

IN THE HIGH COURT OF LESOTHO

CIV/APN/565/2013

In the matter between:

MOSESANYANE MORATEHI

APPLICANT

And

**‘MAPONTSO NCHABE
TEBA LERIBE
MASTER OF THE HIGH COURT
ATTORNEY GENERAL**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT**

JUDGMENT

Coram : Honourable Mr. Justice E.F.M. Makara
Dates of Hearing : 15 April, 2014
Date of Judgment : 11 September, 2014

Summary

Application for an heirship declaratory order and other incidental relieves – Procedural deficiencies inherent in the application in that the head of the family had not been cited, there was no proof that the Applicant’s mother who has disappeared for almost 30 years was dead and no documentary evidence of a judicial pronouncement that she was deemed dead - The Court consequently, refusing to make the order.

CITED CASES

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STATUTES & SUSIDIARY LEGISLATION

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MAKAJA J

Introduction

[1] The Applicant came before the Court praying for an order for an order in the following main terms:

1. That he be declared as an heir of the late Edward Sekhoahla Mosesanyane.
2. That the 2nd Respondent be directed to release to him the monies that it kept on behalf of the deceased Sekhoahla Mosesanyane.

[2] It should suffice to be recorded that the original judgement which had by default been entered in favour of the 1st Respondent was by her consent rescinded and resultantly, the merits were accordingly traversed. The 1st Respondent is the only Respondent who has resisted the application while the rest appear to be ready to abide by whatever judgement.

Common Cause Facts

[3] The Applicant is the 1st son born from the deceased Sekhoahla Mosesanyane and his 1st wife 'Makopano Mosesanyane and that they never got divorced from each other. Their other children were Lieketseng, Rethabile, Mapitso and Pule. His father subsequently under controversial basis married a 2nd wife by the name of 'Mamoratehi who later died. Sebongile was born from this second marriage. It should at this stage be highlighted that it

stands controversial from the perspective of the opposing and the replying affidavits respectively whether the 1st wife 'Makopano is still alive or has passed on. This notwithstanding, it remains standing that she has for about 30 yrs disappeared within the milieu of the greater Republic of South Africa.

[4] The 1st Respondent is not in any manner, whatsoever, a member of the Mosesanyane family, as she is not claiming any right within that family and that she has not been nominated as one of the beneficiaries of the monies in the possession of the 3rd Respondent. A dimension of significance is that the 1st Respondent was a helper to the 2nd wife and that she had taken care of the latter during her illness. There is no disputation that the 2nd wife and her daughter were both buried by the 1st Respondent acting in collaboration with her family. The late Sekhoahla Mosesanyane was during his lifetime a mine worker and that he had nominated the beneficiaries including the Applicant to his savings and the pension.

The Arguments Advanced by the Parties

[5] In motivating his case, the Applicant charged that the 1st Respondent had at the time of the death of the 2nd wife taken the passport of the deceased sekhoahla and thereby depriving him of the opportunity to use it for the purposes of his heirship to his father's estate. It is for the facilitation of this that he is correspondingly asking the Court to declare him as the heir to the estate.

[6] While resisting the application, the 1st Respondent warned that should the relief which the Applicant is asking for succeed, he would simply grab all the properties belonging to the estate for himself. She then drew it to the attention of the Court that actually, the Applicant is not qualified to the heirship declaratory order which he is seeking for since his mother who is the 1st wife of the late Sekhoahla Mosesanyane is still alive somewhere in the Republic of South Africa.

The Findings and the Decision

[7] It is initially found that a mere fact that the 1st Respondent is not a member of the Mosesanyane family is self-explanatory that she is not qualified to claim any property from the estate of the late Sekhoahla Mosesanyane and his wives. On the contrary, the Applicant is by virtue of his standing as a 1st male son of Sekhoahla, a *prima facie* general heir with a right to make a claim over the estate provided that he satisfies all the requirements.

[8] Notwithstanding the Court's pronouncement on the credentials of the Applicant *vis a vis* those of the 1st Respondent in the matter, it is clear that the former has invited the latter into the proceedings by understandably citing her herein. Her answer that the Court should be aware that if the application succeeds, it would pave a way for the Applicant to grab the estate for himself, is ridiculous and lacks legal basis since she has no iota of business over the estate. She could, perhaps, be legible to advance such a response in relation to the question of heirship over the property belonging to her maiden or marital family or where she was

tendering an official testimony. On this note, the Court views her as someone who is capitalising on the situation and her knowledge of the affairs within the family in pursuit of her own opportunistic intentions over the estate.

[9] It is for the purpose of this litigation found irrelevant to attach any significance to the 1st respondent's explanation that she had participated or contributed in the burial of the 2nd wife and her daughter Sebongile. This is so despite a commendable recognition that she had in collaboration with her family acted responsibly and humanely towards the two deceased persons. That being so, she is entitled to bring an action to recover the burial costs which she incurred but not to introduce the subject into this proceedings. She is somehow implying that their gesture disentitles the Applicant from the relief which he is asking for or that the role she played in the burial qualifies her as well as her family to have some claim over the estate.

[10] The Court, nevertheless, appreciates the value in the 1st Respondent's attack against the application on the reasoning that the Applicant does not qualify for heirship since her mother is still alive somewhere within the greater milieu of the Republic of South Africa. The answer lends credibility from the fact that the Applicant has attested to the possibility of the truth in that account save to apologise to the Court that his averment that his mother had passed away, was genuinely premised upon an information which he had got from his father. Otherwise, the Applicant should have advanced a counter documentary testimony

in rebuttal. Assuming that his mother had not been seen for 30 years or so, the Applicant should have approached the Court to declare her assumed dead by operation of the law. The application for such a declaratory order would have been initiated by way of an *edictal citation* in which his mother would have been served through a newspaper circulating throughout South Africa. Now that there is no evidence of such a judicial pronouncement, the Court is, in the absence of any documentation to the contrary, entitled to assume that she is still alive wherever she could be.

[11] Given the finding that it is doubtful that the 1st wife is late and that the Applicant himself has subscribed to that, the Court finds that it would be premature for it to declare that the Applicant is the heir to the estate in question.

[12] Even if the Court had resolutely found that the 1st wife was late, it would nonetheless, have been confronted with a technical obstacle in the form of a *non joinder*. This would be occasioned by the Applicant's none inclusion of the head of the Mosesanyane family in the litigation. It would suffice to have taken it on board in its nucleated or extended sense. The procedural technique would be to ascertain the position of the Applicant since the right in consideration is rooted in *Private Law particularly in its Family Law* dimension. All that the Court does is to give a judicial recognition to that fact in accordance with the advice of those who are qualified to advance the names of a person who should be accorded the heirship private status.

[13] It follows that for the time being the identified procedural deficiencies which renders the Court to be uncertain about the true position of the Applicant, makes it to decline to make an order for the 1st Respondent to release to the Applicant a passport including all the documents which he laments that she has taken from his family. This could only be considered where his status is supported by the family or where he successfully challenges its decision not to advance him as such despite the Customary Law imperatives in his favour. It has correspondingly not been satisfactorily proven that the 1st Respondent had taken the documents. Even if she has, there are alternative means of proving that the Applicant is the general heir to the estate and therefore, entitled to its properties regardless of their nature. The emphasis remains that he must preliminarily pass the procedural test of bringing a litigation of this nature before the Court and that will present a key to the rest.

[14] There has been no reference to the few case law decisions relied upon by the Applicant because they were not relevant to the present decision.

[15] The Court feels enjoined to state that the question of the succession to the estate should for the sake of certainty be procedurally re approached to protect the estate from the potential property vultures who exploit family weaknesses to scavenge the properties of the estate especially the land. It is regrettable that it has in the instant case transpired that there were pertinent

procedural deficiencies which have militated against a final determination of the merits of the case.

[16] Finally, the application is dismissed. This being an intrinsically family matter under the circumstances explained, each party will bear its own costs.

E.F.M. MAKARA
JUDGE

For the Applicant : Adv. A.M. Makase instructed by A.T. Monyako & Co.

For the Respondent : Adv. Potsane instructed by K.J. Nthontho Attorneys