

# IN THE HIGH COURT OF LESOTHO

CIV/APN/364/2012

In the matter between:-

‘MAKAMOHELO LESIA

APPLICANT

AND

MAJORO LESIA

RESPONDENT

## JUDGMENT

**Coram** : Hon. Mahase J.  
**Date of hearing** : Various dates  
**Date of Judgment** : 21<sup>st</sup> February 2013

### Summary

*Civil Procedure – Husband and wife – Customary marriage – unilateral sale of parties matrimonial house by respondent – interdict and cancellation of such sale – contempt of court – what constitutes same.*

ANNOTATIONS:-

CITED CASES:-

- **Easter Brook Transport (PTY) LTD v. The Commissioner of Police and One (unreported) (per Mr. Justice W.C.M. Maqutu J as he then was.**

STATUTES:-

- **Legal capacity of Married Person Act of 20010**
- **High Court Rules No. 9 of 1980**

BOOKS:-

- **Civil Practice of the Superior Courts in South Africa, 3<sup>rd</sup> Edition – Van Visen Eksteen.**

- [1] Briefly the facts of this case are that the applicant and the respondent are husband and wife; having been married by Sesotho customary law – refer to annexure “AA1” page 10 of the record of proceedings. One child, Kamohelo Lesia has been born out of their marriage. This marriage still subsists.
- [2] The applicant is employed as a seamstress at the textile factory; while the respondent is employed as a messenger of Court at Thaba-Tseka local.
- [3] In 2003 they acquired a site situate at Ha Shelile in the district of Maseru – Refer to annexure “AA2” at page 11 of the record of proceedings.
- [4] It is applicant’s case that the respondent has not made any contribution to the building of the house which they ultimately built on the said site, and that in fact the respondent is not at all maintaining or supporting his family. This duty is being borne by the applicant.
- [5] She also says that the respondent is in the habit of assaulting her and that on several occasions she fled to her maiden home as a result of the assaults upon her by the respondent. The reason for such assaults upon her by the respondent center around the fact that, among others, the respondent has or is engaged in an illicit affair with a certain lady at Thaba-Tseka and that he continues to date to keep that lady (mistress) and fully maintains her, while he neglects his own family. That very often respondent assaults her

(applicant) whenever she refuses to give him money; which he usually demands from her.

- [6] The reason why she ultimately approached this Court as she did being that sometime on the 23<sup>rd</sup> July 2012, the respondent telephoned her and informed her that he was going to sell to an undisclosed person their matrimonial home situate at Ha Shelile. It is the applicant's story that she has single handedly build the said house at a cost of plus, minus forty thousand Maloti.
- [7] Ultimately some two days later, the respondent informed the applicant that the person to whom he has sold out their matrimonial home would take occupation of it. He also informed applicant that he intents to marry another wife some six months from July 2012 and that he and that woman have been staying together as husband and wife for several years even though he did not disclose her name. Refer to her founding affidavit.
- [8] The above fact; the alleged unilateral sale of their matrimonial home to some one pronysted her to approach this Court seeking among others, that respondent be interdicted from selling their matrimonial home and other relief as spelt out in her notice of motion. Applicant avers that apart from the fact that she and respondent have never discussed or agreed about the sale of their said house, this is her only house in which she and their son Kamohelo have been and are staying in, and they have nowhere else to go.
- [9] The applicant's initial application was granted by my brother Monapathi J. on the 26<sup>th</sup> July 2012. Refer to interim court order dated the 27<sup>th</sup> July 2012.

[20] Having been served with the said interim court order, the respondent filed a notice of intention to oppose and the case was then allocated to this court. The respondent disregarded the said order of court and went ahead to sell the said house. He also continued to assault the applicant thereby threatening to kill her. He blames the applicant for interfering in the sale of the said house. Refer to applicant's notice of motion dated the 13<sup>th</sup> September 2012. The respondent remains in contempt of both court orders to date. This is despite the fact that he has been served with the orders of court in question as well as the accompanying documents.

[21] It has been argued on behalf of the applicant that the respondent is not only in contempt of orders of this court, but that should the respondent be allowed to get away with his contemptuous behaviour, the applicant will also suffer irreparable damage, because being the wife to the respondent, and having immensely contributed to the acquisition, building and buying of household items, no amount of money can adequately compensate her for the loss of her house.

[22] The respondent denies that he and applicant are married in any way. He argues therefore that the applicant has no locus standi to have brought to court the instant application.

[23] He also argues that he has not complied with the interim court order for the reason that same was served upon his minor son; who he says was then 14 years of age. It is his further argument that for this reason this was an improper service. He does, however not deny knowledge of that interim court order.

[24] In other words, the respondent is aware of and has full knowledge of the court orders and their contents. Actually the son he refers to is their son Kamohelo Lesia. He is therefore joining issue on the fact that he and the applicant have a son born of their union by the names of Kamohelo. Further on this he has joined issue on the fact that both Kamohelo and 'Makamohelo have always been residing on and been in occupation of the said house, - subject – matter herein. The question is if indeed 'Makamohelo resided with Kamohelo in that house, why did he not have her lawfully evicted out of it if her occupation of same was without his consent or if she was a trespasser? Why assault her?

[25] Be that as it may, this court has been asked to deal with the contemptuous behaviour of the respondent and to have him imprisoned should this court so find that he has unlawfully, intentionally and willfully disobeyed or disregarded an order of court.

[26] The respondent has also not denied that on more than one occasion subsequent to the orders of court, and in total disregard of same with impunity he assaulted the applicant.

[27] Some points of law have been raised on behalf of the respondent which do not relate to the issue for determination by this Court, namely whether or not the respondent has been in contempt of court and that if so he should be imprisoned for same.

[28] This court does not wish to deal with same serve for urgency. There is no denying that for the reason that the respondent informed the applicant that he

would be selling their house to somebody else without him having discussed this and agreed upon it and also without him providing an alternative accommodation for her and their son Kamohelo, the matter became urgent; particularly when on the 23<sup>rd</sup> July 2012 she was informed for the first time that night about the intended unilateral sale; and also informed some two days later that the sale has been completed and that the unnamed buyer was to take occupancy of same on that same day. This is what, in the view of this court created urgency.

[29] On the issue of whether or not the respondent is in contempt of an order of court and that he should therefore be imprisoned. As has been alluded to above, the respondent has joined issue with the applicant to the effect that he is aware and has knowledge of the court orders whose effect is to restrain him from selling their said house and from assaulting and threatening to kill her.

[30] It must be mentioned at this juncture that it is not for the respondent to make any determination on whether or not any court process has been lawfully or unlawfully served. What matters is the fact that he was aware of same. The issue whether or not service of same was lawful should have been left to this court to determine. The fact that he considers service of same to have been improper cannot and should not in law bestow on him the right disregard it with impunity. This would create a chaotic situation in the conduct of legal proceedings.

[31] It is trite that all order of court should be obeyed because, until such time that it has been set aside by a competent court, it stands correct. Ex facie its

contents, the said orders of court are valid, lawful orders which should have been complied with.

[32] As a general rule, any person upon whom an order of court is served, may not, except in very exceptional circumstances, refuse to obey such an order on the ground that it has been wrongly made. A person directed to obey an order of court supposed invalid must as a general rule first obey it and thereafter seek his or her remedy elsewhere, whether by way of appeal or review.

[33] In the instant case, the respondent does not argue the said orders of court in question are obviously invalid, or that they have been illegally or irregularly issued. In short, his non compliance with these orders of court, does not fall nor constitute the recognized exceptions to the general rule vide **Takalimane v. Serobanyane, C of A (CIV) 26 of 2011** and other cases therein cited.

[34] It is the considered view of this Court that having been aware of the orders of court in question, the respondent should have complied with same and seek some other lawful remedy later. Indeed it is clear from the facts and surrounding circumstances of this case that the respondent had the requisite *mens rea* to flagrantly and with impunity disobey the orders of court in question.

[35] The arguments advanced on behalf of the respondent to the effect that:

- The applicant has no locus standi in judicio to have launched this application and that,
- Prayer 2(b) is contradictory in terms and a pre-judgment in that the respondent has been called to come to court to explain why he is supposedly in contempt of an order of court, and yet he is supposed to be silenced until he has purged himself; are untenable in the light of the fact that he has already explained why he has refused to obey such orders of court. He has been given a chance to explain his behaviour.

[36] Further on this point, the normal remedy for contempt of an order of court, such as an interdict, is by way of summary application for committal of a person responsible. Of course, this is a remedy which the court is slow to give; the case must be a perfectly clear case, and the order is issued so that the court may assert its authority. It is a summary remedy given for willful disobedience of an order of the court.

[37] Contempt of an order of court is an injury committed against a person or body occupying a public office by which injury the dignity and respect which is due to such office or its authority in the administration of justice is intentionally violated.

[38] There is no doubt in the mind of this court that having been aware of the existence of the order of court, he willfully and intentionally disobeyed it. Refer to paragraphs 7, 9, 11 and 16 of his answering affidavit. Indeed, it is a matter of common cause that the respondent son, who on the return of



service (annexure c) is indicated as being aged 16 years received this order of court and the notice of motion etc.

[39] As has been alluded to above, it is not for the respondent to make a determination whether or not an order of court is lawful; this is the function of the court. In any case no order of court or any court proceeding can be invalidated by what the respondent refers to at paragraphs 5 and 9 of his answering affidavit, as being lack of proper service. What is crucial is that he has been made aware of the existence of the contempt of court proceedings against him and also has knowledge of the existence of the orders of court issued against him in which he has been interdicted and refrained from carrying on with the sale of their carrying on with the sale of their matrimonial house and to stop assaulting, threatening to kill and harass applicant in any manner.

[40] Indeed there is more than ample evidence that the respondent is determined to continue to treat the order of court with the highest degree of impunity and disregard. The use of the words like “I don’t care what her attorney of record tell her”. ( I quote) is more than enough to indicate to this court that indeed the respondent displays the highest degree of disrespect not only towards the applicant but even towards this court. Such utterress by a party in court papers is lacking all respect and decorum to this court. This is an unacceptable use of words to say the least. In any case, the respondent has not challenged the applicant’s averment that he is in the habit of assaulting her.

- [41] In fact he has not pleaded issuably to contents of her founding affidavit dated the 13<sup>th</sup> September 2012, to wit paragraphs 3.3 up to 3.5. he has made no slightest attempt to challenge the authenticity of annexure “HM3” as well.
- [42] As for the argument that since the applicant has no locus standi in judicio since she is not married to the respondent as she alleges and should therefore have not launched this application, this is misplaced and it has no bearing upon the application of contempt nor upon an order interdicting him as prayed in applicant’s notice of motion. This is an issue among other which will be dealt with when the main application is argued. For now the court is called upon to deal with the respondent’s contemptuous behaviour about which the applicant has complained. However, it has to be emphasized that the respondent has repeatedly used unacceptable language as indicated above – Refer also to contents of paragraph 9, 10, 11, 12 13, 14 etc where he used words to the effect that he messenger of court was stupid; and words such as that ..... it makes no difference as to when my son received the court order or whether I had sold or not sold my house etc.; thereby expressing his intention not to obey an order of court.
- [43] In fact, the net effect of his utterances as indicated in paragraph 10 of this answering affidavit, he does not admit nor deny the averments that he has sold the house in question contrary to the order of court which order of court and its contents he knows about. These are therefore taken to have been admitted.

[44] The supporting affidavit of Kamohelo Lesia does not advance the respondent's case in anyway. In fact contrary to what the respondent says, Kamohelo says his mother (applicant) resides at Ha Teko. This contradiction cannot be overlooked, as it does a great blow to the respondent's case.

[45] In the premises, this court has come to the conclusion that the respondent is and has been in contempt of orders of this court whose effect is to interdict him from selling the house in question and from assaulting, threatening to kill and harass the applicant. He is accordingly committed to prison for a period of thirty (30) days, from when he is arrested.

**M. Mahase**

**Judge**

For Applicant:- Adv. L. Mokheseng

For Respondent:- Adv. T. Fosa