

CIV/A/13/2009

**IN THE HIGH COURT OF LESOTHO**

**In the matter between:-**

**TJOTJELA SEBEKO**

**1<sup>st</sup> Appellant**

**RETŠEPILE SEBEKO**

**2<sup>nd</sup> Appellant**

**AZAEL SEBEKO**

**3<sup>rd</sup> Appellant**

**And**

**MOKETE SEBEKO**

**Respondent**

**JUDGMENT**

**Coram: Hon. Hlajoane J.**

**Date of Hearing: 15<sup>th</sup> March, 2013.**

**Date of Judgment: 26<sup>th</sup> April, 2013.**

**Summary**

*Appeal against decision from Judicial Commissioner's Court on inheritance – Appellants descendants from the first wife out of four wives in a polygamous set up – Respondent descendant from the third*

*house – Whether family meeting can go outside the maxim of ‘malapa ha a jane’. Appeal dismissed, confirming decision of both the Central Court and the Judicial Commissioner’s Court. Nor order as to costs as this is a family matter.*

## **Annotations**

## **Statutes**

**Proclamation 62 of 1938 Central and Local Courts**

## **Books**

**Contemporary Family Law in Lesotho 1992**

**Contemporary Family Law 2<sup>nd</sup> Edition 2005**

**Family Law and Litigation in Basotho Society 1976**

## **Cases**

**Sello Tokelo Nkakala v Sehlahla Motjoka and Another 1999-2001 LLR 498**

[1] This case started at Tale Court where the present respondent was the plaintiff and the appellants were the defendants. The Local Court dismissed the claim with no order as to costs.

- [2] The present respondent appealed to the Tsifalimali Central Court which granted the appeal, setting aside the Tale Local Court decision.
- [3] The appellants in this case appealed the Tsifalimali Central Court's decision to the Judicial Commissioner's Court (JC). The JC dismissed the appeal thus confirming the decision by Tsifalimali Central Court.
- [4] Notice of application for a certificate of leave to appeal to the High Court in terms of **section 28(3) (b)**<sup>1</sup> was duly filed and granted by the Judicial Commissioner's Court.
- [5] To be determined from the trial stage was the right to inherit the estate of the late 'Machabalala Sebeko who died intestate.
- [6] There has been no dispute that the deceased Tjotjela Sebeko had married four wives who each had her distinct houses and property. The wives in order of their seniority were the following –
- 'Majonathan
  - 'Mateisi
  - 'Mamatela
  - and 'Maseholoba.

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<sup>1</sup> Proclamation 62 of 1938 Central and Local Courts

- [7] Also common cause that there were male issues in the first, third and fourth houses but the second house had no children. The present appellants being born as descendants in the first house of 'Majonathane whilst the respondent born as descendant in the third house of 'Mamatela. So 'Machabalala's estate in dispute descends from the third house of 'Mamatela.
- [8] It was established in evidence by the respondent that there was a meeting that was held by the Sebeko family where it was resolved that the respondent was the rightful person to inherit the estate of the late 'Machabalala Sebeko. Respondent even handed in evidence the letter signed by all members of Sebeko family who attended the meeting.
- [9] Such allocation was however later contested by the appellants on the ground that the decision was made in their absence as heads of Sebeko family.
- [10] From the proceedings of Tale Local Court CC184/2001 the Court becomes aware of the fact that the respondent had initially instituted an action before the same Court in CC96/2001 against the appellants on the same subject matter as in this appeal. The Court had dismissed the claim in CC96/2001 on the ground that the Sebeko family had first to meet and appoint the heir to the late 'Machabalala's estate. Hence the family meeting of the

23/09/2001 at which respondent was so appointed as evidenced by the letter he handed in in support of his case.

[11] The respondent had in his evidence in an effort of justifying his status as the person to inherit 'Machabalala's estate, pointed out that he had performed a ritual for 'Machabalala's son in accordance with Basotho Law and Custom. The cow was slaughtered by the respondent as it was said he was responsible to open 'Machabalala's family or house.

[12] The issue of having performed such ritual had not been denied, but as rightly pointed out by the appellants and referring to the case of **Sello Tokelo Nkakala v Sehlahla Motjoka and Another**<sup>2</sup>, being negligent or irresponsible does not necessarily deprive the heir of his right to inherit.

[13] We have already been made aware of the seniority of the Parties' mothers. There is no dispute that the appellants are descendents in the first house and the respondent is descendant from the third house.

[14] In our Sesotho custom when a man marries a woman such a woman is entitled to her own house, site, arable land and other property. As **W.C.M. Maqutu** puts it in his book<sup>3</sup>, such a woman

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<sup>2</sup> 1999 -2001 LLR 498

<sup>3</sup> Contemporary Family Law in Lesotho 1992 p.87

so to speak constitutes a house. The book goes further to say that when such a man subsequently marries other women each one of them will be entitled to his property constituting houses. Each house will have its own heir, who will be first male issue in that house. That can never be changed by a family meeting where there is a male issue.

[15] **W.C.M. Maqutu** in the Second Edition of his book<sup>4</sup> in dealing with property rights in polygamous marriage further explained that, “because in law all the property of the house belongs to the husband as head of the house, the wife’s rights of property are closely tied to the house and the wife is regarded as the house.”

[16] **Sebastian Poulter** in his book<sup>5</sup> has also shown that polygamous families are divided up into houses, each house consisting of a wife and children and property. He said there are rules designed to prevent the husband from taking property from one house and allocating it instead to another. That of fundamental importance is the maxim ‘malapa ha a jane’ (houses do not eat one another).

[17] Under the same maxim **S. Poulter** has further shown that by way of illustration that even where the man marrying comes from a junior house within a polygamous family after his father’s death the proper person to be sued would be the heir in the junior house

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<sup>4</sup> Contemporary Family Law 2<sup>nd</sup> Edition 2005

<sup>5</sup> Family Law and Litigation in Basotho Society 1976 pages 35, 139 and 141

as opposed to the general heir in the senior house as bohali would have to be paid from the junior house's property under the rule that houses do not eat one another (malapa ha a jane).

[18] It would therefore be clear that the maxim 'malapa ha a jane' was designed to safeguard the rights of individual houses where the wife comes from a junior house within a polygamous set up.

[19] Based on what has been stated above on the maxim of houses do not eat one another, a male issue from one house cannot inherit the estate of the other house unless there is no male issue in that family. **Section 8 (2) of the Land Act<sup>6</sup>** also refers to the male issue and sharing with junior brothers.

[20] In *casu* since the respondent is the male descendant in the third house of 'Mamatela, he is the one entitled to inherit 'Machabalala's estate.

[21] The appeal is thus found to be without merit, it is so dismissed with no order as to costs as litigants are closely related and the Court would not want to strain the relations between them any further.

**A. M. HLAJOANE**  
**JUDGE**

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<sup>6</sup> Act 19 of 1979

For Appellants: Mr Lephuthing

For Respondent: Mr Maleke