# IN THE HIGH COURT OF LESOTHO

In the matter between:

**MALIAU RATIA** **APPLICANT**

And

**LIAU RATIA** **1ST RESPONDENT**

**MAHOLI RATIA** **2ND RESPONDENT**

---

## JUDGMENT

---

**Coram** **:** The Hon. Acting Justice K.L. Moahloli

**Dates of hearing** **:** 4, 7 and 11 August 2014

**Date of final order** **:** 13 August 2014

## SUMMARY

***Customary law — Sepulchral rights —-- Dispute about who has the customary law duty and right to bury the deceased —-- Widow claiming that her right to bury her deceased husband trumps that of their first-born son, as male customary heir —-- No acceptable legal foundation for the heir's claim that he has a right which takes priority over her mother's —-- Held that it is the marriage regime rather than the succession regime that should prevail in determining questions of burial ---- Held further that the widow has the closest proximity in law to her deceased husband and therefore has the colour of right of burial ahead of the customary heir.***

# ANNOTATIONS

***Cases:***

*Lesotho*

*Abrahams v Abrahams and Another, CIV/APN/4/95*
*Griffith v Griffith (The Regency case), 1926-53 HCTLR 50*
*Lebona and Another v Lebona and Others, CIV/APN/27/2000*
*Lepule v Lepule, C of A (CIV) No.5/13*
*'Mabathoana v 'Mabathoana and Another, CIV/APN/76/2013*
*Mabona v Mabona, CIV/APN/280/86*
*Makhutla and Another v Makhutla and Another, LAC (2000-2004) 480*
*Maretlane v Ntsasa, CIV/APN/185/2011*
*Massa v Massa and Another, CIV/APN/5/97*
*Mokoena v Mokoena and Others, LAC (2007-2008) 203*
*'Mota v 'Mota and Others, C of A (CIV)/12/15*
*Ntloana and Another v Rafiri, C of A (CIV) No. 42 of 2000*
*Pita v Borotho and Others, CIV/APN/164/97*
*Ramaisa v Mphulenyane 1977 LLR 138*
*Sello v Semamola and Others, CIV/APN/319/96*

*South Africa*

*Finlay and Another v Kutoane 1993 (4) SA 675 (WLD)*
*Gonsalves and Another v Gonsalves and Another 1985 (3) SA 507 (TPD)*
*Human v Human and Others 1975 (2) SA 251 (ECD)*
*Mahala v Nkombombini and Another 2006 (5) SA 524 (SECLD)*
*Saiid v Schatz and Another 1972 (1) SA 491 (TPD)*
*Trollip v Du Plessis en 'n ander 2002 (2) SA 242 (WPA)*
*Tseola and Another v Maqutu and Another 1976 (2) SA 418 (THC)*

*Kenya*

*JMK v DMK [2013] eKLR (http://www.kenyalaw.org)*
*Kemboi v Kurgat and Others [2012] eKLR (http://www.kenyalaw.org)*
*Kimata v Wanjiru [2015] eKLR (http://www.kenyalaw.org)*
*Njoroge v Njoroge and Another [2004] eKLR (http://www.kenyalaw.org)*

***Statutes:***

*High Court Rules [Legal Notice No.9 of 2006]*
*Land Act No.17 of 1979*
*Land Act No.8 of 2010*
*Legal Capacity of Married Persons Act No. 9 of 2006*
*The Laws of Lerotholi 1903 (as amended in 1938)*

***Books and other scholarly writings:***

*Duncan, P. 1960 (2006 reprint).* Sotho Laws and Customs

*Jama, L. 2011. "The Laws of Lerotholi: Role and status of codified rules of custom in the Kingdom of Lesotho". Pace International Law Review, 23(1), 92-145*

*Malelu, JM. 2014. "Concept paper on need for disposal of dead body legislation in Kenya". Kenya Law Reform Commission blog*

*Maqutu, WCM. 2005.* Contemporary Family Law (The Lesotho Position)

*Matšela, ZA. 1990.* Bochaba ba Basotho

*Mokotong, MM. 2001. "In lieu of burial instructions: A legal exposition". Tydskrif vir Hedendaagse Romeins-Hollandse Reg, 64, 297-301*

*Mukaindo, Petronella. 2011. "Revisiting the SM Othieno case" [kenyalaw.org/newsletter/20110902.html]*

*Ndulo, M. 2011. "African customary law, customs and women's rights". Cornell Law Faculty Publications. Paper 187-120*

*Ngunjiri, NS. 2006. "Burial disputes in Kenya: A case for legislation". Unpublished master's thesis, University of Nairobi*

*Nwabueze, R.N. 2008. "Legal approaches to the burial rights of a surviving spouse". Amicus Curiae, 73, 12-15*

*Nwabueze, R.N. 2010. "Securing widows' sepulchral rights through the Nigerian Constitution". Harvard Human Rights Journal, 23, 141-156*

*Nwabueze RN. 2013." Legal control of burial rights". Cambridge Journal of International and Comparative Law, 2(2), 196-226*

*Poulter, S. 1999.* Legal Dualism in Lesotho

*Rautenbach and Bekker. 2014.* Introduction to Legal Pluralism in South Africa

*Rautenbach and Du Plessis. 2004 "Law of succession and inheritance" in* Law of South Africa*, vol. 32, Indigenous Law*

*Sakoane, SP. 1995-1996. "Constitutionalised customary law: An agenda for urgent law reform". The Lesotho Law Reports and Legal Bulletin, 546-555*

*Sekese, A. 2006 reprint. Mekhoa le Maele a Basotho*

*Voet, J. Commentarius ad Pandectas (Gane's Translation)*

**"As in most communities in the world, funerals are also significant events in [Lesotho]. In all cultural groups death is treated with reverence and grace [Unfortunately] in a time when family members and friends should console one another, it has become not uncommon that funerals are marred by feuds about burial rights … These include the right and duty to bury the deceased, a corollary of which is the right to determine the place of burial and the right to determine the burial ceremony."[1]**

## Moahloli AJ

## BACKGROUND

**[1]** The Applicant ('Maliau) is an elderly lady of 84. She and her recently deceased husband (Ntene) were married by Christian rites in community of property. They established their marital home in Mantšonyane/ Senqunyane Matomaneng in the Thaba Tseka district, a remote village in a mountainous area of Lesotho, where they spent most of their married life.

**[2]** They bore and raised all their children there [viz. their eldest son Liau (1st Respondent), second son Maholi (2nd Respondent) and four daughters]. All the children are now adults and live in the City of Maseru with their respective families. According to Liau they all moved to the Maseru urban area "in search of greener pastures."

**[3]** In March 2012 'Maliau and Ntene, who were then very sickly, frail and required frequent medical attention, decided to leave their marital home for good, to live in Maseru City, where they would be nearer to health facilities. They were provided with a house for their exclusive use for their remaining

[1] R-M Jansen, "Multiple marriages, burial rights and the role of lobola at the dissolution of the marriage" [University of the Free State, paper print preview, accessed 3/4/2015]

years by their daughter 'Malineo 'Mota (nee 'Mantene Ratia) and her husband Ralenkoane 'Mota.

**[4]** 'Maliau maintains that the couple did not leave Mantšonyane merely to be near doctors. Their intention was to set up life permanently in Maseru City. Hence they started the process of selling their homestead in Mantšonyane and even received a deposit from the buyer. The sale was halted and reversed by Liau who said he wanted the home preserved so that he could still have a home in Mantšonyane.

**[5]** Ntene succumbed to his ailments in Maseru on 19 July 2014. 'Maliau wanted to bury him in a public cemetery in Maseru City, where they had been living for the last two years and where she says she intends to spend the remainder of her life. Her sons, Liau and Maholi, were vehemently opposed to this, and insisted that their father be buried at their home village of Mantšonyane/ Senqunyane Matomaneng.

**[6]** Because of this impasse on 1 August 2014 'Maliau lodged an urgent application with this court, seeking orders, inter alia;

- declaring that she has the right to bury her husband at a place and time convenient to her [Prayer 1 (c)]; and
- interdicting her two sons from interfering with her arrangements to bury her husband at her place of choice within the City of Maseru [Prayer 1(b)].

**[7]** Liau and Maholi opposed the application, for reasons to be discussed later, and prayed that it be dismissed with costs on a punitive scale. In addition

(on 5 August 2014) they lodged a counter-application seeking orders, inter alia:-

- that their mother be restrained and interdicted from burying and/or causing the burial of the remains of the late Ntene at Ha Abia or any other place in the district of Maseru [Prayer 2(a)]; and
- declaring that their wishes to bury their late father at Senqunyane Matomaneng should prevail over the wishes of their mother (Prayer 2 (b)].

**[8]** The counter-application was opposed by 'Maliau who prayed for its dismissal with costs. The parties' counsel appeared before me on 4, 7 and 11 August. They were put on terms regarding filing of requisite pleadings, as well as heads of argument. For convenience and expediency I decided to hear the application simultaneously with the counter-application.[2]

**[9]** On 13 August 2014, having heard counsel for the parties and perused the papers filed of record, I verbally delivered a final order:-

(a) Upholding the application with costs; and
(b) Dismissing the counter-application with costs.

I gave brief extempore reasons for my decision and undertook to issue full written reasons in due course. These now follow:

**THE PARTIES' SUBMISSIONS**

[2] In terms of rule 8(17) of the High Court Rules

**[10]** First of all, 'Maliau contended that as the sole widow of the late Ntene, she had the duty and right in law to determine the time, place and manner of his burial. She said that she had arrived at a decision to bury him in the City of Maseru because two years before his demise the two of them had on their own accord permanently removed from their former marital home, sold all their household goods and settled in Maseru, with no intention of going back.

**[11]** Liau denied that the law gave his mother priority over him to make decisions about the burial. He argued that on the contrary, as the eldest son and customary heir of the deceased, it was he who had the duty and right to decide when, where and how his father should be buried. Consequently he had, in consultation with his younger brother and other family members, decided to bury him at Senqunyane Matomaneng (Mantšonyane) because custom dictated that a man should be buried at his established home. He referred me to several High Court judgments in support of his position. Namely, **Pita v Borotho (1997)**, **Abrahams v Abrahams (1995)**, **Mabona v Mabona (1980), Lebona v Lebona (2000),** where it was held that the wishes of the customary heir prevail over those of the widow.

**[12]** However, 'Maliau contended that the above cases were no longer good law because since the enactment of the Legal Capacity of Married Persons Act (LCMPA) in 2006, the marital power of the husband has been repealed. Spouses married in community of property now have equal capacity to, amongst other things, administer the joint estate. And the husband no longer has any marital power over the person and property of the wife. According to 'Maliau, the effect of this is that:

(a) "no one person may be an heir to the estate jointly owned by the spouses during the lifetime of both or one of them.

And, *in casu* "the status of heir does not arise until the [widow] herself has passed on"; and

(b) "because she is no longer a minor in the eyes of the law, a widow may not be dictated to by any one person in decisions that affect her estate. The duty to bury and to decide on a place of burial for her husband falls within the realm of decisions she has been empowered to make under this Act"

**[13]** In response to this argument, Liau asserted that the LCMPA had no application to the present dispute since its purpose was purely "to achieve equality between married person" and to "abolish minority status of women where they were compelled to consult their husbands before they could transact".

**[14]** Thirdly, 'Maliau argued that if her husband was to be buried in Mantšonyane she would be severely prejudiced because she would be forced to go back to Mantšonyane, not only to bury him, but to remain there to observe the customary mourning period (which could last for up to a year, depending on what period of the year she put on the mourning cloth).

**[15]** Liau contended that the family was amenable to doing away with this ritual. 'Maliau however said that she found such a concession deplorable because it would amount to her reneging on her duty as a Mosotho widow and to turning her back against her deceased husband's clothes and his new grave.

**[16]** Lastly, Liau urged the court, in arriving at its decision, to be guided by the following principles, as enunciated by our courts in **Sello v Semamola**

**(1996), Mabathoana v Mabathoana (2013)**, **Ntloana v Rafiri (2000**) and **Maretlane v Ntšasa (2011**):-

- a sense of what is right
- public policy
- the sociological environment of the deceased during his/her lifetime.
- equity
- according the deceased a decent burial

**ANALYSIS OF ARGUMENTS**

**[17]** It is true that our courts have, in several cases in the past, given the male heir a preferential right over the widow to bury the deceased father/husband. However, a close scrutiny of these cases fails to reveal a clear and satisfactory legal foundation for this preference.

**[18]** One of the reasons for this is that such rule cannot be found anywhere in the Laws of Lerotholi, which, although lacking official recognition, are generally accepted and resorted to as the first point of reference for ascertaining and determining the existence and content of any customary practice.[3] Cotran CJ went further, in **Ramaisa v Mphulenyane (1977),** to opine that the common starting point is to assume that the Laws of Lerotholi are law. The rule is also absent in authoritative classical treatises on our customary law such as Duncan (1960) and Sekese (2006).

[3] Griffith v Griffith at p.58 ; Jama 2011 at 120-1

**[19]** The majority of the cases relied upon by Respondents seem to base the existence of such a custom on the passage in Voet, Book XI, title 7, section 7 which, *inter alia*, states that where the deceased has not specifically chosen the person to bury him or her, the duty falls on the "legitimate children or blood relations," each in order of succession. The courts have interpreted this to mean the intestate heirs in order of succession. And in order to determine who the intestate heir is these judgments cite section 11(1) of the Laws of Lerotholi, which stipulates that the heir is the first male child of the first married wife (and if there is no issue in the first house then the first born male child of the next wife).[4]

**[20]** With the greatest respect, in my humble view it is not correct to rely upon this passage from Voet as authority for Sesotho custom because:-

(i) Voet was dealing with the Roman legal system of his time (and not present day Sesotho custom);
(ii) Voet cannot be regarded as authority on how our legal system should cope with cases unknown to him[5]; and
(iii) he at any rate did not deal with conflicts between competing interested parties.

**Raison d'etre of the rule**

**[21]** It seems that the rationale for giving the male heir preference over the widow was probably that, since the heir stepped into the shoes of the deceased family head and took over his whole estate (including not only his property and

[4] See Maqutu 2005 at p. 296-310. See similar reasoning in the South African cases Finlay v Kutoane (1992), Human v Human (1973); Saiid v Schatz (1972); Tseola v Maqutu (1976)
[5] See remarks of Flemming DJP in Finlay v Kutoane at p 680-1. Also Rautenbach & Bekker 2014 at p.195,

rights, but also all his obligations and debts) he was the only one who had the wherewithal to bury him. This was regarded as part of his obligation to maintain the other members of the family, including the widow. The customary heir became both the beneficiary and executor of the deceased's estate.[6]

**The Current Position**

**[22]** In my judgement this is no longer the position today because present day economic and social conditions have changed drastically, and the eldest son no longer takes over his deceased father's estate as he used to. Nowadays, as a result of the reform of our land tenure system[7] and the enactment of the LCMPA, our society has moved away from the strict patriarchy of past days. The traditional social and economic relations on which this discriminatory customary practice was based have been radically transformed.

**[23]** For instance, in terms of the Land Act of 2010, the first male child of the first married wife no longer automatically inherits his father's land when he dies. According to section 10 (1), "where persons are married under community of property, either under civil, customary or any other law and irrespective of the date on which the marriage was entered into, any title to immovable property allocated to or acquired by anyone of them shall be deemed to be allocated or acquired by both parties, and any title to such property shall be held jointly by both." Our apex court, the Court of Appeal, has a result unequivocally determined that a widow of such a marriage now

[6] See Maqutu 2005 at 291-6 for a discussion of these propositions. See also Poulter (1999) at p.108
[7] The Land Act 1979 esp. section 8 (2) (a) and the current Land Act of 2010 esp. section 10(1).

enjoys the same rights in relation to the landed property as her deceased husband.[8]

**[24]** Land in rural areas: Under this Act, a person only becomes an heir by virtue of being designated as such by the deceased or, failing which by being nominated as such by the surviving family members of the deceased allottee's family. [9]

**[25]** Land in urban areas: According to section 35 (1) (a) (iii) a lessee is entitled to provide for inheritance. However if he dies intestate, then in terms of section 35 (2) (a) "where he qualifies, the disposition of his interests in land shall be governed by written law relating to succession". And, according to section 35 (2) (b), where he does not qualify, the question of heirship shall be determined as in paragraph [24] above. The lessee is also entitled to donate his interest [section 35 (1) (a) (iv)].

**[26]** From the above, it is obvious then that the concept of automatic customary heirship of the first born male has been drastically eroded in land matters.

**[27]** Furthermore Government has signalled a clear intention to remove discriminatory practices against women (including widows) by the passage of legislation such as the LCMPA in 2006. Although this Act does not deal specifically with burial rights, it heralds a significant paradigm shift away from the status of perpetual minority imposed on married women by our laws, particularly customary law. It has ushered in a new era in our country's marriage law architecture, by removing the husband's marital

[8] Lepule v Lepule at paras [17] and [23]; Mokoena v Mokoena at p 212 para [14]; 'Mota v 'Mota at para [11] - [17]; Makhutla v Makhutla

[9] Sections 15 (3) (a) and 15 (3) (b) of the Land Act 2010, respectively

power over the person and property of his wife and bestowing equal powers on spouses married in community of property. What is most significant, in relation to the present case, is that the Act applies to both civil and customary law marriages.

**[28]** Of more significance to the present dispute, our courts have themselves, on occasion expressed discomfort with giving the heir priority in burial matters over the widow. For instance in **Massa v Massa (1997)** Judge Monapathi said that although he felt bound to accord the right to bury the deceased to his first-born son rather than to his wife who had lived in happy matrimony with the deceased for twenty years until his death, he found this outcome bizarre, cruel and unfair.[10]

**[29]** Similarly, in **Sello v Semamola (1996)** Judge Ramodibedi stated:

> "In my view each case must be decided on its own merits and the court must not be bound by any inflexible rules when determining the question as to who has the right to bury. It is true the heir must always be given first preference whenever it is just to do so but there may well be cases where even the heir himself is unsuited to bury the deceased such as for example where he has not lived with the deceased for a very inordinate length of time and has actually killed the latter in circumstances repugnant to public morality such as for ritual purposes. This court subscribes to the view that in determining the duty to bury the court must be guided by a sense of what is right as well as public policy."[11]

[10] Case discussed in S.P. Sakoane. 1995-1996 at 552-3
[11] At p.9 first paragraph

## A New Approach

**[30]** Consequently, in my considered opinion it is not appropriate to continue employing a rule which is not only unjustifiable, but is also based on shaky jurisprudence and ignores our country's human rights obligations. The courts of Kenya, which are beset with burial disputes like our jurisdiction have lately adopted a more rational approach. If a person dies leaving no burial directions the surviving spouse (or civil partner) has the prior right to determine the time, place and manner of burial, as the deceased's closest kin. This approach was aptly set out as follows:

> "The person …who is in the first line of duty in relation to the burial of any deceased person, is the one who is closest to the deceased in legal terms. Generally the marital union will be found to be the focus of the closest chain of relationships touching on the deceased. And therefore, it is only natural that the one who can prove this fundamental proximity in law to the deceased, has the colour of right of burial, ahead of any other claimant. … Whereas the law of succession is first and foremost concerned with the distribution of possessions, the law of marriage is particularly concerned with the standing of persons within the family unit. It follows that it is the marriage regime, rather than the succession regime, that should prevail in determining questions of burial"[12]

**[31]** Using this principle, the courts have held that the first-born male child's claim to the body of the deceased was not nearly as strong and authentic as the widow's. We fully endorse this approach. In our opinion it is the most logical and well-founded approach for dealing with this type of dispute. We are confident that this approach will go a long way towards reducing the flood of burial cases that come before our duty judges on the eve of each weekend. As it has been rightly observed:

[12] Per Judge Ojwang in the Kenya High Court case of Njoroge v Njoroge (2004). Followed in Kimata v Wanjiru (2014) and Kemboi v Kurgat (2012), and by the Kenya Appeal Court in JMK v DMK (2013)

*"To prevent parties coming to court in burial cases with an aim of finally pegging their succession claims on the outcome of a burial case … we propose that matters relating to burial [should] be excluded from succession matters completely. Burial of a deceased by any person should not per se confer on that person any inheritance rights. The place of burial of a deceased person should be irrelevant for purposes of succession matters."*[13]

**CONCLUSION**

**[32]** In the present case 'Maliau has a preferential right to bury the late Ntene, as the one closest to him in legal terms. She has proved this fundamental proximity in law to the deceased, and therefore has the colour of right of burial ahead of any other claimant, including their sons Liau and Maholi.

**[33]** The court is also guided by its sense of what is right in arriving at this conclusion. And in this context, sense of what is right means a feeling or good judgment of what is considered fair, just or morally acceptable by most people.[14]

**[34]** We also feel that in the circumstances of this case it is reasonable, fair and equitable[15] to accord the widow the right to bury her husband, and not the children, for the following reasons:

(a) It would be inhumane to expect such an elderly and sickly lady to make the long and difficult journey from Maseru to the

[13] Ngunjiri (2006) at p.71
[14] See definitions of "sense" and "right" in the Oxford Dictionary of English
[15] According to Black's Law Dictionary "equitable", in this context, means "just, fair and right, in consideration of the facts and circumstances of the individual case"

remote village of Mantšonyane every time she wishes to visit her husband's grave to spiritually connect with him and tend his final resting place;

(b) The grave in Maseru will be more easily accessible, not only to her but also to her children and the rest of the family, who, ironically, are by their own admission all now living in Maseru.

(c) It will reinforce the widow's pre-eminent status as the person closest to the deceased.[16]

(d) It gives acute expression to the binding character of marriage and the precedence that it attracts in family relations.[17]

(e) It is a fulfilment of the Christian marriage vow "till death do us part."

(f) "In order to begin to cope with her loss, a window needs control over the burial of her deceased husband."[18]

**KEKETSO MOAHLOLI**
**ACTING JUDGE**

**Appearances**:

For Applicant: Mrs K. Thabane (Attorney at Law)

For Respondents: Adv. M.J. Motšoari

[16] Nwabueze (2008) at p.12
[17] Nwabueze (2008) at p. 12
[18] Nwabueze 2010 at p.142