

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/600/2011

In the matter between:-

TEBOHO LEPULE

APPLICANT

AND

‘MANTHABISENG LEPULE

1ST RESPONDENT

THE MASTER OF THE HIGH COURT

2ND RESPONDENT

THE ATTORNEY GENERAL

3RD RESPONDENT

JUDGMENT

Coram : Hon. Mahase J.
Date of hearing : 24TH May, 2012
Date of Judgment : 4th February, 2013

Summary

Civil Procedure – Estate of deceased persons – Administration of same – Applicant’s parents dying intestate – Customary heir – Appointment of heir by member of deceased persons family – in total exclusion of first born male son following death of both parents .

ANNOTATIONS

CITED CASES:

- **Plascon – Evans Paint LTDV Van Riebeeck Paints (PTY) LTD 1984 (3) S.A. 623**
- **Ts’ehlana v. National Executive Committee of the L.C.D. and Another LAC (2005 – 2006)**

- **Nts'olo v. Moahloli (1985 – 89) LAC 307 at 310**
- **Hoohlo v. Hoohlo 1967 – 70 LLR 318 (CA)**
- **Ntsane v. Thatho, LAC (2000 – 2004) at page 252**
- **Lerata and Others v. Scott Hospital (1995 – 99) P 147**
- **African Oxygen LTD v. STM Marketing and Agencies (2000 – 2004) L.A.C. (2007 – 2008) 203 at p. 212 C –D**
- **Sekhonyana Letsie v. Chief Mohlalefi Bereng and Two Others 1991 – 1996 LLR 372 at 376**
- **Moteane v. Moteane 1997 – 98 LLR and LB 43 (CA) at p. 46**
- **And may others.**

STATUTES: **Land Act 1979**

BOOKS:

- **W.C.M. Maqutu – Contemporary Family Law of Lesotho**
- **S. Poulter – Family Law and Litigation in Basotho Society p. 28**
- **Bekker: Seymour's Customary Law in Southern Africa, 4th Edition – 1982 p. 277**

[1] The applicant has approach this court by way of notice of motion and in the ordinary way. He has had the papers herein filed in this court on the 6th December 2011. Subsequently same were served upon the first, second and third respondents on the 7th December 2011 respectively; while they were served upon the first respondent on the 8th December 2011.

[2] Only the first respondent has filed a notice to oppose the application in question. The 2nd and 3rd respondents have not done so.

- [3] In a nutshell, the applicant is challenging the appointment of the first respondent as being heiress of the estate of his late or deceased parents, ‘Mateboho and Thomas Lepule.
- [4] According to papers filed of record, the applicant’s parents, ‘Mateboho and Thomas Lepule died in 1988 and 2006 respectively. Thomas was preceded by his wife and in December 1987, Thomas allegedly married the first respondent by civil rights marriage.
- [5] The applicant denies that the first respondent was married by civil rights but alleges that she was married to raise house since the first respondent is the younger sister to his deceased mother ‘Mateboho Lepule. This, the applicant says his father did in accordance with the Basotho custom of raising a house. He avers father that, being a Christian, his father later solemnized his marriage with first respondent but their marriage was out of community of property. Refer to his founding affidavit at paragraphs 6 etc.
- [6] He avers therefore that having been born from the customary marriage between his parents ‘Mateboho and Thomas Lepule as the eldest son, he is therefore the customary heir of his late parents ‘Mateboho and Thomas Lepule.

He avers further that his parents did, during their lifetime accumulate property as appears in annexure “A” to the notice of motion.

- [7] A proper reading of the applicants founding affidavit would reveal that when in 1988, his mother passed on, he was aged about 13 years; while in 2006 when his father also passed on he was aged 31 years old.
- [8] It is a matter of common cause that on the or during 2006 when the Lepule family members purported to appoint the first respondent an heir to Thomas and 'Mateboho Lepule's estate, the applicant was aged about 31 years old. He was already a major but he signed the family letter in which the first respondent was so appointed and later the first respondent was presented before the office of the second respondent as such and as an administrator of the estate of the applicant's parents late estate.
- [9] The first respondent opposes the applicant's application and denies that he was married by the applicant's father by way of customary law as raising his father's house. She avers that she was married to the late Thomas Lepule by way of a civil rites marriage in community of property and that the property in question and subject-matter herein devolved upon her or passed to her through the operation of the law; to wit reliance is placed upon the provisions of section 33 of the Land Act of 1979. Refer to her answering affidavit.
- [10] Interestingly and notably, the first respondent has not denied that the applicant's parents had been married by custom and that they died intestate; neither does she deny or challenge the bold averment by the applicant that he is a customary heir to his late parents' estate by virtue of him having born of them in the way that he has stated in his founding affidavit. She actually

refrains from stating the kind or the regime of marriage under which the applicant's late parents were married.

[11] Of further interest, is the fact that the first respondent refrains from disclosing to this court in her answering affidavit and in argument before this Court when, how and by whom the land upon which the properties she refers to and which she claims to have developed alone was acquired with the exception of the Aiskop Off Sales and the residential plot at Moyeni. Further on this point, she does not disclose to court where the residential plot or house of the late Thomas and 'Mateboho are situated and how, when and by whom that plot was acquired and developed.

[12] The applicant has stated the reasons why he has approached this Court as he did in his founding affidavit at paragraphs 12 up to 15. The first respondent in turn denies same and puts applicant to proof of same, she denies that applicant is a customary heir to the estate of the deceased Thomas and 'Mateboho Lepule who are his parents.

[13] The above is the basis upon which the applicant has approached this Court asking it to call upon the respondents to show cause why

(a) The first respondent shall not be interdicted and restrained from disposing of the property constituting the estate of the deceased Thomas Lepule and 'Mateboho Lepule as appears in annexure "A" hereto pending finalization hereof;

(b) That applicant be declared the heir to the estate of deceased Thomas and 'Mateboho Lepule as appears in annexure "A" hereto;

- (c) That the first respondent cease forthwith from administering the estate of the deceased Thomas and ‘Mateboho Lepule as appears in annexure “A” hereto;
- (d) That first respondent be interdicted and restrained from interfering with applicant’s administration of the estate of deceased Thomas and ‘Mateboho Lepule as appears in annexure “A” hereto;
- (e) That respondents pay costs hereof only in the event of opposition.
- (f) That applicant be granted such further and/or alternative relief as this Honourable Court may deem meet;

That prayer 1 (a) operate with immediate effect as an interim order.

[14] It must be noted at this juncture that the points of law which had been raised on behalf of first respondent have since been abandoned. Counsel for applicant and the first respondent have filed elaborate and extensive heads of argument in support of their respective arguments for which this Court is most indebted to them.

[15] Indeed there is a plethora of decided cases/authorities emanating from our jurisdiction in which the issues pertaining to heirship have been ably discussed and canvassed by both counsel herein.

[16] There is no denying the fact that it is now settled law that the starting point is the relevant family; which in essence is regarded as the council that has to

deliberate and decide on such an issue. Of course, such a family is obliged to do so in accordance with the formal principles of the laws of our country.

[17] The laws of Lerotholi have and are to a very large extent the first source of the law in this regard, especially and in particular in a case such as the instant one where the applicant argues that he is a customary heir to the estate of his late parents.

[18] Counsel for the applicant has ably argued the above issue at pages 8, 9, 10, 11, 12 etc.

[19] As has been indicated above, the first respondent has deliberately refrained from challenging or responding to the applicant's averment to the effect that by virtue of having been born a customary heir to his late parents, and as being the first born male son to them, he is entitled to be declared as such. The first respondent has also not pleaded issuably to the averment that applicant's parents had been married by customary rites and that since they died intestate, their estate fell to be administered according to customary law.

[20] While the first respondent heavily relies among others on the provisions of the repealed Land Act of 1979 for her case, she has also totally ignored the terms and provisions of the Administration of the Estate Proclamation No. 19 of 1935; which law has not been repealed despite the fact that it is very old, and far older than even the Land Act and which law may not accord with modern times, she has made no attempt at all to annex any evidence,

even by way of a supporting affidavit indicating that indeed she has had the said estate, subject-matter herein reported to the Master of the High Court.

In the premises, and in the absence of such an affidavit or any other relevant document emanating from the office of the second respondent, the argument and point taken by the applicant at pages 5 and 6 etc paragraph 5 have been well taken. Also refer to cases therein cited.

[21] With the greatest respect, the reliance by the first respondent upon the provisions of section 8 (3) of the Land Act (supra) which is limited in scope and has not made any reference to anyone in the first respondent's position does not advance her case any further. There is indeed nowhere where this Act seeks to deprive a lawful customary heir in the strict sense of rights which one has acquired by birth.

[22] Further on this issue, the fact that the applicant has not been born of the marriage between Thomas Lepule and 'Manthabiseng Lepule (first respondent) herein should not be lost side of.

[23] In the instant case, it has not been denied that applicant was not born of the marriage between Thomas Lepule and 'Manthabiseng Lepule; that as such the house of 'Manthabiseng Lepule and that of Thomas Lepule should be two distinct separate households in the strict customary law sense and that therefore the maxim that malapa ha a jane should apply in relation to each of the said houses. She has herself to blame for having failed to set up her different household elsewhere other than on 'Mateboho's sites.

- [24] The first respondent should not be allowed to hide behind the alleged civil rites marriage to applicant's deceased father while she has failed dismally to proof on a balance of probabilities and based on lawful facts that she alone and not the applicant's late mother and father acquired and or amassed during their lifetime the land/sites which she later allegedly developed, but which fact(s) are not supported or born out by any evidence. Her bare, unsubstantiated allegation and or denial that she alone acquired that property cannot advance her case in any way.
- [25] Indeed, as has been alluded to above, none of the Lepule family have supported her to proof or confirm that she was ever presented to the Master of the High Court as she alleges in her replying affidavit and in her argument before this Court.
- [26] The fact that the first respondent does not deny that she is the wife to applicant's mother or the younger sister to applicant's mother is very relevant and important even though she denies that she was married by applicant's father to raise the house. Nowhere in her answering affidavit does she say with clear particularly that she acquired any other property other than that which the applicant says is that of his late parents. This cannot be enough to establish in her favour that the property in question was acquired or amassed by her and the applicant's father. In all probabilities, the evidence on the papers points to the fact that she developed (if she is to be believed) the property which had already been acquired or amassed by applicant's natural deceased parents.

- [27] In fact, the first respondent is blowing hot and cold on the issues raised herein pertaining to applicant's status of being a customary heir to his late parents' estate. There are a million dollar questions which are unanswered; for instance, what interest did she have to develop, enhance and improve property which she admits belonged to applicant's late parents?
- [28] Also having just singled out property at Aiskop, first respondent summersaults to say that all property listed in annexure "A" was not accumulated during the lifetime of applicant's mother, and says it would make no difference as regards its legal status, in that it forms part of interest and title which passed to her ex lege without stating the law which entitles her to rights over such property. He alleged civil marriage to applicant's father cannot in customary law principles give her all rights and title to it in total exclusion of the applicant.
- [29] This kind of argument advanced by and on behalf of the first respondent overlooks the well settled principle of the law in the case of MJM at page 11 of the applicant's main heads of argument.
- [30] The first respondent is indeed laboring under the false impression that merely because the applicant has allegedly appended his signature on annexure ML2, then he has waived his birth rights of being a customary heir to his late parents' estate. Indeed, what the Lepule family did and by it having allowed the applicant to append his signature thereat is illegal and can never be countenanced by the law. Refer to case of MJM and authorities therein cited as well as to that of **F & I Advisors (EDMS) BPK v. EEHe**

Nasionale Bank etc 1999 (1) S.A. 515 (SCA) 520 A-B and that of Yannokou v. Appolle Club 1974 (1) S.A. 614 (A) 624 G.

[31] In the premises and for the foregoing reasons, the applicant's application is granted as prayed in the notice of motion dated the 6th December 2011 with costs to the applicant.

M. Mahase

Judge

For Applicant: Adv. P.R. Thulo

For First Respondent: Adv. Z. Mda

For Second and third Respondent:- No appearance.