



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. E. 20 OF 2020

MECHTILDA IMBOGO APPELLANT

VERSUS

CHRISTINE MAKOKHA IMBOGO.....RESPONDENT

(An Appeal from the Ruling of Hon. Z. P. Nyakundi SPM delivered on 27th November 2020 in

Butali SPM's Court Civil Case No. 210 of 2020)

J U D G M E N T

1. The Court has before it an appeal against the decision from the Senior Principal Magistrate's Court in Butali. The case before the SPM's Court concerned a burial dispute. The two protagonists are described as the widows of the Late Benjamin J.S.S. Shamala Imbogo (hereinafter referred to as the Deceased). The Appeal is brought by the Defendant in the suit below. The Appeal does not relate to the substantive dispute but to the decision of the Learned Senior Principal Magistrate on the question of the Court's jurisdiction.

2. The issue was brought before the Court by way of a Preliminary Objection to the effect that the Butali SPM's Court did not have the jurisdiction to hear the matter. The Learned Magistrate held that the SPM's Court in Butali does have jurisdiction to hear and determine the matter. As a result the preliminary objection was disallowed.

3. The Defendant was dissatisfied with the decision and has appealed. In addition to the Appeal the Appellant filed an Application for stay of the Ruling for an additional period after the initial stay had lapsed. That application was settled by the Parties who filed their consent on 10th March 2021.

4. In her Memorandum of Appeal, the Appellant states that she is dissatisfied with the Ruling and intends to appeal to the High Court against "the entire Ruling" on the following grounds:

"1. The learned trial Magistrate erred in law and facts by holding that he has jurisdiction to hear and determine a burial dispute in the Butali SPM's Court Civil Suit No. 210 of 2020 when the deceased, died and was buried in Trans-Nzoia County.

*2. The learned trial magistrate misconstrued the provisions of **Section 15** of the **Civil Procedure Act** and as a result of it reached a wrong conclusion that he had jurisdiction to entertain Butali SPM's Court Civil Suit No. 210 of 2020.*

*3. The learned trial magistrate misconstrued the provisions of **Section 7** of **Magistrates Court Act** and as a result held that he had jurisdiction to entertain the burial dispute before him.*

4. The learned trial magistrate erred in law and fact by making a ruling in a manner that predetermines the issues that ought be dealt with during the main hearing of the suit if the suit is to go up to the main hearing."

5. The Appellant seeks the following relief:

a) That the ruling in Butali SPM's Court Civil Suit No. 210 of 2020 delivered on 27/11/2020 disallowing the preliminary objection dated 20/11/2020 be set aside and in its place the said Butali SPM's Civil Suit No. 210 of 2020 be struck out.

b) The Respondent be condemned to pay the appellant Costs of this appeal and costs of in the Butali SPM's Court Civil Suit No. 210 of 2020."

6. In order to decide whether or not the SPM's Court has jurisdiction or not, it is imperative to look closely at the issues that are in dispute

between the Parties. The Respondent/Plaintiff commenced the suit by a Complaint filed on 16th November 2021.

7. The Respondent first moved the Court by a Notice of Motion brought under a certificate of urgency. The urgency was that the Deceased died on 13th November 2020. Plaintiff/Respondent was the legal wife of the Deceased. The Defendant buried the Deceased at her home in Kitale. That burial is said to fly in the face of Luhya customary law and practices.

8. In her Notice of Motion application, the Plaintiff seeks the following Orders:

- (a) That service of this application be dispensed with, the same be certified urgent and heard ex-parte at the first instance.*
- (b) That this Honourable Court be pleased to issue an order of exhuming the body of the deceased one BENJAMIN SHAMALA IMBOGO pending the hearing of this application and/or further orders of this Honourable Court.*
- (c) That in the meantime the body of the deceased BENJAMIN SHAMALA IMBOGO be preserved at any mortuary within the Republic of Kenya.*
- (d) That costs of this application be provided for.*

9. The Grounds relied upon by the Respondent/Plaintiff were:

- 1. That the Plaintiff/Applicant is the first wife of the deceased one BENJAMIN SHAMALA IMBOGO.*
- 2. That the Plaintiff/Applicant is the legal wife to the deceased.*
- 3. That the Defendant/Respondent in conjunction with the brothers have buried the deceased in Kitale.*
- 4. That the Defendant/Respondent excluded the Plaintiff/Applicant and his children from engaging in the funeral arrangements.*
- 5. The deceased directed that he be buried at their ancestral home in Kabras where the Plaintiff/Applicant resides.*
- 6. That burying the deceased at the home of the Defendant/Respondent is an abomination and against the Luhya Customary Law.*
- 7. That the actions of the Defendant/Respondent are likely to cause a breach of peace.*
- 8. That the Plaintiff/Applicant's suit has very high chances of success.*
- 9. That the Plaintiff/Applicant has come to this honourable Court with clean hand and expeditiously.*
- 10. That the grant of this application will operate to make the ends of justice meet.*

10. In her Complaint, "The Plaintiff avers that she is the legally wedded wife to BENJAMIN SHAMALA IMBOGO (hereinafter referred to as "the Deceased")". She then goes on to say that the Deceased "passed away on 13th November, 2020 at Eldoret Moi Teaching and Referral Hospital". The Plaintiff says she was married to the Deceased in March 1971 at the Friends Church. The Plaintiff says she and the Deceased had 10 Children who are named in the pleadings. She goes on to say that following the demise of the Deceased the Defendant interred the body in Kitale. In addition she mobilised people to prevent the Plaintiff from accessing the body of the deceased and further that the Defendant instructed the mortuary where the remains lay to prevent the Plaintiff from taking the body for burial at the matrimonial home, in Chemuche Location. From her witness statement it is clear the Plaintiff considers that she was the only lawful wife of the Deceased. She expressly pleads that the Defendant is purporting to be the wife of the Deceased.

11. The Appellant/Defendant filed her Defence on 23rd November 2020. In her Defence, the Appellant denies that the Deceased died as pleaded. She avers that the Deceased died on 12th (not 13th) November and that he was buried in Lukesi Village. The Defendant's case is that she is the only wife of the Deceased and that the Deceased had expressed his wishes by a will. Further that the funeral was a public event so the Plaintiff could have attended if she wished to. Prior to filing her Defence, the Appellant filed a Notice of Preliminary Objection. The Grounds relied on were that:

- "1. The suit offends the provisions of Section 15 of the Civil Procedure Act and the instant court does not have jurisdiction to hear and determine this suit.*
- 2. The instant suit offends the Provisions of Section 7 of the Magistrate's Court Act, 2015 and as such this court has no jurisdiction to entertain this suit."*

12. In her Affidavit in Support of the application for a stay, the Appellant states that she married the Deceased pursuant to customary law in 1981. The alleged will upon which she relies is dated 1971 and refers to children who may have been of marriageable age at that time.

13. From the above, it is clear that the issues in dispute include:

- (1) Which of the Parties is/are the wife/wives of the Deceased
- (2) What are the rights and duties of the wives under customary law
- (3) Where should the Deceased have been buried
- (4) Did the Deceased leave a valid will
- (5) Who had the right to arrange and/or organize and/or attend the funeral for the Deceased
- (6) Is the dispute governed by customary law.
- (7) Did the Plaintiff have a right to organise and/or attend the funeral
- (8) In the event of a lack of consensus, what are the deciding factors.

In addition, the relief sought by the Plaintiff, in the Plaintiff, is:

- (e) *An order of exhumation of the body and/or remains of the deceased one BENJAMIN SHAMALA IMBOGO in Kitale.*
- (f) *An order directing the plaintiff to inter and/or burying the body and/or remains of BENJAMIN SHAMALA IMBOGO at his matrimonial and/or ancestral home in Chemuche Location, Tumbeni Sub-Location.*
- (g) *Costs of this suit.*

14. As this is a first appeal to this Court and it relates to a preliminary objection the grounds should raise only points of law on the facts pleaded at the time. The preliminary objection, implies that the Defendant/Appellant admits the facts pleaded in the Plaintiff. The argument put forward is that the Magistrates Court at Butali lacks jurisdiction to hear the suit and therefore it should be “struck out”.

15. The Appeal is opposed by the Respondent. The Parties agreed to file Written Submissions together with the authorities on which they rely. Both Parties filed their Written Submissions and they have been considered carefully. The Appellant urges the Court to allow the appeal and strike out the suit. The Appellant argues that **Section 7(3)** does not give the Magistrate’s Court jurisdiction to hear burial disputes, that is the preserve of the High Court. The Submissions also make the allegation that the lower court did not deliberate upon the issue of jurisdiction and started dealing with the issues within the main suit. The Ruling included in the Record of Appeal contradicts that assertion.

16. The Respondent, opposes the appeal. The Plaintiff/Respondent accepts that both Parties were the wives of the Deceased and relies on **Section 7(3)** of the Magistrates Court Act 2015. The Appellant argues that under **Section 7(3)** of the **Magistrates Court Act 2015** the Court at Butali does not have jurisdiction to hear the dispute but has not put before the Court any authorities to support that assertion. The main the authorities relied upon by the Respondent deal with the substantive dispute and not the Court’s jurisdiction. It is notable that generally the Courts tend to lean in favour of the interpretation of African Customary Law which provides for burial in the ancestral home unless there are good reasons to depart from that norm. That question is yet to be addressed. However, the final authority Civil Appeal No 50 of 2001, John Maraka Wekesa vs Patrick Wafula Otunga was decided before the promulgation of the Magistrates Court Act 2015 and is therefore of limited application. The Appellant similarly relies on an outdated authority namely, **Civil Appeal 80 of 1998**.

17. At the Hearing the Appellant relied first upon **Section 15** of the **Civil Procedure Act**. That Section provides: “15. *Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction – (a) the defendant or each of the defendants... at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, (b) any of the defendants (where there are more than one) at the time of the commencement of the suit, actually or voluntarily resides...*”. It is clear from the Notice and the oral submissions on behalf of the Appellant at the Lower Court, that in relation to this ground, what is put forward, is an argument relating to geographical limitations. The Defendant, filed a Defence and objected to the suit through a preliminary objection.

18. **Section 17** of the **Civil Procedure Act** provides for a different procedure. It provides, “*where a suit may be instituted in any one of two or more subordinate courts, and it instituted in one of those courts, any defendant after notice to the other parties, or the court of its own motion, may at the earliest possible opportunity, apply to the High Court to have the suit transferred to another court and the High Court after considering the objections, if any, shall determine in which of the several courts having jurisdiction the suit shall proceed.*”

19. The second objection appears to be that the subject matter and/or nature of the dispute is outside the jurisdiction of the Magistrates’ Court. The Court will have to decide several issues, inter alia those listed above. **Section 7** of the **Magistrate’s Court Act 2015** lists the areas of jurisdiction. It provides: The civil jurisdiction of a magistrate’s court is set out in **Section 7 of the Magistrates Court Act (No. 26 of 2015)**, which provides:

7. (1) *A magistrate’s court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed-*
 - (a) *twenty million shillings, where the court is presided over by a chief magistrate;*

(b) fifteen million shillings, where the court is presided over by a senior principal magistrate

(c) ten million shillings.....

(d) seven million shillings.....

(e) five million shillings

(2) The Chief Justice may from time to time.... revise the pecuniary limits...

(3) A magistrate's court shall have jurisdiction in proceedings of a civil nature concerning any of the following matters under African customary law-

(a) land held under customary tenure;

(b) marriage, divorce, maintenance or dowry;

(c) seduction or pregnancy of an unmarried woman or girl;

(d) enticement of, or adultery with a married person;

(e) matters affecting status, and in particular the status of widows and children including guardianship, custody, adoption and legitimacy; and

(f) intestate succession and administration of intestate estates so far as they are not governed by any written law.”. (emphasis added).

20. The facts arising from the pleadings made it clear that the dispute turns on the locus of each of the Parties within a marriage. It is also clear that the Deceased hailed from the area of jurisdiction of the Court and owned property in that jurisdiction. The Defendant has not denied that the Deceased originated from the area within the jurisdiction of the Butali Court. Her argument turns on (1) recent residence and (2) a will that has neither gone through probate nor been exhibited to the Defence.

21. In the circumstances, each party would have to prove her locus and entitlement. Those matters are squarely within the jurisdiction of the SPM's Court as provided by **Section 7(3) of the Magistrate's Court Act 2015**.

22. It should be mentioned for the sake of completeness significance of hearing the matter in Kitale would arise if the Court decided that bearing in mind all the facts and matters an order for exhumation was appropriate. However, that does make it necessary for the matter to be heard in Kitale – only enforced, for which purpose the suit could be transferred. A further consideration would be if a Defendant to the suit made an application for the suit to be transferred to his/her/its home court. In the case of the Appellant that may be Kitale, if, for instance, an application was brought against the hospital mortuary, that would be Eldoret. At no point did the Defendant seek transfer of the suit. She is simply praying for “striking out”. Striking out is a specific remedy provided for in **CPR Order 2 Rule 15**. A preliminary objection is not an appropriate application for striking out pleadings. **Sections 15-17** of the **Civil Procedure Act** set out the procedure that the Parties must follow to make sure that the suit is filed in the correct court. That does not bind the Magistrate who must adjudicate the suit. If any party is dissatisfied, that party must make an application to transfer the suit. In this case there are grounds for the suit remaining in Butali as well as for transfer. If and when such an application is made, the court will adjudicate upon it. Striking out the suit is not the correct remedy.

23. In this case the Plaintiff filed a suit. Under **Article 50** of the **Constitution of Kenya** she is entitled to have it hear on the merits. In the event that the Court where she issued her application and plaint did not have jurisdiction, either because of geographic limits or due to the rank of the judicial officer, which is not the case here, the correct remedy would be transfer to the correct court (if necessary) and not strike out. In the circumstances the Preliminary Objection is misconceived.

24. For the reasons set out above, the Appeal is dismissed with costs.

Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED, AND DELIVERED IN KAKAMEGA THIS THE 25TH DAY OF MAY 2021

In the Presence of

Court Assistant: Clement

Appellant: Mr Nyamu on line using the teams platform

Respondent: Mr Wesonga Holding Brief for Mr Masinde