

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/476/12

In the matter between

THAPELO KHADI

APPLICANT

AND

LEBOHANG MOFELEHETSI

1ST RESPONDENT

LENKOE MOFELEHETSI

2ND RESPONDENT

THABISO MOFELEHETSI

3RD RESPONDENT

MAKHABANE MOFELEHETSI

4TH RESPONDENT

JUDGMENT

CORAM:

HON. J. T. M. MOILOA

DATE OF HEARING:

18 November 2019

DATE OF JUDGMENT:

30 April 2020

- [1] On 7th January 1955, Naphtali Nicolas Khadi and Christina ‘Mapitso Khadi attested to a Will. The two were spouses married in community of property. In terms of their Will the couple’s children would be the sole and universal heirs in equal shares. The couple were blessed with one daughter named Mosele Khadi, who naturally stood to benefit under the Will being the only child. We are not told when Naphtali and Christina died. In fact we are not told a lot of dates which are material in this family feud, as shall be seen throughout the judgment. Mosele got married to Abiathar Moerane Mofelehetsi. We are not told when they were married. Upon marriage to Mofelehetsi, Mosele became Mamokete Mofelehetsi. However, for purposes of convenience I will refer to her as Mosele.
- [2] Mosele’s first child was born on 6th December 1953. It follows that in 1955 when Mosele’s parents drew up the Will for her benefit, her first born child was an infant of 2 years. Whether or not Mosele was already married to Mofelehetsi is in dispute. Mosele’s first born child was a boy named Monty Khadi who First Respondent calls Ithabeleng Martin Mofelehetsi. First Respondent was not yet born in December 1953 when Monty was born. The estate which originally belonged to Naphtali and Christina is the subject matter of this litigation following the death of their grandson Monty. Applicant refers to Monty as his father and wants to be declared Monty’s rightful heir. Applicant also seeks an order restraining Respondents from entering Applicant’s sites No. 139 and 177 situate at Seapoint. An intention to oppose this application was filed on behalf of all four Respondents. The Answering Affidavit itself was deposed to by First Respondent who refers to Monty as his elder brother. First Respondent alleges that Monty’s names are Ithabeleng Martin Mofelehetsi not Khadi. First Respondent avers that “Monty” was his nick name. As has been done on the papers I will also be referring to the deceased as Monty to avoid

confusion. Third Respondent filed a supporting Affidavit aligning himself with First Respondent's Answer.

Applicant's case

- [3] Monty got married to one 'Mabafokeng *nee* Seipobi. We are not told when that took place. However, Applicant claims to be Monty's eldest son and customary heir to his estate. Applicant in his Founding Affidavit supports his claim by attaching annexures "TK1" and "TK2" collectively evidencing that the Khadi family appointed him customary heir to the estate of the late Monty Khadi. The Master of the High Court confirmed the appointment.

Applicant refers to site 139 as forming part of his inheritance from Monty. He goes on to allege that Respondents have taken full control and occupation of same without any clear right or *locus standi*. This conduct of Respondents only started after the death of Monty. During the lifetime of Monty, Applicant says, Respondents never claimed any right to the property in question. They have removed and changed locks of certain rooms thereby denying Applicant access. Moreover, Applicants alleges that Respondents have removed some of the tenants and let the property to tenants of their own choice. That in brevity is Applicant's case.

Respondent's case

- [4] In reaction to Applicant's allegations, Respondents outright deny that Applicant is the son of Monty. Secondly, Respondents say that the property in issue never even belonged to the late Monty.

Is Applicant Monty's son

Respondents' version is that Applicant was already born when Monty got married to Applicant's mother. Applicant's birth date is not alleged. However, Respondents do not direct this court to who then fathered Applicant before his mother got into marriage with Monty. Their contention further is that this is a Mofelehetsi family matter not a Khadi family matter; that Khadi is their mother's (Mosele's) maiden surname. Under the circumstances, the Khadi family had no right in terms of customary law to appoint an heir in the family of Mofelehetsi. Respondents thus consider "TK1" as invalid. Of course it is not Applicant's case that he is a Mofelehetsi. He regards himself a Khadi and customary heir to the estate of his late father Monty Khadi.

- [5] On the Monty Khadi/Mofelehetsi debate, Applicant in his Replying Affidavit reacts by telling the court that his late father (Monty) was in fact born out of wedlock to Mosele Khadi. That Monty remained with his maternal parents (although I think he meant grandparents) at the time his mother (Monty's) got married to Mofelehetsi. Applicant reiterates that the Khadi family has been aware of his paternity (being Monty's son) hence appointing him customary heir to his estate. He founds his case on the Khadi lineage through his father Monty who was an illegitimate son of Mosele, the beneficiary under the original will.
- [6] Nothing in the pleadings has persuaded me to find Applicant not a Khadi descendant as he regards himself to be one. No other fitting lineage has been presented to this court as to successfully refute Applicant's allegation that he is a Khadi, son of Monty. I therefore find that Applicant is Monty's son. I have not been presented with any other father for him. It was

therefore correct for the Khadi family to appoint him customary heir to his father's estate.

The Estate

- [7] What constitutes Monty's estate to which his son (Applicant) is heir? In his notice of motion Applicant refers to site numbers 139 and 177 situate at Seapoint. Specifically, Applicant alleges that Respondents have taken full control and occupation of site 139 without a right or *locus standi* to do so. It is common cause that site number 139 formed part of Nicolas and Christina's estate bequeathed to their child (Mosele) through a Will in January 1955. Respondents do not deny having taken occupation as alleged by Applicant. In fact they claim to have rights to the property in issue. Their version is that the site never belonged to Monty. They indicate in answer that upon realising that Monty was no longer working, the family decided and put him (Monty) in charge of the said property to collect rentals and take care of their unmarried sister and her children. Yet again we are not told when this arrangement was made. Most probably in my view, Monty lived at the premises all his life. He was born and raised in the Khadi household having been born of Mosele Khadi, out of wedlock.
- [8] Respondents argue that it is by virtue of being Mosele's children that they have rights to site 139. They rely on the Will by their maternal grandparents Naphtali and Christina Khadi, for the benefit of their daughter Mosele (Mamokete Mofelehetsi; their mother). On this issue of legatees under Nicolas and Christina's WILL, Applicant states in Reply that Mosele did not adiate under the WILL as it was never filed with the Master of the High Court. Adiation is acceptance of a benefit under a WILL and Applicant raises in defence to a challenge raised by Respondent in Answer. Applicant says Mosele under the circumstances forfeited her rights under

the WILL. As a result his father Monty (illegitimate son of Mosele) inherited the estate intestate from her. He in turn inherited the same estate from Monty intestate.

Conclusion

- [9] The devolution of this estate emanates from the WILL by Mosele's parents. Applicant is Mosele's grandson and through Mosele, Applicant inherits from Monty: Mosele's first born son. Respondents are Mosele's children from her marriage to Moerane Mofelehetsi. The difficulty lies in the date on which Mosele got married coupled with when her parents died. We do not know from the pleadings when those material events took place. We do not know whether Mosele brought her inheritance into the pool of marriage in community of property. What we do know is that Monty was already born when his grandparents drew up a will for the benefit of his mother Mosele. I have also found in all probability that Monty was not only born in the Khadi family but was raised there all his life. He is survived by a son Thapelo Khadi who as his customary heir inherits rights emanating from him. By their own pleadings, Respondents correctly belong to the Mofelehetsi family and their inheritance rights are limited thereto. Incidentally, Respondents have no issue with the 51% shareholding at Total Lesotho Properties which the Khadi family appointed Applicant to inherit through TK1. There is really no merit in treating site 139 differently.

Even if we were to operate on the basis of Respondents' version, that Applicant is their elder brother as First Respondent does under paragraph 6 of his Answer. That still makes Applicant heir under customary law by virtue of him being the first born male child.

The Application accordingly succeeds. There is no order as to costs, this being a family dispute.

J. T. M. MOILOA
JUDGE

FOR APPLICANT: ADV. B. E. SEKATLE

FOR RESPONDENTS: ADV. SELLO