



REPUBLIC OF KENYA



KENYA LAW
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Choi v Nyangweso (Appeal E143 of 2024)
[2024] KEHC 16677 (KLR) (Family) (20 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16677 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

APPEAL E143 OF 2024

H NAMISI, J

DECEMBER 20, 2024

BETWEEN

HANNAH BOSIBORI CHOI APPELLANT

AND

BEN NYAEGA NYANGWESO RESPONDENT

*(Being an Appeal from the Ruling and Judgement of Hon. Aduke J. P
Atieno delivered on 28 October 2024 in Milimani MCFC NO E9 of 2024)*

JUDGMENT

1. This appeal arises out of a burial dispute filed in the lower court. The Appellant herein, mother to Sophia Monyenye Choi (Deceased) commenced proceedings against the Respondent seeking the following orders:
 - i. An Order of permanent injunction do issue against the Defendant by himself and/or his servants, employees and/or relatives from interfering, removing, interring, burying and/or transferring the remains of the deceased Sophia Monyenye Choi from Mbagathi Hospital Mortuary;
 - ii. That the remains of the deceased, Sophia Monyenye Choi, be released to the Plaintiff for burial at the Plaintiff's home in compliance with Gusii customary law
 - iii. Costs of this suit
 - iv. Any other relief that the Honourable Court may deem fit.
2. Along with the Plaint, the Appellant filed two witness Statements and Notice of Motion dated 18 March 2024 seeking the following:



- i. (spent)
 - ii. That the Honourable Court be pleased to issue an order of an injunction restraining the Defendant/Respondent by himself, his agents, servants, relatives and/or any other person claiming through him from interfering, removing, interring, burying and/or transferring the remains of the Late Sophia Monyenye Choi from Mbagathi Hospital Mortuary for burial pending the hearing and determination of the Application;
 - iii. That the Honourable Court be pleased to issue an order of an injunction restraining the Defendant/Respondent by himself, his agents, servants, relatives and/or any other person claiming through him from interfering, removing, interring, burying and/or transferring the remains of the Late Sophia Monyenye Choi from Mbagathi Hospital Mortuary for burial pending the hearing and determination of the suit;
 - iv. That the Honourable Court do grant the Plaintiff/Applicant any other relief as it deems fit and just in the circumstances.
3. The Application was supported by an Affidavit sworn by the Appellant and premised on the grounds on the face of it.
 4. The Respondent entered appearance and filed a Defence as well as Replying Affidavit. From my perusal of the proceedings, the matter proceeded to hearing. On 30 July 2024, at the hearing of the main suit, the Respondent's counsel informed the Court that he wished to cease acting for the Respondent. Counsel had filed his application but failed to file a Return of Service, evidencing service upon his client. Noting that the hearing had been adjourned on several occasions, the trial court exercised its discretion and allowed the hearing to proceed. The hearing proceeded, with the Appellant and her son, Shem Ochoi, testified. Parties were directed to file submissions, but the Respondent did not.
 5. The proceedings then become confusing. Following the hearing, the matter ought to have been reserved for judgement. For some reason, the same was reserved for Ruling and a Ruling delivered on 28 October 2024 as follows:

The Complaint dated 18 March 2024 and the motion dated 18 March 2024 are hereby struck out with no orders as to costs.
 6. Aggrieved, the Appellant lodged this appeal on the following grounds:
 - i. The learned Senior Resident Magistrate erred in law and fact in not considering the matter before her at all;
 - ii. The learned Senior Resident Magistrate erred in law and fact by not considering the uncontroverted evidence on record and as such arrived at a wrong decision;
 - iii. The learned Senior Resident Magistrate erred in law and fact by not determining the issue of the burial of the deceased, which issue was pertinent;
 - iv. The learned Senior Resident Magistrate erred in law and fact by not considering the evidence on record that the Plaintiff was the mother of the Deceased and not a co-wife;
 - v. That the learned Senior Resident Magistrate erred in law and fact in not seeking clarification as to the status of the Plaintiff to the deceased;
 - vi. The learned Senior Resident Magistrate erred in law and fact formulated her own issues and arrived at a wrong decision;



- vii. The learned Senior Resident Magistrate erred in law and fact by misapprehending the facts and evidence;
 - viii. The learned Senior Resident Magistrate erred in law and fact by finding that no Kisii Customary law experts were called and yet there was no contention in view of the uncontroverted testimony;
 - ix. The learned Magistrate erred in law and in fact by failing to analyse and evaluate the evidence adduced in court;
 - x. The learned Magistrate erred in law and fact by deciding this case against the weight of the evidence;
 - xi. The learned magistrate erred in law and fact by not issuing any orders on the release of the body of the deceased to the Appellant who is her mother for burial taking into account that the body has been lying at Mbagathi Hospital Mortuary from 3 March 2024 to date incurring a huge bill to be paid by the Appellant.
7. The Appellant prays that the appeal be allowed, that the Ruling and Judgement of the lower court dated 28 October 2024 be set aside and the Appellant’s suit be allowed with orders that the remains of the Deceased, Sophia Monyenye Choi, be released to the Appellant for burial at the Appellant’s home in compliance with Gusii customary law.
8. Parties were directed to canvass the appeal by way of written submissions. Whereas the Appellant filed his submissions, I note that the Respondent did not participate in these proceedings, despite evidence of service.
9. I have considered the Record of Appeal, the Memorandum of Appeal and the submissions by the Appellant. The proceedings in the lower court are rather puzzling. Following the hearing of the main suit and testimonies by witnesses, the logical step would be that the Court delivers a Judgement. In this case, however, the trial court analysed the evidence before it and proceeded to write a Ruling, striking out the Plaintiff and the Application. I have read through the Ruling to find the reason for such drastic orders. The only clue as to the rationale for striking out is given in the following paragraph:
- “From the documents submitted by the Plaintiff and the evidence on record, the court is unable to determine whether the Defendant was the spouse of the Deceased or the Plaintiff. Sadly, this court does not have the liberty of making decisions or writing rulings/judgements on assumptions, but on all the documents and evidence tender before the court weighed against the applicable law. In the circumstances, I strike out the Plaintiff dated 18 March 2024 and the motion dated 18 March 2024 with no orders as to costs.”
10. Whereas I concur with the trial court that the drafting of the pleadings, particularly the Plaintiff, leaves a lot to be desired, there is no justification whatsoever or reasons given for the trial court to have made an order striking out the Plaintiff and application. For this reason, I set aside the orders of the trial court made on 28 October 2024.
11. Section 78 (1) (a) of the *Civil Procedure Act*, Cap 21 provides that subject to such conditions and limitations as may be presented, an appellate court shall have the power to determine a case finally. Owing to the nature of the dispute herein, it is prudent that the appeal, and indeed the dispute, be determined expeditiously. It is time to allow the Deceased to rest in peace, having spent more than 9 months lying in a morgue. For this reason, this court will proceed to analyse the evidence on record and determine the suit in finality.



12. As mentioned earlier, the Plaint is rather confusing. In one paragraph, the Plaintiff (Appellant) avers to be mother of the Deceased, who cohabited with the Defendant. In a subsequent paragraph, the grammar therein implies that the Plaintiff (Appellant) is a co-wife to the Deceased. Though parties are generally bound by their pleadings, I exercise my discretion in interpreting what the Plaintiff (Appellant) meant as opposed to what is written.
13. From the Witness statement and testimony of the Appellant, it is discernible that the Appellant was the mother to the Deceased. It is not disputed that the Deceased and the Respondent had cohabited for 17 years. Out of their cohabitation, three children were born. The Deceased passed away on 11 March 2024 at the Mbagathi Hospital.
14. According to the Appellant, the Respondent and her late daughter were not married. None of the customary rites had been conducted and the Respondent had not paid any dowry according to Gusii customary law and, therefore, could not lay claim to the Deceased. According to custom, the Respondent was not entitled to bury the Deceased. It is the Appellant's desire to bury her daughter at their family home.
15. The Respondent entered appearance, filed as Statement of Defence as well as Replying Affidavit to the Notice of Motion dated 18 March 2024. In his Defence, the Respondent pleaded that he had all the right under Gusii customs to bury the Deceased with whom he had lived peacefully for 17 years. He averred that due to his low economic empowerment compared to the Appellant's financial strength, the Appellant has sworn not to be associated with him, hence why the Appellant wants to bury the Deceased. He further averred that despite having attended functions or occasions organised by either family by virtue of the marriage between him and the Deceased, the Appellant and her family came to his home and snatched the three children.
16. In his Replying Affidavit, the Respondent admitted that despite having lived with the Deceased for a period 17 years, he had not paid dowry according to the Gusii customs. The reason for this was that the Respondent was financially constrained. However, at paragraph 11 of the Replying Affidavit, the Respondent confirmed that he had made arrangements for payment of the dowry, to enable him bury his wife. He averred that under Gusii customs, payment of dowry may be made upon death, to enable burial of a wife.
17. At the hearing, the Respondent did not testify. However, his Advocate cross examined the Appellant. Further, the Respondent did not participate in the appeal, which makes it difficult for this Court to establish whether or not the said dowry was ever paid. It would appear that at some point, the Respondent gave up and allowed the chips to fall where they may.
18. It is quite disheartening that families that once lived harmoniously can be pulled apart because of burial wrangles. Yet, there is no property in a corpse nor does the right to bury have any bearing whatsoever on succession. Be that as it may, the evidence herein by the Appellant is uncontroverted. In order to determine the right to bury, this Court is required to determine whether or not the Deceased was a wife to the Respondent. Without any evidence from the Respondent, the Court is left to make a decision based on the evidence by the Appellant. In fact, the Respondent admitted that he had not paid dowry and was ready to do so, so that he can bury the Deceased.
19. In light of the evidence, this Court finds in favour of the Appellant and makes the following orders:
 - i. The Ruling/Judgement delivered in Milimani MCFC No E9 of 2024 on 28 October 2024 is hereby set aside;



- ii. The remains of the Deceased, Sophia Monyenye Choi, be released to the Plaintiff for burial at the Plaintiff's home in compliance with Gusii customary law;
- iii. The Defendant and his children be allowed to participate in the funeral arrangements, burial and/or interment of Sophia Monyenye Choi (Deceased)
- iv. This being a family matter, there are no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 20 DAY OF DECEMBER 2024.

HELENE R. NAMISI

JUDGE

Delivered on virtual platform in the presence of:

.....for the Appellant

..... for the Respondent

