Mwashi v Mwashi (Civil Appeal E017 of 2022)
[2022] KEHC 12276 (KLR) (18 August 2022) (Judgment)

Neutral citation: [2022] KEHC 12276 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CIVIL APPEAL E017 OF 2022

PJO OTIENO, J

AUGUST 18, 2022

BETWEEN

BEATRICE MBOGA MWASHI ..... APPELLANT

AND

TIMINA IMINZA MWASHI ..... RESPONDENT

JUDGMENT

1. In the Judgment appealed against in the appeal, the trial Court having reviewed the evidence led and the decisions of the Superior Courts on the subject, definitely binding upon it, did determine the place of interment of the deceased's remains in the following words:-

> " This Court must balance the foregoing, as it considers that according to the Defendant and her witnesses, the Deceased whishes while he was ailing were that he wanted to be buried in Cheptulu and in addition that he was not in good terms with his first wife and opted to live with his second wife from the year 2018. Bearing in mind the foregoing, the Court is satisfied that the deceased person's body ought to be released to the 2nd wife who took care of him until his demise. However, since the deceased person had already established his home at L.R. No. Nandi/Koibarak 'A'/197, this Court finds that his remains can only be interred there."

2. In coming to that conclusion the trial Court had appreciated the law on the place of interment of ones remains to have been laid by decided cases and summarized by the Court of Appeal in *SAN –vs- GW* [2020] eKLR to be that; "both common law and customary law are complementary and that the wishes of the deceased, though not binding, must, as far as possible, be given effect."

3. Being aggrieved and dissatisfied with the decision, the appellant presents to this Court four grounds of appeal impugning the decision on grounds that; ordering the deceased's remains to be interred at Koibarak/A "197" was contrary to the evidence that the deceased wished to be buried in Cheptulu

as he was not in good terms with the Respondent who lived at Koibarak; that there was an error in finding that the deceased commenced cohabitation with the Appellant in 2018 on the face of evidence that both had lived together for thirty (30) years and lastly that the finding that the land in Cheptulu belonged not to the deceased but his father was erroneous as much as it was not in dispute.

4. While the recap of the evidence by the trial Court cannot fall below the classification as splendid, there was failure to comply with the statutory requirement on the structure of a Judgment in terms of Order 21 Rule 5 *Civil Procedure Rules*. The failure I see is that there was never isolation of the issues for determination, findings on such issues and reasons for such finding. This Court takes the view that that structural is a substantive, rather than a procedural requirement, for reasons that it makes the reading and understanding of a Judgment by the litigants, the Court and any member of the public to establish with ease the basis and legal foundation of the decision.

5. For that reason, this Court, in execution of its mandate as a fast appellate Court, has reviewed and appraised not only the Judgment but also the pleadings filed, the evidence led and the authorities cited by the trial Court and must, among other things, identify the issues that fell for determination by the trial Court. It is discerned that issues for determinations are:-

    1) Whether the deceased had expressed a wish on his place of burial.

    2) Whether the deceased had one matrimonial home or several of them.

    3) What orders should be made as to costs.

6. In coming up with the foregoing issues, the Court has, as said before, perused the Plaint as well as the Defence and Counter claim filed. In the Plaint, the claim by the Respondent was that being the first (eldest) wife, who had been moved from the ancestral home in Cheptulu to Koibarak, she was entitled, as opposed to the Appellant who is the 2nd wife, under Luhya Customary Law, to bury the deceased at Koibarak being her matrimonial home with the deceased.

7. In response to that claim, the Appellant filed a defence and counterclaim in which it was denied that the Koibarak home was the matrimonial home. The Counter claim was then mounted to the effect that the Cheptulu land was an ancestral land inherited by the deceased from his father where he had lived with both wives, and that the Respondent opted to move away from that ancestral land and matrimonial home to settle at Koibarak with the deceased preferring to live at Cheptulu on the basis that they were not in good terms with the Respondent and her children who not only threatened to assault the deceased but also made claims to his property seeking to force an inter vivoce settlement against the deceased's will.

8. It was equally asserted, in the Counter claim that the Respondent totally failed to visit the deceased on many occasions he was hospitalized as a clear indication of the bad blood between them. It was in addition pleaded and asserted that during his lifetime the deceased wrote and expressed his wishes to peers and family members that in death he be buried at Cheptulu among his relatives and ancestors and that the Respondent having deserted the ancestral and matrimonial home in Cheptulu for Koibarak, it was malicious for her to demand that the deceased follows her in death.

9. Based on such pleadings, the Respondent called three witnesses in support of the claim just the same way the Appellant called three witnesses to prove its Defence and Counter claim.

10. I have anxiously reappraised the entire record filed and will rely on such re-examination and reappraisal to determine the issues set out above and in a seriatim manner.

Did the deceased express a wish on where to be buried?

11. The evidence by the Respondent and her two witnesses averted to wishes of the deceased on his final resting place. For example, in cross examination the Respondent as PW1 said that whatever the deceased said while alive had no meaning (haina maana). That was in reference to the documents alleged to have been the writings by the deceased as disclosed by the Appellants documents and stating among other things the wish to be buried next to his father. In addition, PW2, while adverting to the wishes to be buried at Cheptulu told the Court that a man's wish on where to be interred can only be taken into account when he alters same in the presence of two other men and was affirmative that not all wishes of a deceased be followed upon his death. Equally, PW3 reiterated that the wishes of the deceased needs to be respected but added that if the deceased here expressed the wish not to be buried at Koibarak then such utterances are not important.

12. Not very distant from what the Respondents testimony was, the Appellant in her testimony (DW1) said and produced documents to the effect that the deceased had expressed the wish to be buried at Cheptulu in her presence and the presence of Elizabeth and Dorcas. That he was uncomfortable at Koibarak because of the hostile treatment by the Respondent and her children. DW2, Elizabeth Khadioli corroborated that she was with Appellant, Dorcas, Norah and her children when the deceased expressed the wish to be buried at his parent's home in Cheptulu. The last witness from the Appellant, Tom Muyavi Musuluhtsa told the Court that he was with the deceased two days before he died and he expressed to him the wish to be buried at Cheptulu and that he had differed with the Respondent to the extent that they were not talking. He said in cross examination that he was called twice to mediate the difference and that to his knowledge the deceased was last at Koibarak Home in the year 2018. He concluded with the sentence that the wishes of the deceased are important.

13. After the very detailed analysis of that evidence, the trier of facts, found in the excerpt reproduced above that the deceased wishes were that he be interred at Cheptulu on which basis the Court ordered that the body be released to the Appellant here.

14. To this Court the trial Court was in law and under the doctrines of stare decisis bound to follow the decision of the Court of Appeal in *SAN –vs- GW (Supra)* that the wishes of the deceased, though not binding, must, so far as possible, be given effect provided the same are not contrary to the customs of the community he hails from.

15. Here, I do find that having found that the deceased had expressed the wish to be buried at Cheptulu among his ancestors and relatives, and without any finding that such wishes were an affront to the Tiriki Customs, those wishes ought to have been given effect. That the wishes were ignored was a glaring error on the part of the Court in as much the finding that he be buried at Koibarak was contrary to the evidence led and the Court's own finding regarding the wishes. This Court therefore finds and holds that the deceased had expressed the wish to be buried at Cheptulu and that there was no evidence that such wishes contravene any Tiriki Customary Law and ought to have been respected and given effect.

Did the deceased have one or more matrimonial home?

16. The *Marriage Act* defines matrimonial home to mean any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home and include any other attached property.

17. Before the trial Court it was common ground that both Appellant and Respondent were spouses to the deceased and that both were living in different home as at the date the deceased died. While the Appellant lived at Cheptulu all along, the Respondent initially lived at Cheptulu but later moved

to Koibarak and was established for a home there by the deceased. With such evidence, the Court finds that the deceased had two matrimonial homes; one at Koibarak and another at Cheptulu. There was therefore no justifiable or legal reason to make the difference between the two homes as the Koibarak home being matrimonial home while the Cheptulu home as ancestral home. In law, both were matrimonial.

18. There having been two matrimonial homes with the evidence that the relationship between the deceased and Respondent was strained complied with his wish that he be buried at Cheptulu, the finding by the trial Court that his remains could only be interred at Koibarak were untenable for not being backed with evidence and being contrary to his wishes. That finding of the place of interment to be Koibarak was marred with error and misapprehension or disregard of the evidence and is thus set aside.

19. In conclusion, this Court finds and holds that the conclusion of the trial Court on the site of interment was contrary to the conclusion that there were expressed wishes by the deceased and thus ran affront the settled position of the law in decided cases that the wishes of the deceased be given effect as far as possible. Accordingly therefore the Judgment by the trial Court is set aside and in its place substituted a finding that in respecting and giving effect to the wishes of the deceased, his remains be released to the Appellant and interred at his home in Cheptulu next to his father and other ancestors. For avoidance of doubt the Respondent is recognized as a legal widow to the deceased and shall be so recognized and facilitated and allowed to participate at the burial at Cheptulu.

17. Being a family dispute, and in order that room be created for rebuilding the family fabrics, each party shall bear own costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 18TH DAY OF AUGUST 2022.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Sore and Lumalas for the Appellant

Mr. Mbaka for the Respondent

Court Assistant: Kulubi