



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

APPEAL NO. 15 OF 2018

WILFRED MONGARE ORINA.....APPELLANT

VERSUS

ASKAH MOCHECHE MOMANYI.....RESPONDENT

J U D G M E N T

(Being an appeal from the Judgment and Decree of Hon. S. Soita, RM issued in Kisii CMCC No. 55 of 2008 dated on 6th August 2008)

1. This appeal arises from the judgment and decree in Chief Magistrate's Court at Kisii made by Hon. Samuel Soita, PM in CMCC No. 55 of 2008 on 6th August 2008. In the suit the respondent who was the plaintiff sought to bar and injunct the defendant from having the defendant's mother, Bathsheba Bosibori who had died from being buried on land parcel **Nyaribari Chache/B/B/Boburia/5054** which was registered in the plaintiff's name. The plaintiff averred that even though the defendant's mother had been invited to come and live with the plaintiff's husband on the land no valid marriage either under custom or otherwise had come into existence to entitle the deceased (defendant's mother) to acquire any interest in the suit property to entitle her to be buried on the land. The plaintiff had contended that the defendant's mother had a husband to whom she was married and that marriage subsisted and she therefore ought to be buried in her real husband's land.

2. The respondent in the lower court sought injunctive and declaratory orders that the defendant be restrained from burying the mother in the suit land and that she (the plaintiff) was the lawful owner of the suit property.

3. In his defence the defendant pleaded that his late mother was duly married and that there had been a woman to woman marriage as practiced and in accordance with Gusii Customary Law rites and on that account contended that the deceased and her children were entitled to a portion of the suit land as beneficiaries. Further, the defendant contended the plaintiff held the suit land in trust for herself and the family of the deceased on the basis that Bathseba Bosibori was married to Teresia Nyabate (deceased) under woman to woman marriage under the Abagusii customary rites and was entitled to inherit her (Teresia Nyabate - deceased).

4. The trial magistrate after hearing the parties by a judgment delivered on 6th August 2008 upheld the claim by the plaintiff/respondent and held that there was no valid marriage **"woman to woman"** between the defendant's deceased mother and Teresia Nyabate. The trial magistrate restrained burial of the defendant's deceased mother on the suit property and declared the plaintiff the lawful owner of the suit property.

5. The defendant/appellant being aggrieved by the decision/judgment of the learned trial magistrate has appealed to this court against the judgment and decree by the learned trial magistrate and by the Memorandum of Appeal dated 4th September 2008 filed in court on the same date sets out the following grounds of appeal:

- 1. The learned trial magistrate erred in law and in fact in not holding that the court lacked jurisdiction to try the suit.**
- 2. The learned trial magistrate erred in law and in fact in failing to look at the circumstances surrounding the registration of the respondent in order to determine whether it was envisaged that a trust should be created.**
- 3. The learned trial magistrate erred in law and in fact in failing to hold that the suit land was subject overriding interests as against the respondent even without legal title.**
- 4. The learned trial magistrate erred in law and in fact in not holding that the absence of any reference to the existence of trust in the title documents did not affect the enforceability of the trust.**
- 5. The learned trial magistrate erred in law and in fact in not holding that the plaintiff's suit did not disclose any reasonable**

cause of action.

6. The learned trial magistrate erred in law and fact in failing to take into account the evidence and submissions of the defence.

6. The parties canvassed the appeal by way of written submissions. The appellant filed his initial submissions on 13th September 2018 and further submissions on 11th December 2018. The respondent's submissions were filed on 10th December 2018.

7. The appellant in his submissions maintained his mother Bathseba Bosibori was married to Teresa Nyabate Asango in a woman to woman marriage. The appellant contended that his mother following her said marriage lived on the suit land namely Nyaribari Chache/B/B/Boburia/5054 until the time she died on 7th February 2008. The appellant submitted that by virtue of Section 3(2) of the Judicature Act, Cap 8 Laws of Kenya the subordinate court lacked the jurisdiction to deal with matters relating to burial disputes arguing that it was the High Court that was seized with such jurisdiction. Further, the appellant submitted that as the appellant mother had resided on the suit land for a period of more than 12 years, the registered owner's in the land had gotten extinguished in favour of the appellant's deceased mother.

8. On the submission that the subordinate court lacked jurisdiction the appellant relied on the judgment of the **High Court in Kericho Civil Appeal No. 52 of 2000 Kiplangat Korir –vs- Dennis Kipngeno Mutai [2006]eKLR** where Kimaru J. held that a Resident Magistrate's Court lacked the jurisdiction to hear and determine a customary burial dispute by virtue of Section 2 of the Magistrate's Courts Act Cap 10 Laws of Kenya. The judge in the case further held it was the High Court that had such jurisdiction pursuant to Section 3(2) of the Judicature Act, Cap 8 Laws of Kenya although he did not determine the appeal before him on the issue of jurisdiction. The recently enacted Magistrates' Courts Act No. 26 of 2015 which replaced the old Magistrates' Court Act, Cap 10 Laws of Kenya under Section 7(3) makes provision for Magistrates' Courts to handle customary law matters and provides as follows:-

7.(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.

9. The above provision replaced the provision under Section 2 of the previous Magistrates Court Act which defined a **"claim under customary law"**. The Judicature Act, Cap 8 Laws of Kenya under Section 3(2) made provision for application of customary law in appropriate circumstances. Section 3(2) of the Act provides as follows:

"The High Court, the Court of Appeal and all subordinate courts shall be guided by African Customary Law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay."

10. My understanding of the previous Section 2 of the old Magistrates Court Act, Cap 10 Laws of Kenya which Kimaru, J. relied on in the **Kiplangat Korir** case (supra) to hold the Resident Magistrate's Court lacked jurisdiction to handle a burial dispute, is that the Section particularly when considered together with Section 3(2) of the Judicature Act did not oust jurisdiction of Magistrates Court to handle burial disputes. It is common ground that burials in virtually all Kenyan communities are community affairs and the normal customary rites are observed by the communities before burial takes place. Although Section 2 of the Magistrates Court Act, Cap 10 defined what a claim under customary law entails, my view is that it did not exclude a burial dispute. Under Section 3(2) of the Judicature Act, where both parties are subject to customary law the courts are enjoined to be guided by the customary law of the parties to the extent that the same was not repugnant to justice and morality.

11. In the premises, it is my determination that the trial magistrate properly entertained the dispute and had jurisdiction to hear and determine the dispute that touched on the burial of the appellant's mother. That disposes of the first ground of appeal.

12. Grounds of Appeal 2 through to 6 challenge the trial magistrates findings and evaluation of the evidence adduced. The appellant faults the trial magistrate for failing to hold and find that in the circumstances under which the respondent was registered as the owner of **LR No. Nyaribari Chache/B/B/Boburia/5054** a trust had been created in favour of the appellant's deceased mother and by extension in favour of the appellant and his siblings.

13. I am mindful that this being a first appeal this court is obligated and duty bound to reappraise the evidence tendered before the lower court in order to determine whether the findings and the decision of the trial magistrate was justifiable having regard to the evidence. The

court however will not interfere with the findings of fact of the trial magistrate unless it is manifestly clear and evident that the trial magistrate misdirected himself on a point of law and/or it is clear he failed to take account of any particular circumstances and/or evidence such that a miscarriage of justice could result unless the court interfered to remedy the situation. Thus, this court as an appellate court of first instance has mandate to reappraise the evidence tendered in the lower court and draw its own inferences of fact. This mandate has been enunciated in many decided cases and the courts have been guided by the principles as set out by the then East African Court of Appeal in the case of **Selle -vs- Associated Motor Limited Company [1968] E. A 123** where the court stated thus:

“This court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

14. In the present appeal, the appellant has averred that the trial magistrate erred when he failed to find that there was a woman to woman marriage involving his late mother and one Teresia Nyabate Asango (also deceased). He submitted by virtue of the marriage his mother had become a member of Teresia Nyabate Asango’s household and therefore entitled to inherit the property of her **“husband”** Teresia Nyabate Asango as a beneficiary.

15. The respondent denied that the appellant’s mother Bathseba Bosibori was married to Teresia Nyabate Asango in a woman to woman marriage and contended that Bathseba Bosibori was married to one Orangi Mogoi and that her marriage to him had not been dissolved so that she could contract another marriage as claimed. It was the respondent’s contention that Bathseba Bosibori lacked the capacity to enter into another marriage when her initial marriage to Orangi Mogoi was still subsisting.

16. The issue whether or not there was a woman to woman marriage between the appellant’s mother and Teresia Nyabate Asango was considered and determined by the trial magistrate on the basis of the evidence adduced before him. In his judgment, the trial magistrate disposed the issue whether or not there was a valid marriage **“woman to woman”** between Bathseba Bosibori and Teresia Nyabate as follows:-

“I have carefully appraised the evidence on record and considered submissions by both sides. The first issue for determination is whether or not the marriage of Bathseba Bosibori to Teresia Nyabate was legal. Evidence was adduced and it is not in dispute that Bathseba Bosibori was married to one Orangi Mogoi and dowry was paid. What appears to be in dispute is whether or not dowry was refunded to the family of Orangi Mogoi to extricate the deceased from the marriage and allow her to contract a valid marriage with Teresia Nyabate. Evidence on the issue of refund of dowry was adduced by two witnesses. PW4 and DW1. PW4 who is the brother of Orangi Mogoi was categorical that the dowry was not refunded. DW1 said he refunded. He struck me as an unreliable witness as he was inconsistent. At some stage he said only part of the dowry was refunded due to scarcity and at some other point he said the entire dowry had been refunded. The defendant was sent to consult with his area elders and location chief to give consent. Indeed a letter was written to the chief of Bosongo Location clearly saying they had no objection. The need for consent from where the deceased had been married clearly strengthens the testimony of PW4 that dowry was never refunded as alleged by DW1. It really beats logic why any consent was required if the link had indeed been broken by the alleged refund. On a balance of probabilities, I find there was no refund and she was incapable of contracting a valid marriage with Nyabate. In any event according to PW2 who is an expert in matters of customs of the Abagusii the marriage of the deceased to Orangi Mogoi disqualified her from contracting a woman to woman marriage.”

17. The above extract from the judgment of the learned trial magistrate sums up the basis of the decision by the trial magistrate. I have reevaluated the evidence adduced before the lower court and I find no basis upon which the learned magistrate can be faulted in his holding. PW2 one, Nelson Kingoina Nyangera testified as an expert in Abagusii Customary Law. He was a former lay magistrate, commenced his career as a clerk in 1952 with the African Court, was an interpreter of Ekegusii for reknown author E. Contran and the author of the book title **“The Making of men and Women under Abagusii Customary Law.”** I am satisfied he qualified to be classified as **“an expert”** in Abagusii Customary Law.

18. It was his evidence that under Abagusii custom a woman who is widowed, barren or childless was allowed to marry another woman. He stated further that the woman to be married must have children gotten through illicit sex and had to be one who had ashamed her parents. The parents had to sanction the woman to woman marriage of their daughter and dowry had to be paid. PW2 in his testimony at page 43 of the record of appeal stated as follows:

“Once a woman is discovered that she cheated in marriage, she will be expelled. No parent is allowed to receive dowry twice for the same lady. This is a taboo. The children of a woman to woman marriage are regarded as grandchildren of the woman marrying. Where dowry is not paid, the woman being married should not come to the matrimonial home. Where dowry is not paid she cannot be known as a wife, where woman is married and she runs away sires children with other men, those children will be of the husband who paid dowry. Where a woman is habitually, thief or commits adultery or habitual witch the man will report to the clan elders. If she is not able to look after the children or the husband, a divorce is ordered. She can return some children and the man will return whatever is less than children. He will receive less than four cows. Where a woman who is married buries her children where she stays, she will still be the lawful wife of the person paid the dowry.”

19. Eugene Contran in his publication **“The Law of Marriage and Divorce”** Vol. I Sweet & Maxwell, 1968 describes woman to woman customary unions under the Kikuyu Customary in the following terms:-

“Woman to Woman Marriage:-

Where a husband dies leaving a childless widow, who is past child-bearing age, the widow may marry a wife. The widow pays ruro (Marriage consideration) to the family of the woman selected and arranges for a man from her deceased's husband age set to have intercourse with her. Children resulting from such intercourse are regarded as children of the widow's deceased husband."

20. The courts have applied the customs of the parties before it to determine whether or not a customary marriage of a woman to woman exists. In the case of **Eunita Anyango Geko & Another –vs- Philip Obunga Orinda Kisii High Court Misc. C.A No. 1 of 2013 [2013] eKLR** the court held that in Luo customs, woman to woman marriages are defined in the same manner as that under the Kikuyu customs with the slight difference being that where the widow is left without a male child, and not necessarily without a child at all she could marry another wife. In the case of **Ernest Kinyanjui Kimani –vs- Muiru Gikanga & Another [1965] E.A 735** considered as a *locus classicus* in the application of customary law. Duffus J.A expressed himself while applying customary law to prove validation of woman to woman customary unions:-

“To summarize the position, this is a case between Africans and African Customary Law forms a part of the law of the land applicable to this case. As a matter of necessity the customary law must be accurately and definitely established. The court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward the customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially, of the present lack in Kenya of authoritative text books on the subject, or of any relevant case law, this would in practice usually mean that the party propounding the customary law would have to call evidence to prove the customary law, as he would prove the relevant facts in the case.”

21. The evidence by PW2 was clear that a woman who had been validly married and had children with her husband could not validly enter a woman to woman marriage. It was his evidence that a woman to woman marriage would come into being where a woman marries a woman who had already gotten children through illicit sex. His view was that where a woman had got children through a lawful husband she could not qualify to be married by another woman. The criteria it appears was that for a woman to be married to another, the woman to be married must not be in a subsisting marriage where dowry had been paid and there are children with the legal husband and/or the woman had disgraced her parents by having children through illicit sex with unknown men who had not married her. The woman marrying must also pay dowry to the parents of the woman to be married. The appellant's mother Bathseba Bosibori did not satisfy this criteria and could not therefore have been validly married to Nyabate. The appellant has submitted that the circumstances under which his mother entered and occupied land parcel **Nyaribari Chache/B/B/5054** then owned by Teresia Nyabate Asango was such as gave rise to a trust. The appellant thus argues that when the respondent got the land transferred to her following succession she was constituted a trustee for the appellant's mother.

22. The court having held that there was no valid woman to woman marriage between the appellant's mother and Teresia Nyabate, it followed that the appellant's mother could not claim a beneficial interest in Teresia Nyabate's estate. Since the appellant's mother's entry onto the land was with the permission of Teresia Nyabate, it means she was but a licensee in the property and the licence was terminable. The appellant's mother did not acquire a beneficial interest in the property owned by Teresia Nyabate and therefore the respondent could not have been constituted a trustee for her estate when she was registered the owner of Teresia Nyabate's property through succession.

23. The learned trial magistrate accepted the expert evidence as adduced by the PW2 on Abagusii Customary Law as relates to woman to woman marriages. There was no other evidence to contradict the evidence by PW2 as to what constitutes a valid woman to woman marriage under the Abagusii custom. On the basis of the evidence the learned trial magistrate held that the appellant's mother had not validly been married to Teresia Nyabate in a woman to woman marriage as the necessary ingredients to consummate such a marriage were lacking. The trial magistrate in my view on the evidence was justified to hold no such a marriage came into being.

24. Consequently, there having been no marriage between Teresia Nyabate, was therefore terminable and in the present case the licence was terminated by the death of Bathseba Bosibori, the appellant's mother. The respondent therefore cannot be said to be holding the property **LR No. Nyaribari Chache/B/B/Boburia/5054** in trust for the appellant on account of the appellant's mother having had a beneficial interest over the property. The respondent does not hold the suit property subject to any overriding interest in favour of the appellant.

25. In the premises, I find no merit in the appellant's appeal and I dismiss the same with costs to the respondents.

JUDGMENT DATED, SIGNED AND DELIVERED AT KISII THIS 29TH DAY OF MARCH 2019.

J. M. MUTUNGI

JUDGE

In the Presence of:

Ms. Moguche for Bosire for the Appellant

N/A for the Respondent

Ruth Court Assistant

J. M. MUTUNGI

JUDGE