



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

HCCA NO.98 OF 2016

HELLEN MORAA ONSONGO.....APPELLANT

-VERSUS-

ALICE MORAA ONSONGO.....RESPONDENT

(Being an appeal from the judgment and decree of Hon. J.M. Njoroge (C.M.)

dated and delivered on the 19th day of December 2016 in the Chief Magistrate Court

at Kisii Civil Suit No. 575 of 2016.)

JUDGMENT

1. This appeal concerns the interment of the body of Evans Onsongo Mogaka (“the deceased”) who died on 17th September 2016. The appellant filed Civil Suit No.575 of 2016 claiming that she was the deceased first wife and thus entitled to bury his remains according to Gusii Customary Law. The respondent filed her statement of defense denying the plaintiff’s assertions and averred that the deceased and the plaintiff were never married. She asserted her right to bury the deceased claiming that she was his only wife. The trial court found in favour of the respondent after which the deceased’s body was buried on 23rd December 2016 according to the respondent.

2. The appellant has proceeded to argue her appeal on the following grounds set out in her memorandum of appeal dated 22nd December 2016;

a. The learned trial magistrate erred and misdirected himself in Gusii customary Law and Rites in holding that the Appellant was not a wife entitled to bury and inter the remains of her deceased husband for reasons that the deceased had allegedly lived separately and that the appellant was not the person who attended to him at his death bed;

b. The learned trial magistrate erred in law in not deciding the case against cogent evidence on record that showed that the appellant was the senior wife to the deceased.

c. The learned trial magistrate erred in law in deciding that the appellant was not a wife to the deceased where there was no evidence to that effect; and

d. The learned trial magistrate erred in law in holding that the respondent was entitled to inter the remains of the deceased when the evidence on record she is the junior wife to the deceased.

3. The duty of the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that and to reach an independent conclusion as to whether to uphold the judgment (see ***Selle v Associated Motor Boat Co. [1968] EA 123.***)

4. The evidence of the appellant, **Hellen Moraa Onsongo** (PW 1) was that she was lawfully married to the deceased in 1980 and 3 cows were paid as her dowry. She testified that she had been cohabiting with the deceased and had two children with him including one Bismark Mogaka. She denied the allegation that she had been chased away after 3 years or that she had been married to someone else for 10 years. She however acknowledged that the defendant was her co-wife but insisted that as the deceased’s first wife, she was entitled to bury the deceased’s body in her home according to Gusii Customary Laws. She produced a photo of her home which she testified had been built in 2014.

5. The deceased's brother, Charles Nyakundi Mogaka (PW 2) testified that both the plaintiff and the defendant were the deceased's wives. He stated that being senior, the plaintiff was supposed to bury him at her homestead. During cross examination, he told the court that 2 cows and a sum of Kshs. 20,000/= had been paid as dowry to the plaintiff's brothers and not 3 cows.

6. **Francis Omosa Nyambane (PW 3)**, a senior clan elder, affirmed that both the plaintiff and the defendant were the deceased's wives. He testified that being the first wife, the plaintiff should bury the deceased. On cross examination, PW 3 told the court that the appellant had been shown a place to build after the death of her grandson and that the deceased stayed with his second wife but used to visit the appellant.

7. **Alice Moraa Onsongo (DW 1)** testified that she got married to the deceased on 9th May 1985 and that they had lived together in Erungu village. She admitted that the plaintiff and the deceased had stayed together but they got separated before she got married. That the deceased had subdivided his parcel of land among his children in the presence of elders and stated that the house referred to by the plaintiff in her testimony belonged to her son Bismark Mogaka. She stayed with the deceased up to his last moments at Kisii Teaching and Referral Hospital.

8. **Joseph Gichana Nyambane (DW2)** who knew the deceased as a fellow business man testified that the deceased had lived with the plaintiff from 1983 to 1984 but eventually got separated. He stated that the deceased had paid dowry for the defendant but had not done so for the plaintiff. He recalled that he had once been summoned by the area chief to convince the deceased to give the plaintiff a piece of land to bury her grandson as the deceased wanted nothing to do with the plaintiff. He went on to state that the deceased had been living with the defendant and had even indicated where he wanted to be buried. During cross examination, he testified that the plaintiff was the deceased's 1st wife and conceded that according to Gusii Customary Law, the first wife was supposed to bury her husband but only if they were cohabiting.

9. The deceased's sister, **Joyce Nyaboke Omenyo (DW 3)** told the court that the plaintiff was the deceased's girlfriend and that they got separated in 1982. She testified that PW 2 was not in good terms with the deceased as they had a land dispute and recalled that when the deceased fell ill he had summoned them and told them that he had subdivided his land among his sons including the son he had with the plaintiff. The deceased had also declared the defendant as his wife at that time. She testified that the house referred to by the plaintiff as her own belonged to her son and that the plaintiff herself resides in Eroga.

10. **Pamela Kwamboka Tanui (DW 4)** testified confirming that the deceased had summoned her and his other sisters and subdivided his land among all his children land. She testified that the defendant had taken care of him when he fell sick and that the deceased directed that the defendant was to bury him. She also testified that the plaintiff was the deceased's girlfriend and not his wife.

11. The parties canvassed the appeal by way of written submissions which I have considered alongside the evidence adduced. The two issues arising for determination are;

- a. Whether the trial court erred in finding that the appellant was not the deceased's wife; and
- b. Whether the appellant was entitled to bury the remains of the deceased according to Gusii Customary Laws.

12. On the first issue, the appellant in her submissions dated 22nd April 2019, argued that there was sufficient and cogent evidence to prove that she was the deceased's first wife. She submitted that PW1, PW 2, PW3 and DW2 had all attested to the fact that her dowry had been paid and that she had co-habited with the deceased as husband and wife and that they were blessed with children. The trial court's finding that the appellant could participate in the deceased burial arrangements and rites but not as a wife was faulted for lacking any basis in law and fact.

13. From the facts before the trial court, it was evident that the deceased and the appellant had been in a loving relationship at some point in their lives and had two children together as a testament to this. What is at issue is whether their relationship crystallized into a marriage.

14. The Court of Appeal in **Gituanja vs Gituanja Civ App 25 of 82 [1983] Eklr** held that the existence of a customary marriage is a matter of fact which is proved with evidence. The appellant testified and called PW 2 and PW3 to support her assertion that she got married to the deceased in 1980 according to Gusii Customary Law. The trial court was unconvinced that the deceased recognized the appellant as a wife, in the court's view, the relationship between the plaintiff and the deceased was merely cordial.

15. The appellant testified that 3 cows had been paid to formalize her marriage to the deceased whereas PW 2 denied this and testified that they had paid 2 cows and Kshs. 20,000/= as bride price to the appellant's brothers. This contradiction weakened the appellant's case as dowry is integral in proving the existence of a customary marriage. No further effort was made to prove the existence of a valid Gusii marriage between the appellant and the deceased.

16. The appellant had told the trial court she had been cohabiting with the deceased but conceded that her house was only built in 2014 leaving an inexplicable gap of 30 years. This left the defendant's testimony that the appellant had lived with the deceased briefly only resurfacing in 2011 to bury her grandson unchallenged.

17. In determining the existence of a customary marriage Kneller J. in the case of **Anna Munini & another v Margaret Nzambi CIVIL CASE 751 OF 1977 [1984] eKLR** referred to the decision of the Court of Appeal in **Hortensiah Wanjiku Yawe v The Public Trustee Court of Appeal Civil Appeal 13 of 1976 (UR)** which he summarized as follows:

- i. *The onus of proving customary law marriage is generally on the party who claims it;*
- ii. *The standard of proof is the usual one for a civil action, namely, 'on the balance of probabilities';*

iii. Evidence as to the formalities required for a customary law marriage must be proved to that standard: (cf *Mwagiru v Mumbi*, [1967] EA 639, 642)

iv. Long cohabitation as a man and a wife gives rise to a presumption of marriage in favour of the party asserting it;

v. Only cogent evidence to the contrary can rebut the presumption (*Toplin Watson v Tate*, [1937] 3 All ER 105)

vi. If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage (*Sastry Veliader Aronegary v Sembecutty Vaigalie* (1880-1) 6 AC 364; *Shepherd George v Thye*, [1904] 1 Ch 456)

18. In this case, I find that the appellant failed meet the required standard to prove a customary marriage between herself and the deceased. Similarly, a presumption of marriage could not arise as the appellant had also failed to prove long cohabitation with the deceased which was defined by the Court of Appeal in ***Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & Another NRB CA Civil Appeal No. 313 of 2001 [2009] eKLR***, as follows ;

Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage.

19. On the second issue, the appellant submitted that that there was no evidence that she was divorced from the deceased therefore their marriage remained intact until he died. She submitted that the allegations that she had differences and was separated from the deceased did not bar her from burying the deceased's body according to Gusii Customary Law.

20. The appellant cited an excerpt from a book entitled "***The Making of Man and Woman under Abagusii Customary Laws***," where the author N.K. Nyang'era states as follows at page 82:

"7: B:4 SEPARATED MAN

There were certain homes where separation between husband and wife had taken place. If the wife had run away becoming a mistress of another man or was moving around with other men as a concubine and the husband died in her absence, the elders did their best to try to get her back home in order to bury her husband. The reason why the elders went for her are that a married man cannot be buried without his wife being present so as to wear clothes inside out and to throw soil by using elbows while facing away from the grave and to attend other ceremonies performed before and after burial.

The elders acted very fast by sending emissaries out to locate the woman or wife of the deceased. If she was spotted, strong men were dispatched to fetch her and bring her back home by force in order to bury her husband. The deceased was the husband who lawfully marries her on payment of dowry. When she was out, she was known as Ritenge (mistress). When she was brought back she was the wife of the deceased."

21. The above excerpt was only introduced at appeal stage thus denying the trial court and the respondent an opportunity to respond to it or test its veracity. In any case, this court having come to the conclusion that the appellant failed to prove the existence of a marriage between herself and the deceased, it follows that the second issue must answer in the negative. There was no valid marriage between the deceased therefore her claim that she was entitled to bury the deceased as the senior wife fails.

22. Since there was no dispute that the defendant was the deceased's wife, it naturally follows that she was entitled to bury the body of the deceased. I concur with the decision of the court in ***John Omondi Oleng and another vs. Sueflan Radal(2012) eKLR*** which held;

"When it comes to the disposal of the body of a married man or woman the spouse should play a leading role. It would be better if the relatives of the deceased can sit down and agree on how to give their loved one a dignified exit. When they fail to agree and approach the Court for solution, the court has no option but to step in..."

23. Similarly, ***Ruth Wanjiru Njoroge v Jemimah Njeri Njoroge & Another [2004] eKLR***, Ojwang J (as he then was) held as follows:

"In the Social Context prevailing in this country the person who is first in line of duty in relation to the burial of any deceased person is the one who is closest to deceased in legal terms. Generally the marital union will be found to be the focus of the closest chain of relationships touching on the deceased. And therefore, it is only natural that the one who can prove this fundamental proximity in law to the deceased, has the colour of right of burial, ahead of any other claimant. "

24. I agree with the respondent that this appeal has no merit, it is hereby dismissed with costs to the respondent.

Dated, signed and delivered at Kisii this 20th day of September 2019.

R.E.OUGO

JUDGE

In the presence of;

Mr. Anyona h/b Mr. Soire For the Appellant

Respondent Absent

Mr. Omwoyo Court clerk