REPUBLIC OF KENYA

IN THE HIGH COURT

AT ELDORET

CIVIL APPEAL NO. 58 OF 2018

RUTH ANYOLO...APPELLANT

VS

AGNETTA OIYELA MUYESHI.................................RESPONDENT

(An appeal from the judgment and decree of the principal magistrate

delivered on 15th May 2018 in Eldoret Magistrate's ELC 12/2018.)

JUDGMENT

1. The cause of action was that the respondent **(AGNETTA OIYELA MUYESHI)** sought an order for injunction against the appellant from transporting or interring the remains of her late husband, Fredrick Amwayi Munyeshi, who passed away on 3rd February 2018. The injunction was to stop the appellant **(RUTH ANYOLO)** from interring the deceased's remains on the parcel of land known as **IDAKHO/SHIESO/152.** Her claim was based on the fact that she is the first wife of the deceased while the appellant was the second wife. The respondent further claimed that she was the registered owner of the parcel of land known as **KAKAMEGA/CHEKALINI/181** where she lived with the deceased. The respondents' home being **IDAKHO/ISHISESO/152,** is registered in the name of the deceased and her house was demolished before the deceased passed on. She claimed to be entitled to bury the deceased. The suit proceeded for hearing and the court held that the respondent had proven her case. The appellant being dissatisfied with the decision of the court filed the present appeal.

APPELLANT'S CASE

2. The appellant filed written submissions on 20th February 2019 wherein she set out issues for determination and submitted on the same.

The appellant submitted that the trial magistrate erred in failing to find that she was wrongly sued pointing out that family members of the deceased are not and were not her agents or servants. She was not solely in charge of the burial arrangements.

3. It is her contention that at the trial, no evidence was led to demonstrate the role she played in the burial arrangements or attempts made to prove that those organizing the burial arrangements were her agents as claimed in pleadings filed by the respondent. Further, that evidence and testimony led at the hearing confirmed that during the ceremonies wives do not play any role and the persons mandated to plan and organize for the burial are the brothers. The appellant ought not to have been sued even as the wife of the deceased.

4. The appellant sought to demonstrate the existence of a will left by the deceased, whose executors were his brothers **Vincent Amwya** and **Isaac Khaguli Enan**, and who the appellant insists should have been sued since they were mandated to carry out the wishes of the deceased.

5. The appellant submitted that the trial magistrate erred by finding that the respondent proved customary law requirements allowing the 1st wife to bury the deceased as opposed to the second wife.

The respondent got married to the deceased with whom they got 6 children. She later separated from the deceased and moved out of his home at **IDAKHO/SHISESO/152**. That same year the deceased married the appellant and sired 8 children, they resided on **IDAKHO/ISHISESO/152** with the appellant until he passed away.

6. The respondent testified that the land she intends to bury the deceased being **KAKAMEGA/CHEKALANI/182** was personally bought by herself. She heavily relied on her claim as 1st wife to bury the deceased as a requirement by customary law of the Luhya community. However, in the appellant's views, she did not prove any such customs, no evidence was tendered evidencing that the clan of the deceased known as Kamburi required the 1st wife to bury her husband. The position was noted at page 23 of the judgment. No expert witness was brought to court to assist the court arrive at its finding.

7. The appellant submitted that the burden of proof of an alleged custom lies with whoever alleges. The appellants' witness at the trial court opposed the position being held by the respondent and went further to give instances where a deceased polygamist has been buried in the 2 nd wife's home. The appellant maintains that the respondent did not prove the customary law she relied on and failed to avail a reliable expert witness to testify and prove the alleged customary law.

8. The appellant relied on the cases of **Njoki v Mutheru (2008) eKLR** and **Kaittany & Anor v Wamaitha (2014)** on the burden of proof of customary law. She further submitted that the burden was never discharged.

The appellant submitted that deceased left a valid will which was never challenged and where he expressed his wishes and the will has not been challenged. She cited section **3 and 11 of the Law of Succession Act** in support of this submission. The will takes precedence over customary law.

9. The appellant called 16 witnesses whose testimony was that the deceased was clear on his place of burial. The deceased gave these instructions when he was alive and in hospital. His wishes were to be buried at his home in **IDAKHO/ISHIESO/152**.

The respondent is faulted as she did not produce any order in these proceedings to show that the will has been revoked, nullified or invalidated. She further cited section 18 of the Law of Succession act on revocation of wills. All the provisions of the law had been adhered to and the respondent did not allege that the deceased was of unsound mind, neither did she place any caveat to demand proof of the will. It is submitted that propounding of the will cannot be a reason to challenge it at this time.

10. The respondents' concerns over the propounding details as expected from the defence witness **DW16 GABRIEL KAMAYI** at the trial court cannot hold. If the respondents' concerns were that the will was not correctly prepared or fraudulently acquired, they ought to have taken the necessary action in the requisite jurisdiction to challenge it. The respondents at the trial court claimed that the signature and thumbprint on the will belonged to the deceased.

11. The appellant submitted that there was no evidence tendered to show that any complaint had been lodged at any of the police stations for forgery or of any criminal proceedings against the defendants for criminal activities.

The respondent indicated through her witnesses that the deceased had indicated his desire to be buried at **Chekalini**. This came up during one of the visits by the members of the self-help group when he was asked where he wished to be buried. Further, minutes of the meeting were produced in an effort to prove the oral will. The appellant challenges this part of the evidence and submits that this evidence was a fabrication adding that even if the evidence was to be considered, the suggestion of an oral will had been superseded by the subsequent written will. The appellant reiterates that the deceased left a valid will.

12. The appellant submits that the deceased left a valid will and the will has not been invalidated or revoked so it takes precedence over any customary law requirements. She relied on the cases of **Martha Wanjiru Kimata & Anor v Dorcas Wanjiru & Anor [2015], and CA No. 12 of 1979 – Apeli v Buluku (2008) 1KLR** which had a common finding that the wishes of the deceased, though not binding must, so far as practicable, be given effect, so long as the same is not contrary to custom nor contrary to the general law or policy.

She further submits that customary law is dynamic and that the deceased having left his will on how he desires to be buried, it is only fair and just that his issues be respected.

13. The appellant submits that she does not claim rights to bury the deceased and neither has she contravened customs or tradition but that the deceased's wishes be respected. He expressed his desire to be buried at **IDAKHO/ISHIESO/152** in his written will and orally as well as showing physically where he was to be buried. The trial court erred in failing to dismiss the respondents' case.

RESPONDENT'S CASE

14. The respondent filed submissions on 27th February 2019.

She poked holes at the record of appeal saying it was defective as it did not include the decree - meaning the court lacked the jurisdiction to entertain the appeal. * She cited the case of **Bwana Mohammed Bwana v Silvano Buko Bonaya & 2 others (2015) eKLR i**n this regard. She further cited the case of **Ocheja Emmanuel Dani Gana v Hon. Tai Aidoko Aliusman & 4 others, SC 11/2012.**

15. The respondent cited section 65 of the Civil Procedure Act and Order 42 Rule 13(4)(f) and submitted that any appeal lies from the decree. This means that the judgment of the subordinate court must be accompanied by a decree and contained in the record of appeal. Further she cited the case of Law Society of Kenya v Centre for Human Rights and Democracy & 12 others, Sup Court No. 4 of 2014 to support the submission that the appeal was incompetent and that the court lacked jurisdiction to entertain it. The appeal should therefore be dismissed.

16. The respondent contends that the appellant was properly sued by the respondents and, the findings of the trial magistrate were based on the nature of prayers sought. The respondent stated in her evidence that she sued the appellant as she was planning to take the body from the mortuary and bury it at Idakho, pointing out that the appellant stated she was served with the court order while preparing to take the body in her own evidence. It is therefore argued that the appellant having stated that she intended to collect the body of the deceased from the mortuary is estopped from turning around and claiming she was wrongly sued. That in any event the trial court explained the meaning of agents of the appellant.

The respondent submits that the trial magistrate did not err in finding that the respondent proved customary law requirement allowing the 1st wife to bury the deceased husband as opposed to the second wife. Further that the trial magistrate framed the issue as to whether customs and

traditions of the Luhya community provided that the deceased herein be buried by the respondent.

17. This court is urged to consider the observations made by the trial court that he appreciated the witnesses' testimonies despite the fact that they may not have passed as experts as strictly defined in the Black's Law Dictionary. He relied on Eugene Cotran in Restatement of African Law Volume II to find that under custom, the husbands are buried by senior wives and they are buried outside the house of the 1st wives. He confirmed that Cotran is an authority on African customary law that was in tandem with the respondents' witnesses' evidence. The respondent and the deceased were not divorced and therefore she cannot be overlooked in such matters.

18. The trial magistrate relied on the cases relied upon by the appellant i.e. **Njoki v Mutheru and Kaittany v Wamaitha** (supra).

It is also argued that the trial court made a finding that the deceased left a will but held that the said will was not binding. Subsequent events have rendered the will questionable but a document examiner was not available at the time the will was tendered in evidence in the trial court.

It is submitted that the report by the document examiner which found that the signature in the will was not made by the deceased is on record, the same cannot be wished away. Had the report been availed during the trial the magistrate would have come up with a different finding regarding the will. The trial magistrate noted that the respondent disputed the authenticity of the will and further observed that any party can challenge the will of the deceased person.

19. Further, that the will could not have been challenged at trial and it was not propounded to enable anyone with a challenge to raise it. It is pointed out that the trial magistrate noted the will was not brought to the attention of the parties until the matter came up for hearing. The respondent only saw a copy of it in court and the original was only availed towards the end of the case. In the manner it was introduced, it was impossible for the respondent to proceed with the necessary motions to challenge it.

It is contended that the evidence on record by the respondent clearly proved that the deceased had expressed a desire to be buried at **Chekalini**. The minutes of the meeting in which the deceased expressed that position were tendered in evidence and were not challenged. Further that there was no evidence to suggest that the said minutes were fabricated. The desires of the deceased cannot be said to have been an oral will as they were reduced into writing.

20. The trial magistrate did not err in law in finding that the wishes of the deceased in the will cannot be binding on those left behind. The magistrate observed that the respondent being the 1st wife has a right to bury the deceased and any wish that takes that right away from her is not binding. The trial magistrate concurred with the authority of **Pauline Ndete Kinyota Maingi v Rael Kinyota Maingi, CA no. 66 of 1984 and the case of Virginia Wamboi Otieno versus Ochieng Ougo 7 Anor (1982-1988) 1KAR 49.**

21. The appellant did not tender evidence proving that the respondent burying the deceased is repugnant to morality and justice. The trial court distinguished the decisions cited by the appellant and noted that they were persuasive not binding. Further, the decision in **Martha Wanjiru Kimata & Anor v Dorcas Wanjiru & Anor (2015)** is distinguishable from the suit as the wishes of the deceased were contrary to customary law and us such could not be affected. In the **Pauline Ndete** case the court held a general position regarding any African citizen of Kenya and which includes the deceased herein. Therefore, the deceased did not err in law or fact in giving precedence to customary law over the will.

The respondent submits that the trial magistrate did not err by finding that the deceased should be buried at Chekalini. He made findings that the deceased participated in the establishment of the home at Chekalini and found comprehensive evidence proving that the deceased stayed at Chekalini as well as Idakho. Having found both homes belonged to the deceased it follows that the respondent bury the deceased as she is the 1st wife. Burying the deceased at Idakho would be contrary to the customs and traditions. She relied on the case **of Samuel Mungai Mucheru v Anne Nyathira – HCCC 25 of 2013.**

Further, the submission that the body should stay overnight at Chekalini before proceeding to the appellants' home in Idakho for burial is not in accordance with customary law.

The appeal lacks merit and should be dismissed.

22. ISSUES FOR DETERMINATION

a) Whether the Appeal is incompetent due to failure to include the decree in the record of appeal.

b) Whether the Appellant was properly sued

c) Whether the trial court erred by finding that the respondent proved customary law requirements

d) Whether the deceased left a valid will

e) Whether customary law should take precedence over the will

23. WHETHER THE APPEAL IS INCOMPETENT DUE TO FAILURE TO INCLUDE THE DECREE IN THE RECORD OF APPEAL

Section 65 of the Civil Procedure Act provides;

(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—

(a) ***Deleted by Act No. 10 of 1969, Sch.;***

(b) from any original decree or part of a decree of a subordinate court, other than a magistrate's court of the third class, on a question of law or fact;

(c) from a decree or part of a decree of a Kadhi's Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors.

Order 42, Rule 13(4)(f) of the Civil Procedure Rules provides;

(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—

(a) the memorandum of appeal;

(b) the pleadings;

(c) the notes of the trial magistrate made at the hearing;

(d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;

(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;

(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Order 42 clearly prescribes the contents of a record of appeal. Order 42, Rule 13(4)(f) provides that the record should contain the judgment, order or decree appealed from and the order (if any) giving leave to appeal. I find that this provision requires the judgment AND decree/order appealed from to be part of the record.

In the case of **Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others [2015] eKLR**

The Supreme court held at paragraph 41;

Without a record of appeal, a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or the Constitution, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.

In **Ndegwa Kamau t/a Sideview Garage v Fredrick Isika Kalumbo [2016] eKLR** the court held;

Coming back to this appeal, there is no evidence that the appellants ever applied for the decree appealed against, let alone filing it as part of the record of appeal. Without belabouring the point, this failure is fatal to the appeal; sheer failure to comply with the foregoing mandatory statutory and procedural provisions renders this appeal incompetent and of no consequence; it is hereby struck out with costs.

However, the court of appeal in **Kilonzo David t/a Silver Bullet Bus Company v Kyalo Kiliku & another [2018] eKLR** was of a different opinion on this issue. It held;

15. It was very clear that the Appellant's omission to seek leave to file a Supplementary Record of Appeal to attach a copy of the decree he was appealing from rendered his Appeal incompetent. Having said so, whereas in the cases of Ndegwa Kamau t/a Sideview Garage vs Isika Kalumbo [2016] (Supra), Kulwant Singh Roopra vs James Nzili Maswii [2014] (Supra) and Joseph Kamau Ndungu vs Peter Njuguna Kamau [2014] (Supra) Ngaah J struck out the appeals therein because the decrees that were being appealed from had not been annexed in the respective records of Appeal, this court took a different position that it would be too draconian to strike out the Appeal herein.

16. This court's thinking was informed by the fact that it inadvertently admitted the Appeal herein before it had satisfied itself that the decree the Appellant was appealing from had been filed and it would thus be unfair to visit its omission on the Appellant herein for no fault of his own.

20. For the foregoing reasons, the upshot of the court's decision was that although the Appellant's Petition of Appeal that was lodged on 27th July 2017 was incompetent for want of annexing of the certified copy of the decree to his Record of Appeal, he is hereby directed to file and serve a Supplementary Record of Appeal annexing the necessary documentation by 26th June 2018.

24. The upshot of this decision is that the court had satisfied itself that the decree had been filed but the same was an omission of the court. Order 42 Rule 13 is clear that the appeal was to be admitted upon satisfaction of the court that the necessary documents had been included in the record. However, in the above decision, the court allowed the appellant leave to file a supplementary record of appeal. In the present case there is no such opportunity. In the present case there is an absence of such opportunity, but in my mind, I would have thought that Article 159 (2) (d) would have afforded the appellant refuge on the basis that the omission is a procedural technicality which does not go to the root of the matter. I am however bound by the doctrine of stare decisis and must defer to the Supreme Court position as the correct position and hold therefore the appeal is incompetent due to the absence of the decree in the record.

25. WHETHER THE APPELLANT WAS PROPERLY SUED

Order 1, Rule 10 of the Civil Procedure Rules states;

> **All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.**

The plaintiff sought prayers to restrain the defendant from interring the remains of the deceased on **IDAKHO/SHISESO/152**. It was the appellants' testimony that she was served with a court order as they were preparing to get the body out of the mortuary. She relied on the fact that in their culture the brothers were responsible for making funeral arrangements. However, given the evidence that she was in the process of preparing to get the body out of the mortuary, it is evident that she was participating in the process that the suit sought to stop. Therefore, the relief sought arose out of the transaction that she admitted to have been carrying out. I hold that she was properly sued and this ground of appeal fails.

26. WHETHER THE TRIAL COURT ERRED BY FINDING THAT THE RESPONDENT PROVED CUSTOMARY LAW REQUIREMENTS

The Appellant submitted that there were no expert witnesses availed to prove the customary law that was relied on. The trial magistrate relied on the testimonies of witnesses who were not expert witnesses by definition and further referred to Eugene Cotran's Restatement of African Law volume 11 which was in tandem with the plaintiff's witnesses. What then happens in the absence of an expert by definition?

In **Kimani v Gikanga, (1965) EA 735**, at page 739, Duffus JA expressed himself as follows on proof of customary law:

> **"To summarise 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 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 apparent lack in Kenya of authoritative text books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law would have to call evidence to prove that customary law, as would prove the relevant facts of his case."**

This gave the court discretion on what to consider as the source of establishing customary law. Given that Cotran is an established authority on customary law and the restatement of African law is considered as a reference point for customary law, I make a finding that the trial magistrate did not err in referring to the book as a source of customary law. Further, the testimony of the witnesses cannot be disregarded as they are part of the community and well aware of the customs.

I find that the respondent proved the customary law requirements.

27. WHETHER THE DECEASED LEFT A WILL AND IS IT A VALID WILL

The trial court at determined that the deceased indeed left behind a valid will. The issue of the validity of the will was not challenged as a result of the stage at which it was introduced.

The validity of a will can be challenged on various grounds under common law including;

a) Age

b) Testamentary capacity

c) Insane delusions

d) Knowledge and approval

Section 11 of the law of Succession Act provides;

No written will shall be valid unless—

> **(a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;**

> **(b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;**
>
> **(c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.**

Given that the will was not challenged sufficiently based on these grounds, I hold that the trial court did not err in its finding that the will was valid.

28. WHETHER THE CUSTOMARY LAW SHOULD TAKE PRECEDENCE OVER THE WILL

Where there is a valid will or not, courts have often held that the wishes of the deceased are not binding on the living. Regardless of whether the minutes were considered a will, the same would not be binding on the parties in terms of disposing of the body of the deceased.

In **Samuel Mungai Mucheru & 3 others v Anne Nyathira [2014] eKLR** the court held;

> **However, it has been stated that there is no property in a dead body to be disposed of by the testator at will. Whatever wishes the testator expresses in his will are not binding on the family. This position was stated by Law JA in *Apeli vs. Buluku* [2008] 1 KLR (G&F) 873, where he said that there cannot be property in a dead body and a person cannot dispose of his body by will. The wishes of the deceased, though not binding must be, so far as practicable be given effect, so long as the same is not contrary to custom nor contrary to the general law or policy. Kwach JA made similar remarks in in *Pauline Ndete Kinyota Maingi vs. Rael Kinyota Maingi* Nairobi Court of Appeal civil appeal number 66 of 1984, where he held that an executor's duty is to give effect to the deceased's wishes in relation to the disposition of his corpse as far as practicable. He is not bound effect to those wishes if they are either impracticable or in conflict with the personal law.**

It has been established that where the wishes of the deceased with regards to disposal of his body a person cannot dispose of the same by will. However, if the wishes are not contrary to customary law, they may be given effect.

In the case of **Pauline Ndete Kinyota Maingi v Rael Kinyota Maingi, Civil Appeal No. 66 of 1984**, the court held;

> **Before wishes of an African Citizen of Kenya who has made a will directing where his mortal remains should be interred could be given effect to, the executor of the will must prove that the African Custom was repugnant to justice and morality and inconsistent with written law otherwise such wishes would not be given effect.**

29. In the present case, having invoked the customary law which found a footing in Cotran's Reistatement that a deceased polygamous male from the Luhya community is to be buried by the 1st wife the question that arises is whether there is anything inherently repugnant or inconsistent with the Constitution of Kenya? It is not lost to me that article 11 of the Constitution recognises culture as the foundation of this great nation and its people, and requires us to promote our cultural heritage. In my view, burial practices which are not immoral or contra the Constitution fit in this context. Therefore, whether the will was valid or not, the 1st wife was the rightful party to bury the deceased. In this particular instance it follows that customary law takes precedence over the will as a body of the deceased under custom is not his personal property nor is a funeral and accompanying interment in the African customary setting a private affair to be dictated upon by one who has already exited the stage, and who in fact demonstrated his adherence to customary practices by embracing polygamy.

In the premises, the appeal lacks merit and fails. The appellant shall bear the costs of this appeal

DELIVERED, SIGNED AND DATED THIS 27TH DAY OF JUNE 2019 AT ELDORET

H. A. OMONDI

JUDGE