REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VIHIGA

CIVIL APPEAL NO. 22 OF 2021

KEPHA OMOKE MATINI...APPELLANT

VERSUS

ROSALIND MIRIGO..RESPONDENT

(*An appeal arising from the judgment and decree of the Hon. SO Ongeri, Senior Principal Magistrate (SPM), in Vihiga CMCCC No. 212 of 2021 delivered on 29th December 2021)*

JUDGMENT

1. The suit at the primary court was initiated by the appellant herein, Kepha Omoke Matini, against the respondent herein, Rosalind Mirigo, principally to stop or bar her from interring the remains of Sospeter Odenyi Matini, to be referred hereafter as the deceased, at Kanduyi, Bungoma County, and to order that the remains be given to him, for burial at Kitagwa, Jepkoyal, Vihiga, where the ancestral home of the deceased was allegedly situated, and where he had established a matrimonial home on Tigoi/Tiriki/405. The appellant is a brother of the deceased, and the respondent is the widow of the deceased. His case is that the deceased was bound by the traditions and customs of his community, the Maragoli, which required that the remains of a polygamous man ought to be interred next to the grave of his first wife, and that, in this case, the remains of the first wife had been interred on Tigoi/Tiriki/405, and that the remains of the deceased be interred at Tigoi/Tiriki/405,next to the grave of his first wife, who was interred in 2013, and not at Kanduyi, Bungoma, the home of his second wife, the respondent herein. The respondent did not agree, asserting that the deceased lived for thirty-eight years at Bungoma, and that his remains ought to be interred at his home on East Bukusu/South Kanduyi/9226.

2. The dispute was disposed of by way of *viva voce* evidence. PW1, the appellant, stated that Tigoi/Tiriki/405 was registered in the name of their deceased father and that they had not undertaken succession to the said property. He testified that the deceased did not have a house at the ancestral land on Tigoi/Tiriki/405, but he had one at Bungoma, but he said that the said home was commercial rather than residential. He stated that the customs of his clan were that where a man was polygamous, his remains were to be interred at the homestead of his first wife. He said that he did not go to hospital to nurse the deceased, nor pay his hospital bills, as the respondent never approached him for help. PW2, David Abiud Wasera, was a distant cousin of the deceased, as their grandfathers were brothers. He said that he never visited the deceased when he was sick. He said that the cousins of the deceased would be harassed by demons should he be buried at a place other than at Tigoi/Tiriki/405, as per custom.

3. PW3, Joseph Ndige, a brother of the deceased, testified that he had visited the deceased in hospital once, but he died before he could make a second visit. He said that he did not know whether the deceased had shown where he wished to be buried. He confirmed that Tigoi/Tiriki/405 was still registered in the name of their father, as the family was yet to undertake succession over the same. He said that he had visited the deceased several times at Bungoma. He explained that the deceased visited the Tigoi home several times after burying his first wife there, and that he had no traditional home at Bungoma, as the houses he had there were commercial. He conceded that the respondent was closer to the deceased as a spouse, than he was, as a brother. He stated that he used to take care of his deceased's tea farm, and he would send the proceeds to him. He said that he assisted in settling the medical bills.

4. DW1, the respondent, testified that the brothers of the deceased did not visit the deceased when he was ailing, even though they had telephoned them and informed them about it. She also stated that they did not assist in settling the bills, neither did they call him on phone. She asserted that the deceased was a Christian, who did not recognize traditional customs, and did not honour memorials. She said that he had showed her where he was to be buried. She said that she did not have a home in Maragoli, and that she visited the home once, during the lifetime of her co-wife. She said that she was not assisted to settle the medical bills incurred by the deceased. She denied chasing the appellant and his brothers away from her home. She averred that she was the only caregiver recognized by the hospital. She further stated that she was not married to the deceased under custom. She denied using the rental funds from the Majengo property to settle the medical bills incurred by the deceased, saying that she did not know where the accounts holding the moneys were. She stated that the deceased showed her where he was to be buried, when he was identifying the grave site for her son. DW2, Grace Iminza Martin, a daughter of the deceased, testified that the deceased was polygamous, but her stepmother had died. She stated that the house at Kanduyi was residential. She said that the deceased was not bound by customs, and that was why he did not commemorate the death of his first wife. She asserted that he showed her where he wished to be buried at Bungoma.

5. DW3, Manasseh Oyondi, asserted that it was not mandatory that one be buried at the home of his first wife, saying that a person could be buried elsewhere. He stated that he used to visit the deceased at Bungoma, and that he had said that he wished to be buried at Bungoma, so that the land was not invaded. He confirmed that the Bungoma land was registered in the name of the deceased., and that he was showed the spot where he wanted to be buried, during the burial of his son. He said he was 72 years old, and said a polygamous Maragoli man could be buried in any house. DW4 was a witness whose name is not disclosed in the proceedings. He testified that he attended the same church with the respondent and the deceased. He said that the deceased did not recognize traditional burial customs, because he was saved. He said that he did not know about Maragoli customs. He testified that the deceased had showed him where he wished to have his remains interred.

6. After reviewing the evidence, the trial court framed three issues, and proceeded to answer each of them. The first issue was whether the deceased had denounced his allegiance to customary law, the court concluded the deceased had not denounced all that pertained to customary law, no evidence was presented of any customs that the deceased had specifically denounced, and that the deceased still subscribed to Maragoli customs. The second issue was with respect to who the body of the deceased was to be released for burial. The court reviewed several judicial decisions, before concluding that the closeness of the deceased ought to be the decisive factor to be taken into account, of course, alongside the relevant customary law. The court found that the person closest to the deceased was the respondent, and ordered that the remains of the deceased be released to the respondent for burial at Kanduyi, Bungoma. The third issue was on who was to bear the mortuary fees and costs of the suit. The trial court did not deal with the same in the body of the judgment, but it made orders that each party bear their own costs, and share the mortuary charges equally.

7. The appellant was unhappy with that outcome, and he lodged the appeal herein. He raised several grounds: the trial court determined the issue of the right to bury instead of the real issue which was the place of burial; the trial court misunderstood and misapplied Maragoli customs as they related to burial of a person who lived and died a polygamist; the order to stop the appellant from participating in the burial of his late brother was contrary to the law and public interest; the evidence was against the weight of the evidence; the decision departed from Maragoli-Tiriki customary law; the credibility of the respondent and her witnesses was not taken into account; and the trial court was not properly guided on the correct and known principles of eth law. The appellant seeks judgment in their favour, that the judgment of the trial court be set aside, and that it be substituted with a judgment directing that the remains of the deceased be released to him for burial in accordance with Maragoli-Tiriki customs.

8. Directions were given on 21st March 2022, for disposal of the appeal, by way of written submissions. By then the parties had already filed their respective written submissions.

9. In his written submissions, the appellant argues on all six grounds listed in his memorandum of appeal, as recited above.

10. The first ground is that the real issue in dispute was the place of burial of the deceased. It is submitted that the trial court did not address that issue, instead it determined a totally different question which was not even pleaded, that is as to who had a right to bury the deceased. He submits that there was a departure from Orders 15 and 21 rule 4 of the Civil Procedure Rules, on framing of issues for determination and on the content of a judgment.

11. The second ground is on the application of Maragoli-Tiriki customary law on the place of burial of a man who died a polygamist. It is submitted that although the trial court did correctly find that the deceased was still subject to Maragoli-Tiriki customary law, instead of applying that custom, he departed from it. It was submitted that the trial court could only depart from custom on the basis of Article 159 of the Constitution of Kenya, 2010, and section 3(2) of the Judicature Act, Cap 8, Laws of Kenya. It is submitted that the trial court did not address itself to these provisions, and did not come to the conclusion that Maragoli-Tiriki customs violated those provisions. The trial court is also said to have applied decisions that were not applicable nor binding on the court, being *In re Burial of Musa Magodo Keya(Deceased)* [2021] eKLR (Achode J), *Ruth Wanjiru Njoroge & another vs. Jemimah Njeri Njoroge* [2004] eKLR (Ojwang J) and *Edwin Otieno Ombajo vs Martin Odera Okumu* [1996] eKLR (**Akiwumi, Shah JJA & Bosire,Ag. JA**), which were determined prior to the promulgation of the new Constitution in 2010, and turned on right to bury as opposed to place of burial. It is submitted that although the appellant did refer to *Ruth Anyolo vs. Agnetta Oiyela Muyeshi* [2019] eKLR (Omondi J) and *Hesborn Lumadede & 2 others vs, Kenneth Kamaliki Shaban* [2021] eKLR (Musyoka J), which are more recent decisions on the subject, the trial court did not advert to them.

12. The third ground is on the making of orders which barred the appellant from interfering with the funeral and burial arrangements of the deceased. It is submitted that the order barred the brothers of the deceased from participating in the burial of their deceased brother. It is submitted that, as crafted, the order was not specific as to whether the appellant could attend the burial without being accused of violating the order. It is submitted that nothing stopped the respondent from collecting the body at night and interring it under cover of darkness so as to lock out the appellant. *Rowland Amulyoto & 2 others vs. Alfred Amulyoto* [2017] eKLR (Njoki Mwangi J) is cited to support contention that a wife becomes a member of the clan of the man, and cannot be locked out of a burial.

13. The fourth ground is that the decision of the court was not supported by the recorded evidence. It is submitted that the trial court largely dismissed the case by the respondent, which should have meant that the evidence by the appellant should have been embraced, and a determination made in his favour. It is submitted that it was not contested that the respondent was a widow of the deceased, and, therefore, his closest relative, but then that was not the main point of contention. What the court should have determined was the right place of burial. It is submitted that even after being given the body the respondent should have been directed to allow burial of the body at Tigoi as per custom.

14. The fifth ground is about the credibility of the respondent. The appellant points at bits of her evidence to demonstrate that she was not a reliable and truthful witness, whose testimony the court should have believed. One of the bits is about whether she attended the burial of her co-wife. The appellant testified that she did, while the respondent testified that she did not, while her daughter, DW2, said she did. There is also the issue as to whether the respondent was married under customary law or not. It is asserted that she lied to court, and the court should not have decided in her favour in the circumstances. *Peter Kifue Kiilu and another vs. Republic* [2005] eKLR (Tunoi, Waki & Onyango Otieno JJA) is cited, on truthfulness and trustworthiness of witnesses, and the weight that ought to be given to evidence given by such witnesses.

15. The sixth, and last ground, is on the court not applying the correct legal principles. It is submitted that the decision was against Articles 44 and 159 of the Constitution 2010, and its effect was to kill Maragoli-Tiriki customary law.

16. On her part, the respondent submits that the land on which the appellant proposes to inter the remains, the deceased belonged to the estate of the father of the deceased rather than to the deceased himself. It is submitted that the court was not in error when it considered customary law as against the facts. She also submits that the appellant was a brother of the deceased, while the respondent was his widow. The deceased had established a home at Bungoma, where he lived with the respondent and their children, and when he fell ill, it was the responded and the children who nursed him in hospital. It is submitted that jurisprudence has developed very much since the days of *Virginia Edith Wamboi Otieno vs. Joash Ochieng Ougo & Another* [1987] eKLR (Bosire J) case, and refers to *Martha Wanjiru Kimata & another vs. Dorcas Wanjiru & another* [2015] eKLR (Achode J), *In re Burial of Musa Magodo Keya (Deceased)* [2021] eKLR (Achode J) and *Ruth Wanjiru Njoroge vs. Jemimah Njeri Njoroge & another* [2000] eKLR (Ojwang J). It is submitted that the modern considerations on the matter would be where the deceased wished to be buried, the body ought to be released to the person who was closest to him while he lived, where married the closest person to the deceased would be the spouse, the person with the closest proximity to the deceased during his final days, among others. It is asserted that the trial court made the right decision, when it pronounced that he be buried at Bungoma, where he had established a home, on land registered in his name, and where his family lived. It is submitted that the deceased was not polygamous, for his first wife had died, and there was no other wife save the respondent. It is further submitted that the trial court had not injuncted the appellant from participating in the burial, as the order only stopped him from interfering with the formal burial and the burial arrangements. It is also submitted that the respondent and her witnesses were credible, and that the appellant did not call expert witnesses to shed light on the Maragoli-Tiriki customs that he was asserting.

17. I will now turn to determine the dispute based on the grounds of appeal as set out in the memorandum of appeal.

18. It is true that the trial court did not address the question of place of burial, and appears to have largely focused on the right to bury. I have closely read through the plaint filed at the trial court, and it is clear that the case by the appellant was anchored on the question of place to bury as opposed to who had a right to bury. The appellant could have a point on this ground, but the trial court may have had reasons for not adverting to that, and that ought to become clear as I look at the other grounds.

19. The second ground is on the Maragoli-Tiriki customs relating to where a polygamous man ought to be buried. It is averred, in the plaint, that that ought to be at the homestead of the first wife or next to her grave should she be dead. The appellant and his cousin, PW2, testified, and asserted that alleged custom. The question is, did the appellant prove that that custom existed? It is one thing to plead a custom, and it is another to prove it. It is trite that customary law, unlike statute or case law, is treated as a fact rather than a law. It has to be established by way of evidence, largely because it is not codified or it is not in written form, so it has to be ascertained before it is applied. The existence of a custom is subject to certain rules relating to how it is to be proved. The law is that it has to be proved by an expert, that is a person familiar or conversant with, with the custom. There are two categories of such experts. One category is that of elderly members of the community who are intimately familiar with the substance and application of that law, who can speak with authority on the customs and their application. The other category is of scholars, who have conducted research on these customs, and who can authoritatively speak on them, based on the research. Other than expert witnesses, the existence of a custom is established through writings or treatises of scholars on such customs, by the persons relying on such customs citing such works. The other approach is to rely on judicial precedent, by citing judicial pronouncements on the said custom. See section 51 of the Evidence Act, Cap 80, Laws of Kenya; *Kobina Angu vs. Oudjoe Attah* [1916] PC 1874-1928 (The Lord Chancellor, Earl Loreburn, Lord Shaw & Sir Arthur Channell); *Ernest Kinyanjui Kimani vs. Muiru Gikanga and Another* [1965] EA 735 (Newbold VP & Crabbe & Duffus JJA); and *In re estate of TOO (Deceased)* [2017] eKLR (Muigai J).

20. The appellant was obliged to establish that the burial custom that he was asserting did in fact exist. He could do so by calling elders from the Maragoli-Tiriki community to prove the custom, or by calling scholars who have done research on the custom, and who could bespeak them with authority. Secondly, he was obliged to cite treatises by scholars on the custom or judicial precedents where the said custom came up for consideration, and the court made pronouncements on its existence and application. Was that done? The appellant called only two witnesses, himself and his cousin. They did not purport to have any expertise on the custom they were talking about, and they did not speak with any authority over the subject, and did not dwell much on what the custom entailed in detail, in terms of the content and substance thereof. I have looked through and perused the written submissions filed by the appellant, at the trial court, on 23rd December 2021, of even date. At pages 1 and 2 of the written submissions, where the appellant submits on choice of burial site, there is no reference to any revered writing of a scholar on the Maragoli-Tiriki custom, neither is there citation of any judicial pronouncement by either the High Court or the Court of Appeal on the existence and application of the alleged custom. Consequently, it cannot be said that the appellant proved existence of that custom, for the trial court to apply it. The trial court could not proceed to apply a custom that the appellant had not proved existed. The burden of establishing existence of that custom lay with him, for it was him alleging its existence. The mantra is that he who alleges must prove, and what ought to be proved is what I have highlighted above. Without that proof, the trial court was not obliged to tax its mind addressing the question of place of burial, when no evidence was adduced on the customary law around the subject. It is not enough to plead customary law, and lead general evidence on it, there is a duty to prove or establish it as required in law. There was no evidence that such a custom existed.

21. The appellant submits that he cited *Ruth Anyolo vs. Agnetta Oiyela Muyeshi* [2019] eKLR (Omondi J) and *Hesborn Lumadede & 2 others vs, Kenneth Kamaliki Shaban* [2021] eKLR (Musyoka J), which he says are recent decisions, which the trial court should have regard to them. I have read through the two decisions, they turned, alright, on customary law, as it related to burial rights under Luhya culture, but none of them were on the custom that the appellant is asserting in the instant case, and, therefore, they are of little application to the matters at hand. The respondent did a better job of citing *In re Burial of Musa Magodo Keya (Deceased)* [2021] eKLR (Achode J), where the question of place of burial was in issue, and the custom similar to that asserted by the appellant existed, but the court considered other factors, whose effect was to altogether avoid application of the said custom.

22. Even on appeal, the appellant has not endeavored to place any material before me to demonstrate that such a custom existed. Of course, he did not call additional evidence on appeal, but he could have cited treatises on Maragoli-Tiriki customs on that subject, or cited case law on the same. All what he has done is to cite provisions of the Civil Procedure Rules on framing of issues for determination and contents of a judgment. Obviously such provisions say nothing about Maragoli-Tiriki customs on the place of burial. The respondent helpfully pointed me to *In re Burial of Musa Magodo Keya (Deceased)* [2021] eKLR (Achode J), to argue that the law has fundamentally changed since *Virginia Edith Wamboi Otieno Vs. Joash Ochieng Ougo & Another* [1987] eKLR (Bosire J), and burial rights are dependent on various other considerations, in addition to customary law. On appeal, therefore, the appellant has not done much to persuade me that the trial court fell into error by not applying the alleged custom, as the same was not proved.

23. The third ground is about the injunction order made in the judgement barring the appellant and his agents from interfering with the formal and burial arrangements of the deceased. The appellant argues that this order had the effect of stopping him for participating in the burial process. There could be some legitimacy to this argument, for it is not clear what "interfering means". The appellant is a brother of the deceased. The court found, as a matter of fact, that the deceased was subject to customs of his community to an extent, and that would include having his brothers participate in his burial. The trial court should have framed the order in a manner that departed from the actual wording in the counterclaim, so that room was left for the appellant to participate in the burial, but with specific directions that the ceremony be conducted strictly in accordance with Christian values, as opposed to custom.

24. The fourth ground is about the decision of the court not being supported by the evidence on record. The case before the trial court was initiated by the appellant. I have found and held above that the appellant did not lead adequate evidence to demonstrate that there existed a custom, which obliged that the remains of the deceased be interred next to those of his late first wife. That being the case, the suit lost its foundation, which meant that it was open to the respondent to dispose of the remains of her late husband as she willed, as the alleged custom had not been proved. The trial court cited case law to justify the decision that the respondent had superior right to take charge of the process of disposal of the remains of her late husband, that is in the absence of proof of the custom the appellant was relying on. The appellant lost his case, and the trial court decided the matter on the basis of the more recent case law on the subject. It cannot, therefore, be said that there was no evidence to support the decision of the court. The appellant failed to prove the law on the place of burial in accordance with customary, whereupon determined the matter on the basis of who had a better claim to the right to bury. With the elimination of the appellant from the equation, the decision could only go in favour of the respondent.

25. The fifth ground is on the credibility of the respondent as a party and a witness. She was said to have told lies on oath. I have carefully gone through the testimony of the respondent as against the testimonies of some of the other witnesses. It is true that there are inconsistencies between their testimonies. However, the inconsistencies do not turn on the critical questions on where the deceased was to be buried. The inconsistencies were on peripheral issues as to whether she attended the burial of her co-wife, whether she was married under customary law, among others, none of which affected, in any way, how the matter was to be determined with respect to where the deceased was to be interred, by who, under what rites, among others. The issue as to the customary law under which the respondent was married was irrelevant. She appears to be Kikuyu, she could only have been married under Kikuyu customary law, for the customs that have to be fulfilled at the time of marriage are those of the woman, so that her parents can release her to her husband. The customs of her husband's community only apply to the woman after she has been legally married in accordance with the customs of her father. That is the law. Kikuyu customary law is wholly irrelevant here, with respect to customs that ought to govern the burial of the respondent's husband. Whether she attended the burial of her co-wife is also totally irrelevant. There is nothing to suggest that her evidence was not reliable or that she was not a trustworthy witness. Even if that were the case, it would not have changed the fact that the appellant had not established existence of the custom he was relying on.

26. The last ground is that the trial court did not apply the correct principles of the law. In the written submissions, the appellant does not identify the legal principles that he alleges the trial court failed to apply. The court is accused of killing Maragoli-Tiriki customs, yet it is not the duty of the court to look for and find existence of the custom alleged. It is the duty of the parties to prove their case. The appellant alleged existence of a custom. He did not prove it, and it was on that basis that his case collapsed.

27. Overall, I find no merit in the appeal before me, save for the need to re-work the wording or to re-frame the order relating to the injunction. The appeal is dismissed, but the order on injunction is revised or received, so that the same allows the appellant to participate in the preparations for and the ceremony on the disposal or interment of the remains of the deceased, but is barred from interfering with the same by way of imposing any Maragoli-Tiriki customs and traditions.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF MARCH 2022

W. MUSYOKA

JUDGE