

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/15/19

In the matter between:

‘MATLOTLISO NTHINYA

APPLICANT

AND

**MOTONGOA NTHINYA
‘MARELEBELETSOE NTHINYA**

**1st RESPONDENT
2nd RESPONDENT**

JUDGMENT

CORAM: HON. J. T. M. MOILOA

DATE OF HEARING: 25 FEBRUARY 2019

DATE OF JUDGMENT: 25 FEBRUARY 2019

ANNOTATIONS:

Legislature

1. Legal capacity of Married Persons Act, 9 of 2006

Text-Books

1. Hebstein & Van Winsen: Supreme Court Practice and Rules

[1] This matter came before me on the unopposed motion roll while I was on call on 18/02/2019. It is an application wherein Applicant prays for orders in the following terms:

(a) That the purported customary law marriage entered into between 1st and 2nd Respondent (sic) be declared null and void and of no legal force and effect for want of consent of Applicant.

(b) That the 2nd Respondent be evicted and/or ejected from the Applicant's matrimonial home with the 1st Respondent situated (sic) at St. Monica's Ha Barete in the district of Leribe.

Alternatively

(c) That the 1st Respondent be ordered and directed to build 2nd Respondent a separate house of her own.

(d) Costs of suit

(e) Further and/or alternative relief

According to the return of service filed of record the Deputy Sheriff served the notice of motion upon the 2 Respondents on 21/01/19. The mode of service was by posting it under the door of the parties' house at St. Monica's, Ha Barete, Leribe. I was satisfied at to proper service. I heard Adv. T. F. Motsie for Applicant on 25/02/2019 and on that date I dismissed the application. There was no order as to costs. My reasons for the dismissal of the application are explained below.

[2] **BACKGROUND**

In her Founding Affidavit Applicant refers to First Respondent as her husband. Applicant in the same Affidavit refers to 2nd Respondent as staying with the 1st Respondent as husband and wife. Applicant alleges that in or around 2008 she and 1st Respondent agreed to get married and

eloped. Their elopement was followed by their families agreeing to marry them. The Nthinya family performed all rituals in recognition of the customary law marriage. For instance a sheep was slaughtered to welcome Applicant into the Nthinya family. In this sense I am satisfied that the requirements for a customary law marriage were met. Applicant in this regard annexes “MN” and its fair translation “MN2” evidencing the marriage in question; hers and 1st Respondent’s. “MN1” is dated 29/01/2012. But it bears date stamp of Chief of Tsikoane in 2017. From this one can deduce that the Chief’s date stamp was affixed to “MN1” several years after it was authored. No children were born out of this marriage.

[3] **THE JOINT ESTATE**

Applicant goes on to say that at the inception of their marriage she and 1st Respondent lived with the latter’s parents. They did not have a place of their own right away. Later in the same year (2012) they acquired a residential site at St. Monica’s. Together, Applicant and 1st Respondent developed the said site. They built a 2 roomed house for their own use as well as 2 flats to rent out. They moved to their new premises in 2014.

[4] **MARITAL PROBLEMS**

Their house was still incomplete in 2014 when they moved herein. There was still finishing touches to be done. However, it had become a matter of urgency that they moved out of their parents’ home with 1st Respondent and move to their own. The urgency was influenced by 1st Respondent’s parents who had created an unfriendly home environment for Applicant. Applicant says that her in-laws developed a painful and hurtful habit of calling her names because she did not have any children. A year after moving to the new home the insults came from 1st Respondent himself.

Applicant says 1st Respondent too started insulting her for not bearing children. Applicant says that 1st Respondent assaulted her verbally and physically to an extent that at one point Applicant broke one of her fingers. She says she reported the verbal and physical assaults to 1st Respondent's parents. They seemed to support his actions. The situation was unbearable. Applicant eventually fled to her maiden home (“*ngalaed*”). No efforts came forth to reconcile Applicant and 1st Respondent neither by 1st Respondent himself nor his family/parents. During the period of Applicant's fleeing from the matrimonial home to her maiden home, Applicant found a job in Newcastle, Natal South Africa at a textile factory. Applicant says she is still working there as a factory manager and during her absence 1st Respondent took 2nd Respondent as his wife. Applicant says this was done without her knowledgeable and consent.

[5] **THE LAW**

As we have seen, Applicant seeks High Court's nullification of the marriage of 2nd Respondent to 1st Respondent on the ground that she did not give consent to 1st Respondent to marry 2nd Respondent. In the same breath Applicant acknowledges that her consent was not mandatory. However, she seeks to find justification by saying that it is null and void in terms of the **Legal Capacity of Married Persons Act, 9 of 2006**. Applicant says she has been advised by her legal counsel that in terms of the Act her consent to the marriage of 1st Respondent and 2nd Respondent “is so strictly necessary because same has the net effect of exposing my joint estate with the 1st Respondent into liability of paying the 2nd Respondent's *bohali* cattle in terms of the law.” I do not know how one comes to this conclusion. In my view applicant and her legal counsel are both incorrect and confused. The Act they are relying on and without directing this court to the relevant provisions, deals with the removal of

minority status of married women. The Act removes the sole marital power of husbands over the person and property of their wives. It has nothing to do with the capacity of women to marry or to consent to their husbands marrying second or subsequent wives. **Section 7 of the Act** defines transactions that require the other spouse's consent. Consent of the senior wife for her husband to marry a second wife in a polygamous marriage does not make the list.

[6] **JURISDICTION**

In my view the relief sought as outlined above should have alerted Applicant's Counsel to consideration of jurisdiction for the determination of her case. The legal regime governing Applicants marriage is the customary law which is justiciable in the subordinate courts of Local and Central Courts. In the circumstances of this case it is clear that the case should have been enrolled by Applicant in the Local and Central Courts and not in the High Court.

Secondly, I frown upon matters being brought "on motion proceedings" when they should have been brought by way of "action." This case is a classic example of a case that cried out for action proceedings. This is a matter which should have been commenced by way of action at the Local and Central Courts and not by motion act the High Court. One of the many reasons why I say so is that the gravamen of Applicant's case is to change the personal status of 2nd Respondent. It cannot be done by way of motion proceedings. It can only be done by way of action proceedings in an appropriate forum.

[7] **EVICTION**

As to the second prayer of Applicant namely eviction of 2nd Respondent, I concluded that in the absence of a Certificate of the Judge authorising the removal of such action from the subordinate court where it is ordinarily justiciable to the High Court I was not persuaded or inclined to overlook this aspect of the case. There have been no reasons advanced in this application why it was not sued out in the subordinate court of appropriate jurisdiction but was brought straight to the High Court without leave of the Judge.

[8] **ALTERNATIVE PRAYER SOUGHT**

As to the alternative prayer sought, namely, to order 1st Respondent to build a separate house for 2nd Respondent I found this to be a further manifestation of the confusion of Applicant and her legal counsel. It made no sense to me. I did not grant it either.

[9] **CONCLUSION**

For reasons set out as discussed above I dismiss this application. I did not order costs against Applicant as none had been asked for against her. The Applicant simply did not get past the judge with her case. In other words Applicant failed to establish her case before this court.

J. T. M. MOILOA
JUDGE

FOR APPLICANT: ADV. MOTSIE

FOR RESPONDENTS: No appearance for Respondents