

IN THE HIGH COURT OF LESOTHO

CIV/T/623/2012

In the matter between:-

‘MATOKELO PHEKO

PLAINTIFF

AND

ESTATE LATE MOTHETHE PHEKO

1ST DEFENDANT

TŠEPO MOTSAMAI

2ND DEFENDANT

‘MAPHEKO PHEKO

3RD DEFENDANT

TSIKANE PHEKO

4TH DEFEBDANT

THE MASTER OF THE HIGH COURT

5TH DEFENDANT

ATTORNEY GENERAL

6TH DEFENDANT

JUDGMENT

CORAM: Honourable Mahase J.

Date of Hearing: Various Dates

Date of Ruling: 22ND April, 2013

Date of Judgment: 16th May 2013

SUMMARY

Civil Procedure – Husband and wife – customary Marriage – Divorce – Granted in the Local Court – Appeal to the Central Court – Death of husband in the course of divorce proceedings before the Central Court – Effect of same on whole proceedings – Alienation of property of the deceased husband in exclusion of widow. – Legal Capacity of Married Persons Act read in conjunction with the Land Act

(as amended) on heirship of the surviving spouse over the Land rights.

ANNOTATIONS

Cited cases:-

- ***Motšoene v Hasly and others 1954 HCTLR Page 1 at pages 14 to 15.***
- ***Ntsoele v Ramokhele 1974 – 75 LLR 130 at 134 E. (per Mapetla CJ as he then was)***
- ***Lintša v Mahloko and others, LAC (2005 -06) page 193 at 195, paragraph 6.***

STATUTES:-

***High court Rules No9 of 1980.
High Court Act No. 5 of 1978.
Laws of Lerotholi***

Books:-

- *Contemporary family Law of Lesotho – W.C.M Maqutu pages 73 -74.*
- *Hahlo, - The South African Law of Husband and Wife 4th edition page 326.*
- *Family Law through cases – 1991 page 150 – per ‘Mamashela.*
- *The Law of Marriage – 1996 page 248 – per June Sinclair.*
- *Herbsteina Van Winsen 3rd Ed. Page 599.*

[1] This case was partly heard before my brother Makara AJ on

the 13th March, 2013. However, for reasons specified in the court minute of the 22nd April, 2013 he formally rescued himself from presiding over this matter. The case was then reallocated to this court.

- [2] The facts of this case have been spelt out briefly in the written submissions filed on behalf of the parties herein. These are of common course. In a nut shell they are that the plaintiff was married to her husband Mothethe Pheko by customary rights/rites.
- [3] No children were born of the said marriage; and the parties marriage came to end, after the plaintiff's husband was granted divorce on the 7th February, 2011 by or before the Fika-le-mohala Local Court.
- [4] Subsequently, the plaintiff being dissatisfied with the said Judgment, appealed to the Matsieng Central Court on an undisclosed date. However, before the appeal could be prosecuted, the plaintiff's husband, Mothethe Pheko passed on. It is important to mention that before his death, plaintiff and her late husband had not been living together although they had not been formally divorced. Put different, the parties were not longer staying together, even though not divorced. The divorce proceedings were instituted and finalized in the

above shown Local Court while the plaintiff and her husband were living apart.

- [5] During their marriage the late Mothethe Pheko and the plaintiff had amassed a huge estate including immovable property as well as movable property , but details of same have not been specified in the summons. The divorce order has not been attached to the declaration, but plaintiff's case is that due to her husband's untimely death, there has not been a final determination regarding the division of their joint estate.
- [6] However, and to her dismay, after her husband's death, the Pheko family have since appointed the second defendant (Tšepo Motsamai) an heir to Mothethe Pheko's estate, and the second to the Fourth defendants have further unlawfully and wrongfully took over the properties belonging to Mothethe Pheko's and plaintiff's Joint estate.
- [7] The said family members are further refusing to hand over to the plaintiff requisite documents which would enable the plaintiff to claim from the insurance company death benefits in respect of her late husband. This explains why she has instituted the present proceedings.
- [8] Lastly, the plaintiff's case is also that to her knowledge, her

late husband, was never previously married, and/or did he have any previous marriage nor children at the time of their marriage; neither had he fathered any children elsewhere.

[9] As has been ordered by my brother Makara AJ, counsel have been asked to firstly address the court on the three specific points of law to wit:

(a) the effect of the death of the husband in the course of divorce proceedings before the Central Court, as to whether or not it renders the proceedings to cease to exist and thereby restoring the status *quo ante*;

(b) The effect of the Legal Capacity of Married Persons Act in conjunction with the Land Act (as amended) regarding the heirship of the surviving spouse over the land rights;

(c) Whether consequently anyone could have a legal qualification to alienate any of the properties of the deceased. (My underlining)

[10] Counsel have both filed written submissions in an endeavour to address and or to answer the three points of law mentioned above.

[11] It should at the outset be indicated that the defendants

have objected to the plaintiff's summons on a number of grounds spelt out at page 2, paragraph 2 of its written submissions.

[12] In brief, it is the defendants' case that since the plaintiff and her late husband were married by customary law, then issues pertaining to their divorce as well as to the division and or the administration of their joint estate have to be dealt with by or in the Local and Central Courts etc. In other words, they argue that because of the nature of their marriage, then only the Basotho Courts and not the High Court are empowered to deal with such issues; and that the High Court in its original jurisdiction is precluded from dealing with this matter save if plaintiff had obtained Leave of the High Court to remove the case from the Basotho Courts.

[13] They are challenging the Jurisdiction of this court to deal with this case and are further saying that because of her undisputed customary marriage to her late husband, and also because her appeal against the divorce order granted by the Fika-le-mohala Local Court, is still pending before the Matsieng Central Court, then plaintiff should not be allowed to jump the queue without having followed procedural requirements as laid down in the provisions of **section 6 of High Court Act No.5 of 1978**, and while

the current divorce proceedings and the ancillary matters thereto are still pending within the Local and Central Courts. They therefore ask this court to dismiss this case with costs for want of Jurisdiction of the High Court in such matters.

[14] On the other hand, it has been argued on behalf of the plaintiff that since she was legally married by customary law to her late husband, she is entitled to institute interdict proceedings against any person who seeks to alienate, to her exclusion, any property(ties) of her and of her late deceased husband as is the position in the instant case.

[15] It immediately becomes clear that counsel in this case have approached their argument or their case(s) from two different angles. Counsel for the plaintiff is in fact arguing his clients case from the premise that, whether or not the divorce proceedings in question are still pending before the Central or Local Court, the plaintiff is entitled to approach this court (The High Court) as she did for an interdict against the defendants who have already appointed an heir to plaintiff's Joint Estate thereby alienating the property which she has amassed with her late husband, and in doing so they have totally excluded her on the grounds that she has since been

divorced prior to the death of her late husband and are overlooking the fact she had appealed the divorce order or decision of the Fika-le-mohala Local Court to the Matsieng Central Court.

[16] Yet, on the other hand it has been argued on behalf of the defendants that, for reasons already outlined above, this court has no jurisdiction to entertain a case which by its nature falls within the jurisdiction of the Local and Central Courts.

[17] Nothing has been said on behalf of either party to rebut the argument raised by each of their counsel in support of their cases and as regards the issues pertaining to jurisdiction of this court to entertain this case on the issue pertaining to an interdict sort against the defendants. There is no counter argument advanced in rebuttal of each other's issues raised herein in this regard.

[18] Counsel for the defendants has only contended himself with saying that the relief claimed by or on behalf of the plaintiff is unknown to customary law in so far as regards the division of the parties' Joint estate but he has not elaborated on this issue; neither has this court been

informed by any of the parties herein whether or not the Local Court has made any determination on the issue pertaining to the parties' Joint estate. The Local Court should have made a finding on the parties' Joint estate.

[19] If it has not done so, then the plaintiff will be justified in having asked this court to interdict and to restrain the second up to the fourth defendants from disposing, alienating and or selling the property belonging to the Joint estate of the late Mothethe Pheko and herself.

[20] There is no argument before this court to the effect that this court has no jurisdiction to entertain prayers 1 and 2 as asked for on behalf of the plaintiff. In fact, being the lawful customary wife of the late Mothethe Pheko, her rights over their property are protected by law even after the death of her husband whether or not she has since been divorced for as long as there is no order of court through which she has been dispossessed of the property forming part of their Joint estate.

[21] Of course, the plaintiff has elected to issue summons instead of proceeding by way of application or motion proceedings. This has not been challenged; instead the defendants have taken further steps on the proceedings. They can not now change their stand.

[22] Be that as it may, this court has not been successfully persuaded that the plaintiff has taken proper procedural steps by having raised matters or issues pertaining to her rights over their Joint estate before the High Court without first having sort leave of this court (High Court).

[23] On the other hand, this court has equally not been successfully persuaded that it has no jurisdiction to determine issues and or to deal with plaintiff's claims pertaining to prayers 1 and 2 of her summons. As far as the two specific points of law referred to and raised *Meru Moto* at the pre-trial conference on the 13th May, 2013; those should best be left for the determination by or before a proper forum; namely the Central and Local Courts with the exception of issues raised at subparagraphs 1 – 3(b) since the above courts are not empowered nor do they have the expertise to interpret the statutes in question. In the premises it is ordered as follows:-

- (1) That issues with regard to points of law raised, but with the exception of 1.3(b) herein, are remitted to the Central Court for it to make a determination on the said points of law as contained:- in subparagraphs 1.3(a) and (c).

- (2) That prayer 1 in the summons in relation to the release to plaintiff of documents therein tabulated be and is hereby granted only for purposes of allowing the plaintiff to claim such death benefits as there in shown and for no other purposes. None of the defendants will suffer any prejudice if such documents be released to plaintiff; while the contrary will prejudice the plaintiff.
- (3) The Prayer in the summons with regard to interdict and restraint against the said defendants be and is hereby granted pending the finalization of the appeals in all relevant customary courts through which an appeal from the Central Courts should go.
- (4) Prayers 3, 4, 5 and 6 are dismissed but no order as to costs is made since this is a family matter.
(I note that there has been an error in the numbering of the prayers in plaintiff's summons).

M. Mahase
Judge

For Plaintiff: -

Adv. Shale Shale

For Defendants Nos. 1 – 4:-

Adv. K K Mohau KC

For Defendants Nos. 5 - 6:-

No appearance.