



THE HIGH COURT OF SWAZILAND

LYDIA THELMA MASANGO

Plaintiff

And

MAGWAZA NDWANDWE

Defendant

Civil Case No. 1733/2000

Coram

For the Plaintiff

For the Defendant

S.B. MAPHALALA – J

MR. MAGAGULA

MR. O. NDZIMA

JUDGMENT

(22/05/2002)

This is an action by the plaintiff for the return of cattle from the defendant purportedly given in a “sisaed” transaction between the parties. The defendant denies any “sisa” agreement between him and the plaintiff.

The plaintiff avers in her particulars of claim that during or about 1996, an oral agreement was made between the plaintiff and the defendant in terms of which the plaintiff placed five (5) herd of cattle at the defendant’s homestead for safe keeping in

conformity with the Swazi custom of “kusisa”. The said five (5) herd of cattle placed at the defendant’s place of residence have since reproduced and are presently believed to be ten (10) in number.

During 1998, the plaintiff requested the defendant to return the herd of cattle together with their progeny but defendant refused to do so.

Pursuant to the defendant’s refusal to handover the cattle as requested by plaintiff, the plaintiff referred the matter to the Umphakatsi (Chief’s court) of the area for arbitration. The Umphakatsi and the family members of the two parties failed to resolve the matter in an amicable way.

The plaintiff prays for an order directing the defendant to return the five (5) herd of cattle together with the offspring reasonably believed to be ten (10) in number; alternatively payment of the sum of E10, 000-00 being the value of the said cattle and costs of suit.

The defendant opposes this action and in his plea avers that at no stage did he and the plaintiff enter into an oral agreement of “sisa”. There are no cattle belonging to the plaintiff in the defendant’s homestead.

The defendant avers further that sometime in 1992, the plaintiff came requesting for cattle from the defendant for “insulamyembeti” on behalf of his mother.

When the matter came for trial the plaintiff led her own evidence and then closed her case. The defendant on the other hand called the evidence of three witnesses, namely: Beauty Magagula, Robert Ndwandwe and his own evidence.

The plaintiff in her evidence claims the cattle in question were a progeny of a beast given to her mother, Dlelaphi Magagula for “kuphahla” since she was sick. The plaintiff claims the beast came from her grandmother and it was male, but was exchanged for a female which subsequently gave birth to others. The plaintiff further claims that the cattle were kept by one Moses Ndwandwe. She collected them from him because Moses was facing litigation.

The defendant on the other hand in his evidence claims that the cattle belong to him as they were left by Dlelaphi Magagula, his mother by virtue of the Swazi custom of putting someone in somebody's else stomach "kufakwa esiswini". The defendant states that he was put in the stomach of this Dlelaphi Magagula because she did not bore any male child. This fact has not been denied by the plaintiff who only stated in her evidence in chief that the defendant was failing in his duties.

The defendant denied any "sisu" agreement between him and the plaintiff. The defendant called one Beauty Magagula and Robert Ndwandwe to support his story. These witnesses deposed that the cattle belonged to Dlelaphi Magagula. Further, the evidence before court that the cattle were twelve (12) in number when the plaintiff took them from Moses Ndwandwe. Only three (3) herds of cattle ran away from the plaintiff and returned back to Moses Ndwandwe who subsequently surrendered them to the defendant. This evidence has not been denied by the plaintiff and thus remains uncontroverted. The defendant testified that these are the cattle which form the subject matter before court.

When the matter came for arguments Mr. Magagula for the plaintiff contended that in terms of the laws of interstate succession the plaintiff is entitled to inherit from the estate of her mother as she is the only natural child of the deceased Dlelaphi Magagula who owned the cattle in dispute. He referred the court to *A.J. Oosthuizen, The Law of Succession (1982)* at page 15 where the learned author states that the law of interstate succession indicates the order in which the interstate heirs inherit from the deceased, and this order may be *per capita* or representation *per stirpes* – (See *Voet 38. 17.4*). An heir inherits *per capita* when he inherits on the ground of the degree of consanguinity in which he stands to the deceased. In *casu* it was argued that the plaintiff as the only natural child is automatically entitled to inherit from the estate of the deceased following the above mentioned legal authority. On the other hand, so goes the argument the defendant is far removed in the order of succession as he was put into the deceased's stomach and that his rights to succeed in the estate of the deceased are subservient to those enjoyed by the plaintiff who is a natural child of the deceased.

Mr. Magagula went on to punch holes in the evidence of both witnesses for the defence. That Beauty Magagula is the mother of the defendant and is a naturally bias witness. Her evidence should be taken with a pinch of salt in the circumstances. She further contradicted the evidence of the defendant on how the deceased acquired the cattle in dispute.

The evidence of Robert Ndwandwe is to the effect that the defendant was given the cattle to look after and not to own and this is more reason that the cattle should be returned to the plaintiff.

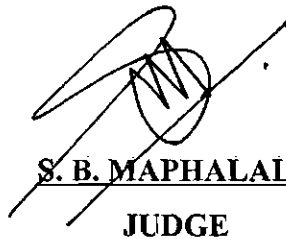
Mr. Ndzima argued at length *au contraire*. The gravamen of the defendant's case is that the plaintiff has failed to prove that there was a "sisa" agreement as per paragraph 3 of the plaintiff's particulars of claim which spells out the cause of action in this matter. There was actually no "sisa" agreement between the plaintiff and the defendant. The cattle in issue here forms part of an estate of the late Dlelaphi Magagula and as such should have been dealt with in terms of Rule 6 (23) of the rules of court.

After careful consideration of the issues before me, I agree in *toto* with the submissions made by Mr. Ndzima for the defendant on a number of points. Firstly, the plaintiff has not called corroborative evidence to support her story that the cattle in question were progeny of a beast given to her mother, Dlelaphi Magagula for "kuphahla" since she was sick. The plaintiff claims that the cattle were kept by Moses Ndwandwe and that she collected them because Moses was facing litigation. The evidence of Moses would have gone a long way to support her case. Secondly, the evidence of the defendant that the cattle belong to him as they were left by Dlelaphi Magagula, his mother by virtue of the Swazi custom of putting someone in somebody's stomach "kufakwa esiswini" is more credible. The plaintiff has not denied this evidence and it remains uncontroverted. The plaintiff only stated that defendant was failing in his duties. Thirdly, the evidence of Beauty Magagula and Robert Ndwandwe support the defendant's version in all material respects and that the cattle belonged to Dlelaphi Magagula. Lastly, on the evidence presented before court there was no "sisa" agreement as averred by the plaintiff at paragraph 3 of her particulars of claim which founds this action.

It is my considered view, that on the totality of the evidence before me the plaintiff has not proved her case on a balance of probabilities and I agree with Mr. Ndzima for the defendant that the matter should have been dealt with in the traditional way, in that it involves Swazi law and custom.

It is still open to the parties to take the matter to the appropriate forum for proper adjudication on these issues of Swazi law and custom on how succession should proceed in these circumstances.

In the result, I dismiss the action and costs to follow the event.



S. B. MAPHALALA
JUDGE