CIV/APN/572/2012

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the matter Between:

ESTHER 'MAMOROENYANE MOKUENA Applicant

And

MOSONNGOA 'MAMOLEFI A. SELEBELENG Respondent

REASONS FOR JUDGEMENT

Coram	:	Hon. Mr. Justice T. E. Monapathi
Date of Hearing	:	12th March 2013
Date of Judgement	:	12th March 2013

SUMMARY

An applicant will be joined in the proceedings where she has a direct interest in the proceedings. This is demonstrated where she claimed to be heiress to one of the parties. The issue is not whether she has prospects of success in the main matter. For that reason the court, on application for joinder, will not go into the merits. Advocates should not keep trust accounts. Keeping trust accounts by Advocates is illegal.

CITED CASES

Matšaseng Ralekoala v Minister of Justice, Human Rights and Correctional Affairs and Others, CC No. 03/2011

STATUTES

Legal Practitioners Act No. 11 of 1983

[1] This is an interlocutory application. Simply put it is a minor application that arises out of the main application. It is concerned with issues that seek to carry forward the main application but it is not the main application. This one is about joinder of the Applicant, someone who seeks to become a Respondent on the basis that she has an interest in the claim itself. The other ground is about the Respondent's Counsel and Miss Nku's competence to maintain trust accounts by law.

[2] The main claim is one in which Mosonngoa Mamolefi Alina Selebeleng was First Applicant. There were other Respondents.

[3] There is no disguising the fact that since that property (i.e. property that had been identified) has fruits such as rentals. Hence the prayer 1(b) (c) (d) and (e) in the main application. The Applicant says she has interest because she wants, in the end, to be declared an heir or confirmed an heir. So that the investigation will be whether is she a person who is related, in the circumstances of the case, either to the person who claims or who has a claim against or to the disputed property. See prayer (f).

[4] If the above relationship is proved *prima facie* it is going to be said Applicant has a direct interest. It is because the task of the court, in investigating whether Applicant is entitled to join or not, is not whether she is going to succeed but whether she is a genuine claimant. There may even be others who have a prior right in the end. That relationship if proved gives Applicant a basis or *locus standi*.

[5] This claim has a long history that makes it not complex but a bit be complicated. When you look at the history, there is civil application CIV/A/P/591 of 2011and C of A (CIV) No 28/2000. The facts that are elicited in these proceedings including those that belong to the merits. That give a clear picture of the nature of these proceedings. They go over generations of this Selebeleng clan including those females and males, those who are married, those who were not married. That along the line certain marriages were dissolved including that of a lady called Mosonngoa who is the First Respondent in the main application. The above are matters which belong to the merits which I cannot investigate.

[6] *Points-in-limine* were raised by Respondent. These included lack of urgency. One point raised was that since Applicant was not a citizen of Lesotho she could not own land even an estate or portion to which she may have otherewise been entitled.

[7] When I started to enquire I looked at the contents of paragraphs eight(8) and nine(9) of the founding affidavit. Those paragraphs speak of one Mosili Hlalele. That Mosili Hlalele who is spoken of in that Court of Appeal case No. 28 of 2000 as a litigant in a matter that went to the Court of Appeal. The appeal case resulted in

a settlement. It is not disputed that the deed of settlement divided estate in the names of Alice Selebeleng and Molefi Selebeleng. This resulted in the estate being divided in equal shares between Mosili Hlalele and Molefi Lucas Selebeleng by declaration or pronouncement of the Court of Appeal.

[8] Pertinently, this Applicant says Mosili Hlalele was her mother. That may be true or may not be true but it remains a matter that will be settled by a court in the main application. I will not enquire about the relationship further because the Court of Appeal declared the position of Mosili Hlalele. For our purpose it is demonstrated that this Applicant has a direct interest.

[9] I did not fault the approach of the Applicant in coming to court on urgent basis. It is simply because the attack was based on the contention that all along in the old proceedings including Court of Appeal matter Applicant had taken no action and was silent. I thought the attack was unsound. Applicant was never included in any of those cases. It cannot consequently be charged that she took no steps nor that she has delayed.

[10] Other points of law were not pursued except that one about competence to keep trust accounts. Although the point that the Applicant is not a citizen seems to belong to the merits, I left it open. I do not decide it.

[11] This point raised in one prayer which is whether advocates such as Adv. Khiba (Respondent's Counsel) will run a trust account is a very sensitive issue. It is not only a matter of serious practice but it is a matter of policy. That section which was quoted by Counsel from the ***Legal Practitioners' Act 1982***, speaks of the entitlement only of Attorneys, Notaries and Conveyancers to keep trust accounts. The Act provides so because there are obligations and responsibilities in that class of practitioners. It does so because certain practices are exclusive to these professionals mentioned therein. Others will not. If it was permitted all would keep trust accounts it would have said so.

[12] While the Law Society seems to condone many things concerning regular practice, I was not persuaded that it legitimately allows advocates to keep trust accounts. Those advocates who did so did so by stealth. They do so because they know that it is irregular, it is against the law, the rules and practice. They know that if attention or challenge is brought before the courts they will never get sympathy. I never knew anyone who sought sympathy on that and succeeded. The High Court has reinforced this in many of its judgements when it said that the practice of advocates and attorneys is not only separate but they behave differently in handling of client's moneys. See ***Matšaseng Ralekoala v Minister of Justice, Human Rights and Correctional Affairs and Others, CC No. 03/2011***, 30th March 2012 'Musi AJ et al.

[13] Incidentally, the courts condone most practices like wrongful keeping of trust accounts if they are not challenged. Even for example, this practice of practitioners fraudulently using signatures of attorneys. When they are challenged the courts will

insist on the correct practice and procedure. Courts will stand up to stamp out what is irregular as long as the law exists in the present form. Indeed there is movement for mooted fusion of Attorney's practice and Advocates' practice. This has regrettably been "threatened or paid only lip service" for over twenty (20) years without any progress.

[14] I made the point that Advocates Ms. Nku and Mrs. Khiba should not keep trust accounts. I decided that those fees (and all of them) should be directed and paid over to attorneys who will keep them in a trust account. There is no prejudice against anyone. I record that since there is a perception against the offices of attorneys Mofolo-Tau and Company they were not preferred. By agreement Counsel could appoint an attorney who would keep such monies. By agreement the rentals and similar fees will be paid into the offices of T. Fosa & Company-Attorneys until these proceedings are finalized.

[15] The application succeeds with costs on the ordinary scale.

T. E. MONAPATHI
JUDGE

For Applicant : Mrs. Tau-Thabane
For Respondents : Mrs. Khiba