

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

COURT OF APPEAL CIVIL APPEAL NO. 42 OF 2001
HIGH COURT CIVIL APPEAL NO F11 OF 2000

In the matter between

LOPANG NTHOBELANG	1ST APPELLANT
KEKGATHEGILE NTHOBELANG	2ND APPELLANT
KEBADIRETSE NTHOBELANG	3RD APPELLANT
KELEBILE MOALOSI	4TH APPELLANT
NKILANG NTHOBELANG	5TH APPELLANT

Versus

DOMMY LOPANG NTHOBELANG	RESPONDENT
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Mr. P. A. Kgalemang for the appellant
Mr. B. D. Leburu with him Ms. F. Mbuso for the respondent

J U D G M E N T

CORAM: KORSAH J. A.
LORD SUTHERLAND J.A.
KIRBY A.J.A

KORSAH J.A.

This matter proceeded by way of an appeal from the Customary Court of Appeal in Francistown to the High Court.

The first statement in the judgment of the Customary Court of Appeal reveals the nature of the matter in dispute from its inception. It reads:

“This borehole case was heard at the Chief’s court in Mmaphashalala in December 20th 1998.”

We are left in no doubt that the dispute between the parties related to a borehole, but then let me commence this narrative from a relevant point.

The grandfather of the respondent was the father of the 1st, 3rd, 4th and 5th appellants. The 2nd appellant was one of the three wives of the late Lekando Nthobelang. The 3rd, 4th and 5th appellants were the daughters of the said Lekando Nthobelang, and had been given a well which was sunk manually. Adjacent to that well was a modern drilled borehole.

The Chief's court in Mmaphashalala ruled that the respondent "made a mistake by selling the borehole without any discussion with parents." It declared that the well was given to the women, but that the borehole was given to Kekgatlegile and Dommy (the respondent). This was as a result of the misinterpretation of a Will.

Aggrieved and dissatisfied with this determination, the respondent appealed to the Chief's court in Serowe. The Deputy Chief of Bangwato, who heard the matter on 18th March 1999 declared that the borehole was the property of the respondent as was stated in the Will of Lekando Nthobelang. Now, it was the appellants who, dissatisfied with that declaration, approached the Customary Court of Appeal for redress.

The Customary Court of Appeal observed in its judgment that while the appellants entertained doubts about the Will said to be made by Lekando Nthobelang, they say that the borehole was given to the respondent in trust for the family and not that it was given to the respondent absolutely with a right to dispose of it.

The Customary Court of Appeal noted, however, that the will does not indicate that the respondent was given the borehole to hold in trust for others. That court reasoned that, if it is believed that the will was made by Lekando Nthobelang and it bequeathed 25 head of cattle and the borehole to the respondent, then if he is free to dispose of the cattle he is equally entitled to dispose of the borehole. That court then added this rider to the above statement:-

“Even though a person is entitled to use his/her property as it pleases him/her what has to be considered is that in Batswana’s lifestyle people live together. Whatever one has is used for the benefit of his/her family. When we come to a cattle-post lifestyle we find that many times relatives live in one area, and use one borehole the fact being that they grew up there and they are accumulating their livestock there.”

Later in that judgment the court said:-

“The court is not based on whether the WILL is valid or not. What the court is saying is that, that borehole belongs to Nthobelang’s compound it cannot leave the compound without any discussion and agreement with all those who depend on it. Dommy Lopang broke a Tswana custom by selling the borehole without informing parents. ...

In Tswana custom a child is not above parents. Even though his age is that of a man, he/she is still a child and he should discuss with his parents.”

The customary Court of Appeal chose to disregard the testamentary disposition of the borehole in the will and declared that:-

“This borehole is that of the compound so the complainant should continue to water from it just as they have been doing.”

It is from this decision that the respondent appealed to the High Court in Francistown.

The first ground of appeal raised a challenge to the jurisdiction of the Customary Court of Appeal to entertain the matter. It was put as follows:-

- “1. The Customary Court of Appeal erred and misdirected itself in entertaining the action or appeal in so far as the court a quo (including the Customary Court at Serowe) did not have jurisdiction to hear the matter, it being excluded by section 12(c)(i) of the Customary Courts Act.”

There was no doubt that in selling the borehole the respondent had relied on a bequest contained in the last will executed by his late grandfather Lekando Nthobelang at Francistown on 13th February 1976, which recites that:-

“I hereby give and bequeath to my grandson Domi Lopang Twenty-five (25) head of cattle plus my borehole together with all the equipment thereto situated at Mokgalong at Sekwaba.”

Incidentally, clause (4) of the Will provided as follows:-

“I hereby appoint my sons Balebetse, Lopang and Kelebonye and my daughter Koolehile, Nkelang, Keadiretse, Ntamana and Boitumelo anyone of whom failing such person's issue per stirpes, to be the heirs and heiresses to the remainder and residue of my estate, property and effects in equal shares share and share alike.”

Thus the deceased effectively disposed of all property, of which he was possessed at the time of his death, by a Will. Therefore, any argument

that the customary courts had jurisdiction because he died partly intestate is not sustainable.

The appeal was heard by Mosojane J. who noted in his judgment that at the hearing of the appeal Counsel agreed that the first ground of appeal was the ground upon which all others rested. Its disposal in favour of the respondent would be the end of the matter.

It is obvious to me that courts, being creatures of statute law, cannot arrogate to themselves jurisdiction which was not granted to them by the statutes which created them. They cannot, even with the consent of the parties, arrogate to themselves jurisdiction which they do not have.

Section 12 (c) of the Customary Courts Act [Cap 04:05] reads:-

“Subject to any express provision confirming jurisdiction, no Customary Court shall have jurisdiction to try:-

- (a) ...
 - (b) ...
 - (c) any cause or proceeding –
 - (i) arising in connection with a testamentary disposition of property;
 - (ii) arising in connection with the administration of a deceased estate to which any law of Botswana applies;
 - (iii) arising under the law relating to insolvency;
- or

- (iv) involving matters of relationships to which customary law is inapplicable.”

It is inescapable, as the learned Judge found, that a Will is the testamentary disposition of property stated in section 12(c)(i). It is not true that the issue of the Will was not introduced from the onset. The respondent's claim to a right to sell the borehole had been based, from the inception, on his absolute ownership of the borehole deriving from a bequest in a Will. But even if the existence of the Will came to light at the appeal stage in the Serowe Customary Court, the mere existence of the Will disposing of the borehole and other property precluded the Customary Courts from entertaining the matter. I am in entire agreement with the learned Judge that: “the Customary Courts entertained this matter contrary to the clear provisions of s. 12(c)(i) of the Customary Courts Act and that those proceedings had to be set aside as a nullity.” That, as agreed by counsel for both parties, should have been the end of the matter, instead of which this appeal has been lodged.

Mr. Kgalemang who appeared for the appellants submitted that, as the Will was not produced until the hearing of the appeal to the High Court the appellants should not be mulcted with the costs in both the High Court and this court; that it would be fair if each party bore its own costs.

This submission is as unmeritorious as all other submissions made by Mr. Kgalemang in this appeal. When the Will was produced in the High

