IN THE HIGH COURT OF SWAZILAND

a:Kunene

CASE NO. 1413/98

IN THE MATTER BETWEEN

JABULANE KUNENE	APPLICANT
VS	
ESTEL MASUKU	1ST RESPONDENT
SIBHAKELANE VUSI MASUKU	2ND RESPONDENT
MFELAFUTSI KHUMAO	3RD RESPONDENT
MKHUZWENI HEALTH CENTRE	4TH RESPONDENT
CORAM	S.B. MAPHALALA - A J
FOR APPLICANT	MR S. DLAMINI
FOR RESPONDENTS	MR S. NXUMALO

JUDGEMENT

(25/06/98)

Before court is an urgent application which came before court on the 18th June, 1998 whereupon a rule nisi was issued returnable on the 24th June, 1998 for an order on the following grounds,

1. Interdicting and restraining the first, second and third respondents from either directly or indirectly removing the body of Gladys Maria Kunene (nee Masuku) from the mortuary of the forth respondent and from interfering the said remains of Gladys Maria Kunene,

2. Directing the fourth respondent to hand over the body of the said Gladys Maria Kunene(born Masuku) to the applicant to enable the applicant to proceed with the funeral arrangements and the burial thereof,

3. Declaring the applicant to be the person who has sole burial rights in respect of the body of the said Gladys Maria Kunene (born Masuku),

4. That the rule nisi operate as an interim order pending the finalisation of the application.

5. Costs.

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The respondent filed a notice of intention to oppose together with the founding affidavit of the 2nd respondent supported by the affidavit of the 1st respondent and the 3rd respondent.

The matter then came for arguments on the 24th June, 1998 where Mr Dlamini for the applicant applied for a confirmation of the rule issued by the court on the 18th June, 1998. That was common cause that the applicant were married together in terms of the Swazi law and custom. The applicant is therefore an heir of the deceased estate and has a better right to bury his wife. To this effect he referred the court to the case of Mankahla vs Matiwane 1989 (2) S.A. 920 where it was found inter alia that in the absence of a testamentary direction, the duty of, and the corresponding right, to see to the burial of the deceased is that of the heirs, i.e those appointed as heirs in the will of the deceased. Mr Dlamini further argued that the respondent ground for seeking to bury the deceased is that when they went to report the death of the deceased who is their sister to the applicant's parental home so that burial arrangements commence they were chased away by the applicant's father. Mr Dlamini argues that this is not a material ground for one to oppose such an application. He further went to contend that what the respondent can now do as they have spent some money in preparation for the funeral was to sue applicant in a separate action for costs they might have incurred in preparing for the burial. Finally, he argued that the husband is the closest relative of the deceased and he is the heir and has a right to bury the deceased.

On the other hand Mr Nxumalo submitted that a party who seeks an interdict has to prove certain pre-requisites that he has an alienable right. He submitted that in this case the applicant has proved that he has an alienable right and this is without question. However, that applicant has waived his rights by chasing the respondents from his home when they came to report the death of the deceased. Secondly, that he had waived his rights in that the spouses were no longer living together until the death of the deceased. He argued further that the applicant has not fully satisfied all the requirements of a valid marriage in terms of Swazi law and custom in that although the deceased was smeared with red ochre a certain beast was not paid to the deceased family in accordance with custom, that this renders the marriage between the applicant and the deceased a nullity.

These are the issues before me. I am inclined to agree with Mr Dlamini for the applicant on the strength of the ratio decidendi Mankahla vs Matiwane (supra) that the surviving spouse being the applicant has a better right to bury the deceased. I do not agree with Mr Nxumalo that applicant has waived his rights of burial in this case. Evidence before me is to the effect that the respondents were chased away by the father of the applicant and not the applicant who chased them away. The mere fact that when the deceased died she was no longer staying with the applicant is neither here nor there. There are numerous married people who live in separation that does not mean their marriages are no longer in existence in law. Marriages can only be terminated by divorce in accordance with the law. The point made by Mr Nxumalo that the marriage between the parties was a nullity as the beast which accompany the smearing with the red ochre

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was not paid by the applicant is not valid. Unfortunately, I could not locate a decision of this court by the late Lukhele J (as he then was) on this point but I am well alive to the principle propounded in that case. The learned judge in that case ruled that a customary marriage comes into existence upon the smearing of the red ochre, that is when such marriages become valid marriages in terms of our law. For this reason I dismiss Mr Nxumalo's contention. It appears to me to be common ground that the applicant was married to the deceased in terms of the Swazi law and custom. The second respondent is his founding affidavit confirms the marriage at page 2, thus:

" 4 Ad paragraph 6

© I admit that applicant was married to the deceased by Swazi law and custom on the 7th September, 1985".

For this reason I hold that the applicant has a better right to bury the deceased. I thus confirm the rule I had issued on the 18th June, 1998 with costs.

S.B. MAPHALALA

ACTING JUDGE