IN THE LAND COURT OF LESOTHO

Held at Maseru

LC/APN/52/2014

In the matter between:

MOLEFI LIPHEHLO **1ST APPLICANT**

MAHALI LETSA **2ND APPLICANT**

And

'MARELEBOHILE LIPHEHLO **1ST RESPONDENT**

LAND ADMINISTRATION AUTHORITY **2ND RESPONDENT**

CORAM: **S.P. SAKOANE AJ**

DATES OF HEARING: **17 NOVEMBER, 2014, 2 and 23 SEPTEMBER and 17 NOVEMBER 2015**

DATE OF JUDGMENT: **26 NOVEMBER, 2015**

SUMMARY

Claim of title to land by child born out of wedlock – child nominated by mother's family – name not forwarded to the land allocating authority – failure to do so resulting in lack of capacity to assert better title against registered owner – Land (Amendment) Act, 1992 s.8 and Land (Amendment) Regulations 1992, regulations 7 and 8.

ANNOTATIONS

CITED CASES:

Makhutla And Another v. Makhutla And Another LAC (2000-2004) 480

Mbangamthi v. Phalatsi LAC (1980-84) 179

STATUTES:

Child Protection and Welfare Act No.7 of 2011

Land Act No.17 of 1979

Land (Amendment) Act No.6 of 1992

Land Act No.8 of 2010

Land Regulations, 1980

Land (Amendment) Regulations 1993

Land Regulations 2011

Systematic Land Regularization Regulations, 2010

BOOKS:

Poulter, S. (1976) Family Law And Litigation In Basotho Society (Oxford: Clarendon Press)

JUDGMENT

I. INTRODUCTION

[**1**] The 1st applicant is a nephew of the 1st respondent. He was born out of wedlock. The 1st respondent is the wife of the brother of 1st applicant's mother. Both the 1st respondent's husband and the 1st applicant's mother have since died.

[**2**] The 1st applicant's mother passed on in 1998 during the infancy of the 1st applicant. He was brought up by the maternal grandparents. The 1st respondent's husband passed on in February 2011.

[**3**] The last parent of 1st respondent's husband, who was her mother-in-law, passed on in 2004. This was long before the 1st respondent and her late husband got married by civil rites on 27 April 2007. The said marriage was in community of property per a marriage certificate annexed to the papers.

[**4**] In 2013 the 1st respondent applied for and was issued with a lease to the parental home of her late husband. The lease number is **13302-1355**. The lease is Exhibit 2 in these proceedings.

[**5**] These proceedings are a challenge of the lease held by the 1st respondent in which the applicants claim:

1. Cancellation of the lease.
2. Interdicting sale of the landed property by the 1st respondent.
3. Interdicting exercise of any rights of possession or ownership of the landed property.
4. Ejectment of 1st respondent from the site.

II. EVIDENCE

Applicant's Case

[**6**] It should be pointed out at this juncture that the 2nd applicant never participated in these proceedings by either entering appearance or filing an answer.

[**7**] The 1st applicant was the first to give evidence in support of his claims. In his evidence-in-chief he stated that he is the son of **Palesa** who is the daughter of his deceased grandparents. The 1st respondent is the wife of his late uncle **Malefetsane**. He was born on 23 February, 1988 and grew in the household of '**Mapalesa** and lived there when he attended school. During his school days he stayed with the grandparents even after his mother died in 1998. His uncle did not stay with them as he stayed

somewhere else at Lithabaneng. He further stated that he left the homestead in 2013.

[**8**] In 2012 he got sick and thereafter discovered that the 1st respondent had obtained a lease without proper documents. The site had been allocated to him and not her. He was shown Exhibit 1 which is a document purporting to be a family letter appointing him as the heir. He said he recognizes it as a document given to him by the family after the death of his grandmother. He also testified that he possesses Exhibit 1 and a Form C.

[**9**] In 2010 his late uncle had made a request to stay at the site and he accepted the request. The site is currently under the control of the 1st respondent.

[**10**] Cross-examined, he stated that although undated, Exhibit 1 was written in 2004 but only taken to the chief to be stamped in 2013. This was after acquisition of a lease by the 1st respondent. He said he was very young when he was given a Form C and the letter appointing him as the heir. He only got to know about issuance of the lease to the 1st respondent in November 2013 when he came out of hospital. He approached the Land Administration Authority in 2014 to make an enquiry. He was told to

come with the person who had registered the site. He denied that the 1st respondent was appointed as the heir of her late husband.

[**11**] The second witness is **Tšeliso Liphehlo**. He stated that he stays at Qoaling. He currently stays with the applicant. The reason for applicant staying with him is because of fights he has with the 1st respondent. After the deaths of 1st applicant's grandparents they, as the family, took a decision that the estate belongs to the applicant. That decision is in the form of Exhibit 1. At the time of the making of the decision, **Malefetsane** (1st respondent's husband) was not present as he did not associate himself with the affairs of the family.

[**12**] Under cross-examination, he stated that he is a **Phokojoe** and not a **Liphehlo** by surname. He got the surname of **Liphehlo** from the **Liphehlo** family. But his parents never divorced. He confirmed that Exhibit 1 was written in 2004 but does not know whether it was ever taken to the chief. He left for Qoaling immediately after it had been written. But at the time it was written, he knew that the applicant was born out of wedlock. He also knew that the grandparents had 1st respondent's husband as their son, yet as the family they chose not to appoint him as the heir.

[**13**] That was the end of the applicant's case.

1st Respondent's Case

[**14**] The 1st respondent '**Marelebohile Liphehlo** testified in her evidence-in-chief that when she got married her mother-in-law was still alive. She passed on in 2005. After her death, the applicant stayed together with her and her late husband at the site. The applicant is no longer staying with her. He just left without any warning.

[**15**] The site she stays at has a lease. The lease is in her names and it is Exhibit 2. She denied that the applicant owns the site as it is her husband's home. There was never a family meeting at which a resolution was made to allocate the site to the applicant. After the death of her mother-in-law the family never appointed an heir. She and her husband took care of the applicant and her mother-in-law. They also made funeral arrangements for her.

[**16**] When shown Exhibit 1, she said she first saw it when she was served with the originating application. Before then she had not seen it. She knew the names appearing on the Exhibit but had heard little about one **Thaele**

Liphehlo. She followed the correct procedures when applying for the lease.

[**17**] Under cross-examination, she testified that the applicant grew in the homestead as a son of her sister-in-law. She applied for the lease on the advice of **Molefi Liphehlo**, the paternal uncle of her husband. She got application forms at a gathering (**pitso**) called by the chief. She produced her passport, the chief filled in the form. Thereafter the lease was issued. In the form the chief has stated that she has a right to be allocated the site. The applicant was in hospital at the time.

[**18**] This witness rejected the suggestion that she applied for the lease behind the back of the applicant. She did not know that he would also apply for a lease. Her husband and not the applicant is the eldest son with better rights to be issued the lease.

[**19**] **Molefi Liphehlo** was called as the second defence witness. He testified that he knows the applicant as a grandson of his elder brother (i.e. **Mokhethi** the later father-in-law of 1st respondent). But he disagrees that he is the heir. The heir is the late husband of the 1st respondent.

[**20**] After the death of **'Mapalesa** they sat down and told the applicant to live in peace with the 1st respondent. The same advice was repeated after the passing on of the 1st respondent's husband. After the death of '**Mapalesa** they identified **Relebohile**, the daughter of 1st respondent, as the heir although she was still young.

[**21**] When shown Exhibit 1, this witness said he does not know anything about it. He can neither read nor write. He knows the persons named **Tšeliso Liphehlo** (as his nephew), **Selai Relebohile** (as daughter of 1st respondent) and **Thaele** who was the brother of 1st respondent's father-in-law but who predeceased **'Mapalesa**.

[**22**] Cross-examined, this witness testified that there were no persons in the family by the names of **Thaele** and one **Relebohile** from Ladybrand who were present at the funeral of **'Mapalesa**. The **Relebohile** they appointed as heir is the only child of 1st respondent. The applicant is just a nephew who was advised to look for a place to stay.

[**23**] That was the end of the 1st respondent's case.

III. ANALYSES

[**24**] The applicant's case is that he is the heir and was appointed as such by the family per Exhibit 1. This is a letter which it is said to have been written in 2004. It does not bear any date nor seem to have been passed on for endorsement by the chairperson of the land allocating authority as it ought to have been under the **Land Regulations, 1980**.

[**25**] The provisions of the **Land Act, 1979** (as the operative law then) in respect of intestate inheritance of landed property are section 8 (2) and regulation 7 of the **Land Regulations, 1980**.

[**26**] Section 8 (2) (as amended in 1992) provided that:

> *"(2)… where an allottee of land dies, the interest of that allottee passes to,*
>
> *(a) where there is a widow, the widow is given the same rights in relation to the land as her deceased husband…* ***on the widow's death, title shall pass to the person referred to in paragraph*** *(c);*
>
> *(b) where there is no widow – a person designated by the deceased allottee;*
>
> *(c) ….* ***a person nominated as the heir of the deceased allottee by the surviving members of the deceased allottees family****;"*

[**27**] Regulation 7 (amended in 1993 per **Land (Amendment) Regulations, 1993**) provided as follows:

"(1) Whenever a person dies within the jurisdiction of a given [Allocating Committee] leaving any allocated land referred to in section 8 of the Act, the nearest relative or connection of the deceased or in default of any such relative or connection, the person who at or immediately after the death has a control of the land formerly held by the deceased, shall within 12 months thereafter ***cause a notice of death signed by him to be delivered or transmitted to the Chairman of that [Allocating Committee].***

(2) The notice referred to in subsection (1) shall show:

(a) the date of the death of the deceased…;

(b) the relationship of the informant to the deceased;

(c) the name and sex of the heir of the deceased;

(d) whether the heir is the [widow] of the deceased or was nominated as heir by the surviving members of the deceased's family ***in the event of there being no [widow] heir*** *or a designated heir;*

(e) ……..

(f) ……."

[**28**] The above statutory framework ushered in a criterion for appointment of an heir free from the primogeniture rule of the customary law. The widow, and in her absence the designate of the allottee has superior rights to inherit landed property. It is only if there is no widow or a designate that the family has a role in nominating one of their members as the heir. Even then, it does not follow that the family has to nominate the first male issue of the deceased. I am fortified in this view by the repeal of

"first male issue" in both the original section 8 2 (a) and regulation 7 (2) (d). If the legislature had wanted the family to be guided by the primogeniture rule, it could have easily have said so. It did not say so in 1979 and neither did it say so in 1992. Interestingly, it has not even said so under section 15(3) of the **Land Act, 2010**.

[**29**] It follows that the contention made on behalf of the 1st respondent by Mr. **Selikane** that her late husband had a prior right to be nominated as the heir has no legal basis. It is rejected.

Does a child born out of wedlock qualify to be nominated as heir?

[**30**] The 1st applicant is a grandchild who is born out of wedlock. The question that arises is whether he qualifies to be nominated as an heir by the family members of his maternal grandparents. The learned author Poulter answers this question in his works **Family Law And Litigation In Basotho Society** (1976) thus:

> At p.181 *"The distinguishing feature of legitimacy is that it places a child in the lineage of its mother's husband and it is his family that has rights and duties in relation to the child.* ***Illegitimate issue, on the other hand, belong in the family of their mother's father or his successor****.*
> *...It should, however, constantly be borne in mind that* ***one of the most significant practical aspects of the whole question is the right of inheritance, and the decisive factor here is often the collective view of the family rather than any formal legal rule****."*

At pp.238-239: "***Through the process of adoption even a child which was illegitimate at birth may come to inherit. He might for instance, be adopted by his maternal grandfather, in which case he would inherit in his mother's family****, or by his paternal grandfather or paternal uncle, in which case he would inherit in that family. In the latter case cattle may be paid to the family of the child's mother since the child is being transferred from one lineage to another in a manner similar to cases where the father of a pre-marital child pays extra* ***bohali*** *to 'marry' the child with its mother.*"
[Emphasis supplied]

[**31**] Such a child's right to inherit is now protected by the **Children's Protection and Welfare Act** No.7 of 2011 under section 19 which provides that:

> "*A child has a right to the property of his parents but where the child is born out of wedlock, the child has a right to the property of his biological mother irrespective of the mother's marital status."*

This section does not in any way diminish any rights of a child born out of wedlock to inherit the property of its maternal grandparents under customary law as expounded by Poulter (supra). This is so because the **Children's Protection and Welfare Act, 2011** says that:

> "*2(3) Nothing in this Act is intended to prevent, discourage or displace the application of informal and traditional regimes that are more promotive or protective of the rights of children except where those regimes are contrary to the best interests of children."*

[**32**] It is common cause that the applicant's mother was never married and that he grew up in her home. He has taken the mother's surname and, importantly, was brought up by the maternal grandparents. All these facts establish that he is the adoptive child of the deceased grandparents whose property he now claims. As such, he has *locus standi* to bring these proceedings as the nominee-heir chosen by the family members.

[**33**] As I understand the position of the 1st respondent, she does not dispute that the applicant is the adoptive son of her parents-in-law. What she contests is his right to inherit the property. This contestation is premised on two bases:

(1) that her husband is the first male child and elder brother to the applicant.

(2) Exhibit 1 is not a valid nomination as there was never any family meeting and, at any rate, the persons named therein are not members of the deceased's family.

[**34**] The 1st respondent's contestation cannot be valid because she has produced a 2007 marriage certificate which shows that in 2004 she was not yet married to her husband. She could then have not been there when the applicant's grandmother **'Mapalesa** passed on and the family

members met to nominate him as an heir. It is only her husband's uncle **Monyane** who could have been present at the burial of **'Mapalesa** and thus can say something about Exhibit 1.

[**35**] But **Monyane** did not strike me as a reliable witness because he did not disclose the names of any persons he was with in the meeting whereat they identified **Relebohile** as a future heir and not the applicant. In any event, I was not told how **Relebohile** featured when her parents only got married in 2007. It seems to me that if **Relebohile** was already born, her birth was out of wedlock as well. Therefore, any impediments to the nomination by the family would apply to her as well.

[**36**] I, therefore, incline to the view that there was this family meeting in 2004 whereat the 1st applicant was indeed nominated as the heir.

Was the nomination endorsed by the Allocating Authority?

[**37**] The nomination of an heir is not constitutive of allocation of property as the family cannot allocate landed property. Such power belongs to the Allocating Authority: See **Makhutla And Another v. Makhutla And Another** LAC (2000-2004) 480 @ 489 para [28]. It is imperative in terms of regulation 8 of the **Land Regulations, 1980**, that the nomination be communicated to the chairperson of the relevant Allocating Authority for purposes of examining evidence on the disposition of the allocation,

considering claims or objections to claims by any other interested persons before accepting the nomination and endorsing the register of allocations accordingly.

[**38**] The communication ought to have been made within 12 months after the death of '**Mapalesa** in 2004 as a constituent part of a signed notice to the Chairperson of the Allocating Authority. This was never done. It is only in November 2013 that Exhibit 1 was taken to the chief for his stamp and, by then, the Land Administration had issued the 1st respondent with a lease to the property.

[**39**] There is no evidence that at the time she applied for the lease, the 1st respondent knew about Exhibit 1. She said in her evidence that she first knew about this exhibit when she was served with the originating application. The 1st applicant testified that he was given this exhibit after the meeting following the funeral of '**Mapalesa** in 2004. He also had a Form C. At all material times he must have possessed these documents. No explanation has been proffered about non-compliance with the regulation 7 (1) procedure by the elders then or by him when he became of age.

[**40**] While I must accept that in 2004 he was aged 16 years having been born in 1988, he turned 18 in 2006 and was 21 years in 2010. When he acquired the age of majority in 2006, he ought to have taken steps to cause the registration of the property in his names. He did not do this. His evidence is that in 2010 his late uncle came to reside in the property. This was with his consent. If the chief and Allocating Authority did not have information that the late uncle and the 1st respondent did not have any claim of rights on the property, there is no way in which they could have not assisted the 1st respondent in the application of the lease. Hence the assistance of the chief in doing the application process.

[**41**] What is also crucial here is that the 1st applicant says he was given a Form C together with Exhibit 1 but the Form C has not been annexed to the papers or exhibited in these proceedings. Nothing further need be said about it.

IV. DISPOSITION

[**42**] The non-compliance with the regulation 7 mandatory procedure is, in my judgment, fatal to the assertion of any recognizable title of ownership to the landed property by the applicant. His nomination does not by itself confer any title short of its knowledge and acceptance by the Allocating Authority. The procedure serves the purpose of ensuring that disposition

of landed property is not shrouded in family secrecy. The lease-hold land tenure system in this Kingdom is such that all dealings in land are public matters which the Crown has to know about and to resolve any attendant disputes before the Crown approves them.

[**43**] The onus was on the applicant to rebut the acquisition of title and its registration as the owner by the 1st respondent: see **Mbangamthi v. Phalatsi** LAC (1980-84) 179. There is no evidence that either the chief, the Allocating Authority or the Land Administration Authority knew about the nomination of the applicant or that the 1st respondent knew about it but concealed it from them. There is also no evidence that the application of the lease and its issuance were done contrary to the requirements of either the **Systematic Land Regularization Regulations, 2010** or section 30 of the **Land Act, 2010** read with regulation 9 of the **Land Regulations, 2011**. On the contrary, it emerges that the disposal of the property falls short of the mandatory procedures. As such, the disposal is of no effect in terms of section 85 (2) of the **Land Act, 1979**.

[**44**] The result is that this application must be dismissed and is hereby dismissed with costs.

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S.P. SAKOANE
ACTING JUDGE

For the Applicants: L.R. Malefane instructed by T.L. Mpopo & Co.

For the 1st Respondent: S.O. Selikane