REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 22 OF 2020

HESBORN LUMADEDE..APPELLANT

AGGREY AGUSHOMA..APPELLANT

MARY LOVEGA..APPELLANT

VERSUS

KENNETH KAMALIKI SHABAN.........................RESPONDENT

(A*n appeal arising from the judgment and decree of the Hon. Rose Ndombi, Senior Resident Magistrate (SRM), in Vihiga CMCCC No. 69 of 2020 delivered on 23rd April 2020)*

JUDGMENT

1. The dispute herein pits two sets of close relatives. The appellants are the biological children of the deceased, Airen Monyani, while the respondent is a grandson of the deceased. The conflict is over the remains of the deceased.

2. Upon the demise of the deceased, a dispute erupted as to where her remains were to be interred and by whom. The appellants wanted to inter her remains at their home at Kapkangani, on grounds that she was their mother, and they wanted her buried next to their father, her husband, Nashon Paka, according to them. The respondent took the view that the deceased was not married to the father of the appellants, but was the wife of his grandfather, Musa Kamaliki, and it was upon the demise of her grandfather that she was inherited by the father of the appellants. She never became the wife of the late father of the appellants, but remained the wife of the respondent's grandfather, and, according to tradition, he averred, her remains ought to be returned to her late husband's compound and interred next to his. The respondent argued that as the nearest surviving relative of his grandfather, he had a better claim, traditionally, over the appellants, the children of the deceased, to take charge and bury the remains of the deceased.

3. The dispute was disposed of by way of *viva voce* evidence, after which the court found that, according to the Maragoli customs, women were bound by the customs of their husbands. It was held that the deceased was bound by those customs and, it was directed that her remains be interred next to her official husband, the grandfather of the respondent herein. That finding was based on the evidence that the father of the appellants had inherited the deceased upon the demise of the grandfather of the respondent, and custom demanded that upon her demise, she should be buried next to her first husband.

4. The appellants were unhappy with that outcome, hence they lodged the appeal herein. They raise several grounds, such as that the trial court did not have jurisdiction to handle a burial dispute, the trial court ought not have entertained the respondent's claim to bury based on an alleged marriage between the deceased and the respondent's grandfather, the trial court applied customs on marriage and burial that were repugnant to justice and morality and contrary to the provisions of the Constitution of Kenya 2010, the trial court unfairly shifted burden of proof from the respondent to the appellants, the trial court misapprehended the content and extent of the Maragoli customs on marriage, subsistence of marriage after death of a spouse and wife inheritance and hence came up with a decision that was contrary to public interest, the decision went against the principles of equity and against the declared wishes of the deceased in her over 50 years marriage to the appellants father, the decision violated the constitutional rights of women by holding them slave to obsolete customary law application, the decision went against the evidence recorded, and the decision was founded on wrong provisions of the law resulting in injustice to the appellants. The appellants seek judgment in their favour, and that the judgment of the trial court be set aside. It is specifically sought that the court finds that, as between the grandson of the deceased, and her children, the children were possessed of an unrivalled right to bury their mother next to their late father's grave or wherever they may wish to bury her.

5. Directions were given on 28th July 2020, that the appeal be disposed of by way of written submissions.

6. In their written submissions, the appellants argue three grounds: whether the trial court had jurisdiction to entertain the matter, whether the respondent had adequate *locus standi* in the matter, and whether Maragoli customary law was applicable.

7. On the first ground, they appellants submit that the High Court is divided on the matter, as to whether a magistrate's court is mandated to try burial disputes. They argue that the trial court lacked jurisdiction, asserting that jurisdiction is conferred and acquiesced, but not created through judicial craft. They cited the decision in *Bilha Mideva Buluku vs. Everlyne Kanyere* Kakamega HCCA No. 12 of 2016 (Mwita J) (unreported). On the second ground, they argued that the respondent lacked the standing to claim the body of the deceased for burial, and he established not right at all. It is submitted that the deceased was apparently acting in a representative capacity, yet he did not plead so in his plaint, and in that respect he did not assert any independent right to bury the deceased. It is asserted that the respondent could not legally maintain the suit without a grant of letters of administration intestate. The third ground is with respect to the applicability of Maragoli customary law, and the *mwandu* practice in particular. It is conceded that both parties are Maragoli, and ordinarily Maragoli customs would govern and dictate some of the aspects of their lives. However, it is submitted that the same ought not to apply to the set of facts that make up the dispute, for the deceased had cohabited with her inheritor for over 60 years, they had 8 children together, and had moved away from the area where the late grandfather of the respondent had a matrimonial home. It is also argued that the *mwandu* practice was not omnipresent and unending. It is also argued that the provisions of the Constitution, 2010, would frown upon such a practice. They have also cited the Judicial Service Act, No. 1 of 2011, and the Births and Deaths Registration Act Cap 149, Laws of Kenya. There is also the argument that the court ought not have made orders in favour of the clan and the family members of the respondent, when the two groups were not parties to the dispute, neither should it have described the late grandfather of the respondent as the official husband of the deceased.

8. On jurisdiction, the respondent, in his written submissions, argues that the appellants had submitted to the jurisdiction of the trial court in their defence statement. The issue of lack of jurisdiction was not raised at all in the course of the proceedings before the trial court. He also submits that the fact that the High Court had a divided opinion on the matter meant that the issue of jurisdiction of the trial court was not quite settled, and could be overlooked once the court was seized of the matter up to the end without any objection. On *locus standi*, it is submitted that the issue was the place of burial of the deceased, rather than the right to bury, and there was nothing that prevented the appellants from participating in the burial of the deceased. It is also submitted that there was no need for a grant of letters of letters of administration intestate, for the respondent to protect the place of burial of the deceased. Furthermore, it is argued, the issue of grant of letters of administration intestate presented a technicality, which was not required under customary law. It is further submitted that there was no need for the respondent to join other parties to his suit. It is further argued that the appellants had conceded that they were children of a *mwandu* arrangement and they could not benefit from the Mudete property which belonged to the estate of the late grandfather of the respondent. It was further argued that the deceased could not bury two husbands. On the application of Maragoli customary law, it is submitted that the same did apply to the parties, and so did the *mwandu* practice or arrangement. It was further submitted that there was nothing to suggest that the custom was repugnant to justice or morality.

9. On jurisdiction, it is common ground that the law in quite clear on where jurisdiction lies, as between the High Court and the magistrate's court. The Judicature Act Cap 8, Laws of Kenya, provides, at section 3, that both the High Court and the magistrate's court are to be guided by African customary law where one or more of the parties are subject to or affected by it. I am aware of the decisions in *Kiplagat Korir vs. Dennis Kipngeno Mutai* [2006] eKLR (Kimaru J), *Salina Sote Rotich vs. Carolyne Cheptoo & 2 others* [2010] eKLR (Mwilu J), among others, where the courts took the position that the magistrate's court was bereft of jurisdiction to handle burial disputes, since claims around that were not in the basket of matters set out in section 7(3) of the Magistrates Courts Act, No. 26 of 2015, and in section 9 of the Act before its amendment or overhaul in 2015. On the other end of the spectrum are the decisions in *Martha Wanjiru Kimata & another vs. Dorcas Wanjiru & another* [2015] eKLR (Achode J), *Beatrice Wanjugu Mwaniki vs. Josephine Wanjiru Mwaniki* [2015] eKLR (Waithaka J), among others, which take the view that there was nothing, in the provisions of the Magistrates Courts Act, which took away jurisdiction with respect to burial disputes. It is true and correct to state that section 7(3) of the Magistrates Court Act does not list burial disputes as among the customary law claims that the magistrate's court has jurisdiction to handle. However, section 3(2) of the Judicature Act appears wide enough to allow the magistrate's court to adjudicate over a burial dispute, where the parties are African, and be guided by African customary law in the resolution of the dispute. I would bend to the position taken by the courts, in *Martha Wanjiru Kimata & another vs. Dorcas Wanjiru & another* [2015] eKLR (Achode J), and *Beatrice Wanjugu Mwaniki vs. Josephine Wanjiu Mwaniki* [2015] eKLR (Waithaka J), in that regard, to hold that the magistrate's court in Vihiga PMCCC No. 69 of 2020 was properly seized of the matter, the parties were all Maragoli and, therefore, subject to or affected by Maragoli customary law, and it was quite proper for the court to be guided by that law in the resolution of the burial dispute that had been placed before it.

10. I believe that I have dealt with one aspect of the applicability of the Maragoli customary law to the dispute at hand, by finding that the parties were all Maragoli, and, therefore, it naturally followed that they were subject to or affected by Maragoli customary law, in certain, if not all aspects of their lives, where customary law may apply. The appellants have not demonstrated how and why Maragoli customary law ought not apply to the set of facts that were presented. No case law, nor statutory provision, nor a treatise by a learned scholar on Maragoli marriage and customs and burial rites, were cited, to displace the presumption that since the parties were Maragoli, the customs and traditions of that community applied to them, and more so with respect to the burial dispute at hand.

11. The second aspect of the matter of application of Maragoli customary law to this case relates to whether there was anything that would have provided an exception or deviation from the application of the law. The appellants have not cited any rule of the customary law which would have allowed that. No cases were cited, nor statutory provisions were relied on, no excerpts from works by learned scholars in the subject were quoted. Crucially, the appellants did not lead any evidence that suggested there was a way of walking away from or opting out of, traditionally, that custom. DW1 and DW2 testified for the appellants. The 1st appellant testified as DW1. He was familiar with the customs around the *mwandu* arrangement, but he did not say anything that would have suggested that customarily there could be a departure from that custom, so that the deceased could be buried next to his father, her inheritor, instead of that of the late grandfather of the respondent, her actual husband. DW2 was an elderly man. His age was put at 85 years. His testimony did not support the case for the side that had called him, the appellants. He said that a woman, meaning a wife, cannot bury 2 men at the same time, suggesting that the deceased having buried the late grandfather of the respondent, she could not bury the father of the appellants, and, therefore, and that was why she did not address his funeral gathering. That would mean she was still the wife of the late grandfather of the respondent, and that being the case, her remains were for interment next to her husband, and not her inheritor.

12. The custom was attacked on appeal on grounds that it offended the provisions of the new Constitution, 2010. Articles 27, 28, 30 and 36 were cited, and it was argued that the *mwandu* custom has limited the dignity of women. The appellants have not elaborated on how the dignity of women is lowered with respect to the custom, and more so with regard to the deceased. The Articles of the constitution cited are not about burial rights. They relate to rights of living persons, and not the dead. A dead human being ceases to be a person upon death, and that is why they become deceased, and the rights under the Articles of the Constitution cited cannot be ascribed to a dead person. He cannot

enjoy those rights, because he is dead. What remains after death is the shell or body of the person. These provisions cannot be asserted to protect the rights of the deceased once she died, they can only be urged during her lifetime, but not after her demise.

13. The appellants have argued that the *mwandu* arrangement was inconsistent with written law, or repugnant to justice or morality. Section 3(2) of the Judicature Act and Article 2(4) of the Constitution were cited. However, the appellants have not demonstrated that the practice was inconsistent with or repugnant to any written law. No such law has been identified, other that Articles 27, 28, 30 and 36 of the Constitution, and the Judicial Service Act and Births and Deaths Registration Act. However, I have dealt with the three in the preceding and receding paragraphs, and made the point that they do apply to the facts of the matter before me, for they have nothing to do with burial rites.

14. As stated above, the appellants have cited the provisions of the Judicial Service Act and Births and Deaths Registration Act. The provisions of the Judicial Service Act relate to the Judicial Service Commission and the Judiciary as bodies. The provision cited, section 3(k), enjoins the two to be guided in their internal affairs and in the discharge of their mandates by consideration of social and gender equity, and the need to remove any historical factors and discrimination. I believe this provision is about how the Commission and the Judiciary, as entities, ought to operate as administrative units as opposed to courts handling disputes. It cannot possibly be a provision to rely on to deal with a burial dispute. The Births and Death Registration Act is about registration of the fact of death, and it has nothing to do with who has a right to bury and the place of burial, which tend to be the principal issues in burial disputes. The provision cited, section 17, requires that the nearest relatives of the deceased would make a report of his death, and in their absence, or default, any other relative could make such a report.

15. On the *locus standi* of the respondent to bring the suit, the appellants argue that the respondent had no standing to assert a right to bury the deceased, as he had no legal interest that could be protected by the law. They argue that he did not prove any such right. They argue that the prayers were coined in a manner that the respondent was suing in a respective capacity, and he had not properly brought the case in that capacity. As I understand it, the claim is for a right to bury the remains of the deceased at a particular place, founded on customary law. The respondent was a grandson of both the deceased and his late grandfather, as the father of the respondent was a child of the both the deceased and his late grandfather. His father is also deceased. It would appear that his late father was the only sole child of the late grandfather, as at the time of his death. When his grandfather died, the deceased was inherited by the father of the appellants, and went on to have children with the inheritor, who included the appellants. The respondent sued as the nearest relative of his late grandfather, who was entitled to assert the right to bury his grandmother next to his grandfather. That duty should have fallen on the shoulders of his father, unfortunately the latter had pre-deceased the deceased. The right asserted was founded on customary law, which is the personal law so far as burial matters are concerned. As the closest relative of his late grandfather, the respondent was vested with standing under customary law to assert the right to bury the deceased as against the appellants. Of course, the appellants were the nearest relatives of the deceased, being her children, as opposed to the respondent, who was her grandson. Under written law that would have clothed them with a greater right over him, but the personal law in this case was customary, as opposed to written law, and when customary law applied, it granted greater burial rites to the respondent, over the remains of the deceased, over those of the appellants. By dint of the decision in *Otieno vs. Ougo & another (No. 4)* [1987] KLR (Nyarangi, Platt & Gachuhi JJA), a claimant under customary law does not require any grant of representation to assert the right to bury another. Such would be a requirement under written law. In any event, there is no property in a dead body, to be disposed of in succession proceedings. The respondent did not also need to bring a representative suit, as it is clear that he brought the suit to assert his right as grandson of both the deceased and his late grandfather, and the reference, in his prayers, to his family and clan, did not make the suit representative.

16. The appellants took issue with the reference by the trial court to the late grandfather of the respondent as the official husband of the deceased. The recorded evidence is clear that that was the man who had married her officially under customary law, after paying her dowry. The father of the appellants never paid dowry, and he could not because the deceased was never his wife, but that of someone else. He had merely inherited her traditionally. Consequently, the use of the term official by the trial court was not off turn.

17. Overall, I am not persuaded that the appeal herein is merited, and I accordingly dismiss the same. The dispute pits a nephew against his aunt and uncles, consequently each side shall bear their own costs.

DATED, SIGNED and DELIVERED IN OPEN COURT AT KAKAMEGA THIS 6th DAY OF AUGUST , 2021

W. MUSYOKA

JUDGE