho Customary Law** the Applicant contended that in the circumstances of his claim the provisions of the **Laws of Lerotholi**

fell to govern the way the inheritance should go and that would be in favour of the Applicant. He accordingly submitted further as follows. That:

- a) According to the section 11 (1) **Laws of Lerotholi** that the heir shall use the unallocated estate with his father's widows or widow. I noted that it was not made clear as to what was the unallocated estate in the circumstances where it was unarguable that the First Respondent and the Deceased had their own estate or perhaps it meant the Deceased's share of the estate;
- b) That the **Law of Inheritance Act No. 26 of 1873** does not affect nor alter the laws of inheritance according to **Customary Law**;
- c) The community of property does not alter or affect Basotho Customary Law of Inheritance where not excluded by antenuptial contract;
- d) The **Land Act 1979** (the principal law) as amended by **Order No. 6** of 1992 particularly section 8 thereof was to the effect that a widow has been granted the same rights as her deceased husband over a land which has been allocated to her deceased husband.

10. The First Respondent submitted that it was important to investigate as to which law was applicable in this case where the

issue is as to who should be the rightful heir to the estate of the Deceased. He said what should guide us is the mode of life of the Deceased and his surviving spouse, the First Respondent, in particular as to their type of marriage.

11. Since there is no dispute that there had been a legally binding civil law marriage between Deceased and the First Respondent the investigation should go not further than discussing the distinction between the two (2) different type of marriage for the purpose of determine which law is applicable because guidance is to be found in section 3 (b) of the ***Administration Of Estates Proclamation 1935*** as against Sesotho Customary Law. The section 3 (b) reads thus:

“This proclamation shall not apply to estates of a 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 estate of Africans who have 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.”

Reference was made to ***Khatala v Khatala 963 HCTLR 907*** and ***Mokorosi v Mokorosi 1967-70 LLR***.

12. The First Respondent accordingly submitted that beside the most important question of the undisputed civil marriage the other factors that should persuade the court to find for Respondent on

the aspect of mode of life are as follows. Firstly, that during the seventeen (17) years of their married life with the Deceased they owned and drove motor vehicles, they went to church on Sundays, they had bank accounts and insurance policies, they slept in modern beds, they ate with knives and forks at table, they did not do any subsistence farming and they did not recognize any ancestral spirits nor practices nor witchcraft. All these indicated that the European law should be the governing law.

13. The First Respondent added that it was worth noting that prior to the Deceased's marriage with the First Respondent, the Applicant's father, the Deceased, had had a civil marriage with the Applicant's mother and had already divorced the Applicant's mother First Respondent's Counsel argued that upon dissolution of the said marriage each party became entitled to one half of the joint estate plus a child's share, to a party to whom the custody of the minor child had been awarded.

14. Again First Respondent's Counsel argued that it was a presumption of law that the Applicant must have had a child's share from the joint estate of his late parents prior to the second marriage between his late father and the First Respondent. That this presumption was derived from section 56 of ***Administration of Estates Proclamation of 1935***.

15. That furthermore in the light of the said section 56 the First Respondent, as submitted, the Applicant does not have a right to claim anything from the estate that was acquired by the First Respondent and Applicant's late father during subsistence of their marriage. This includes the disputed site as part of the joint estate.

16. Counsel submitted that in the above circumstances the First Respondent was the lawful heir and she did accordingly have the power to dispose of the property of the joint estate of herself and her late husband without prior consultation from the Applicant nor anybody else. Instead or at least the only person who could have a legitimate right to claim a share from the said joint estate is that child who was born out of the marriage, whether male or female. The only benefit that the Applicant stood to claim was a child's share from the estate of the Deceased before his re-marriage to the First Respondent.

17. The Second Respondent's argument was mostly consistent with that of the First Respondent. He submitted that the First Respondent's late husband would not be subject of customary law in the circumstances of this case. He said demonstrably they had both abandoned customary mode of life in favour of European way of life. In addition, which I regard as most important and opposite, even in the context of the said section 3 (b) First Respondent was married to the late husband in community of property in a civil marriage. Counsel urged that the court to conclude that

customary marriage would not feature in the said estate and the First Respondent was accordingly entitled to inherit her late husband's property. The Applicant can therefore not be heard to claim as a customary law heir. He cannot therefore raise any customary law issues, and the issues ought to dismiss the Applicant's claim. The court was referred to the following authorities: ***Mokatsanyane v Thekiso C of A (CIV) No. 23*** of 2004 at paragraph 15, ***Rakhetla v Aldiea C of A (CIV) No. 20/2009, Mokete and Others v Mokete and Others C of A (CIV) No. 19/2007*** at para 14, ***Hoohlo v Hoohlo 1967 LLR 318*** and ***Legal Dualism in Lesotho*** S.M. Poulter, page 30. I agreed with the Second Respondent.

18. Second Respondent's Counsel argued further that it was trite law in our jurisdiction that, where a widow was married to her deceased husband in community of property she had the same rights to land as her husband had, see section 5 (2) ***Land (amendment) Order 1992*** as ***Mapali Phakoe v Teboho Phakoe 1998 CIV/APN/134/2007*** (unreported). In no way therefore can a family decision disinherit one where in law one has right and title.

19. That, as Counsel argued further, there are exceptions to the rule laid out in the said section 5 (2). Firstly, it is where a widow remarried in which case the land will not constitute part of the joint estate of that marriage. Where a widow dies her title will pass to a different person. Where none of these exceptions feature the

First Respondent will still be entitled to her late husband's rights to the land to which accordingly Applicant will have no title. I was referred in that regard to ***Lithebe Makhutla and Another v Mamokhali Makhutla and Other C of A (CIV) No. 7 of 2002***. According to principles laid out there are well established ways in which rights to land may terminate. In the present case, none of those can be said to have materialized. It means, in effect, that the First Respondent has not lost any of her rights to the land in question. See ***Lithebe Makhutla and Another v Mamokhali Makhutla and Other*** (*supra*) at paragraph 27. This argument seemed valid. It is an almost complete answer to the Applicants "challenges".

20. That in any event, as Counsel argued further, even if the Applicant's argument that Deceased's estate was and is governed by customary law, was accepted as valid the application would still be bad in law for the following reasons. The principle of customary law that a customary widow cannot disinherit the customary law heir was changed by the Court of Appeal. It is now good law that a customary law widow can disinherit the customary law heir. See in that regard ***Tšepe Mokatsanyane and Another v Motsekuoa Thekiso and Others C of A (CIV) No. 23/2004***.

21. Looked at from another angle, on the other hand, under Sesotho Customary Law every wife's property is distinct and her first born male is heir to her own house. The Applicant who is not

the first born male of the First Respondent can therefore not be heard to claim status of the heir in the First Respondent's house. See in that regard ***Contemporary Family Law of Lesotho***, W.C. M. Maqutu 168.

22. In my view the issue of the First Respondent allegedly being a citizen of South Africa is tied with the issue whether possession of a South African identity document necessarily means that one is a citizen of South Africa. It is a notorious fact that both citizens and non-citizens of South Africa may be issued with an identity document. The First Respondent who is domiciled in Lesotho denied being a citizen of South Africa. In no satisfactory way can it be said that she has been proved to be a citizen of South Africa. He who alleges must prove.

23. In any event the fact of one who is domiciled in Lesotho, being a citizen of South Africa, in the above doubtful circumstances cannot be disinherited in circumstances where the rights are given *ex lege*. That is where by law one is given a right and by which no formality or transfer is required. It is because as regards, immovable property "... irrespective, however, of in whose name the property is registered, it forms part of the joint estate". See ***South African Law of Husband and Wife*** (supra) page 163. A spouse in the circumstances of the First Respondent who is married in community of property perforce has a share in the estate. In my opinion this is what makes the First Respondent, in law, owner of the property.

24. I am satisfied that by operation of the law of intestate succession as against customary law, the Respondents have persuaded me, as they have argued, that the application ought to be dismissed with costs.

T. E. Monapathi
Judge

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| For Applicant | : | Mr Khauoe |
| For First Respondent | : | Miss Thabane |
| For Second Respondent | : | Mr Thoso |