



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO 157 OF 2018

V O O.....PLAINTIFF

VERSUS

T O O.....1ST DEFENDANT

P A O.....2ND DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated and filed on 29th June 2018 was brought pursuant to the provisions of Section 3, 3A and 63(e) of the Civil Procedure Act Cap 21 of the Laws of Kenya and Orders 10 Rule 11 and 40 Rules 1 and 3 of the Civil Procedure Rules 2010. Prayer Nos (a) and (b) were spent. It sought the following remaining prayers:-

1. Spent.

2. Spent.

3. THAT the Honourable Court do also issue an order directed to the Respondents and/or their agents from burying the body of the deceased J A O before this matter is heard and determined.

4. THAT costs be in the cause.

2. The Defendants also filed their Notice of Motion application dated on 13th July 2018. It was brought pursuant to the provisions of Order 40 Rules 1(a), 3, S.3.3A (sic) and 63(e) of the Civil Procedure Act Cap 21 of the Laws of Kenya and Orders 10 Rule and ions (sic) 1A, 1B, 3A and any other enabling provisions of the Law. Prayer No (1) therein was spent. It sought the following remaining prayers:-

1. Spent.

2. THAT this Honourable court do issue an order vacating the Interim Orders of injunction given by this Court dated 5th July 2018 restraining the 1st and 2nd Defendants and/or their agents and/or servants from removing the body of J A O from Kenyatta National Hospital Mortuary.

3. THAT this Honourable court do issue an order of injunction restraining the Plaintiff and/or his agents and/or servants from interfering with the burial arrangements of the deceased J A O.

4. THAT this Honourable court do issue an order allowing the Defendants/Applicants the parents of the deceased to remove and proceed to bury the body as per the Luo customs when a daughter is not officially married.

5. THAT the cost of this application be provided for.

3. When the matter came before the court on 27th August 2018, both parties consented to the two (2) applications being heard together as they were closely related. The Plaintiff's Written Submissions and Bundle of Documents were both dated 30th July 2018 and filed on 13th August 2018 while the Defendants Written Submissions and List of Authorities were both dated 24th August 2018 and filed on 27th August

2018.

4. Both parties asked this court to deliver its two (2) Rulings based on the Written Submissions that they relied upon in their entirety.

THE PLAINTIFF'S CASE

5. The Plaintiff stated that he had been cohabiting with J A O (hereinafter referred to as the "deceased") from 2002 until her demise at Kenyatta National Hospital (KNH) on 21st June 2018. They were blessed with two (2) issues namely M I A and F O O who were born on 7th January 2003 and 1st April 2007 respectively. It was his contention that he took care of the deceased until the time of her death.

6. He was concerned that the Defendants, who were the deceased's parents, had been planning to bury her without involving him yet he had cohabited with her as husband and wife and even visited her parents for purposes of dowry negotiations as required by the Luo customary law.

7. He averred that he stood to suffer irreparably as their children would be taken aback by the Defendants herein (**sic**) and he would be denied his right to bury or give a good send off to the deceased. He therefore urged this court to allow his application dated and filed on 29th June 2018 as prayed.

THE DEFENDANT'S CASE

8. The Defendants were the deceased's biological parents. They stated that although the Plaintiff and the deceased had two (2) issues out of their union, they were not legally married and they stopped co-habiting four (4) years before her death. They said that the Plaintiff was not present at the time she fell ill and that they had in fact paid all her medical bills.

9. It was their contention that they stood to suffer more trauma if the interim injunctive orders that were granted to the Plaintiff on 5th July 2018, which he served upon them on 12th July 2018 when they went to pay the mortuary bills at KNH before the funeral that was scheduled to take place on 13th July 2018, were not lifted and/or vacated.

10. They therefore urged this court to allow their application dated and filed on 13th July 2018.

LEGAL ANALYSIS

11. The Plaintiff submitted that he was entitled to bury the deceased because they had cohabited for sixteen (16) years and they were blessed with two (2) children. He contended that he made part payment of the dowry when he paid the Defendants a sum of Kshs 18,000/= being dowry under the Luo customary law.

12. He referred this court to the cases of **Martha Wanjiru Kimata & Another vs Dorcas Wanjiru & Another [2015] eKLR** where it was held that the place of burial was determined by customary law and the case of **Ruth Wanjira Njoroge vs Jeremiah Njeri Njoroge & Another [2004] eKLR** where it was held that the social context prevailing in our jurisdiction is that the person closest to a deceased in legal terms is the first in line in the duty of burying such deceased person.

13. He urged this court to allow the matter to proceed to trial because a presumption of marriage could be inferred and confirmed by his witnesses. He relied on the case of **MWG vs EWK [2010] eKLR** where the court held that a long cohabitation of fifteen (15) years, recognition and acceptance by family members, relatives and friends and the birth of children was sufficient for a presumption of marriage to be inferred.

14. It was his further submission that the principles of deciding the place of burial were well settled in the case of **Virginia Edith Wambui Otieno vs Joash Ochieng Ougo & Another [1987] eKLR** where the deceased therein was buried in accordance to Luo customary law.

15. On their part, the Defendants submitted that the principle of presumption of marriage could not outweigh customary law rites and/or constitutional provisions. They averred that even if a presumption of marriage between the Plaintiff and the deceased could be inferred, they were not married under the Luo customary law and consequently, the Plaintiff could only be allowed to participate in the deceased's burial but that he could not bury her.

16. It was their argument that the Plaintiff would not suffer substantial loss because the deceased was not living with the deceased at the time of her death and that they were the ones who had suffered the most pain for having lost their biological daughter.

17. It was not in dispute that the Plaintiff and the deceased cohabited and had two (2) issues as a result of their union. There was no dispute that the Defendants paid the deceased's medical expenses. There was also a point of convergence on the issue of presumption of marriage due to a long period of cohabitation by parties.

18. However, according to the Defendants, a presumption of marriage could not be inferred because the Plaintiff had not paid any dowry and further that the Plaintiff and the deceased were not living together at the time of her death. On the other hand, the Plaintiff was emphatic that the deceased was his wife by virtue of having cohabited with him for a period of sixteen (16) years, they had children together and he had paid a sum of Kshs 18,000/= towards payment of dowry for the deceased.

19. It was clear to this court that this was a case of one party's word against the other. This court carefully perused the receipts that had been

attached to the Defendants' Replying Affidavit sworn on 25th July 2018 and filed on 27th July 2018 showing that the deceased was staying in a one-roomed house at Saika Estate which they averred was proof that the deceased was not cohabiting with the Plaintiff at the time of her death. It noted that the said receipts were for the years between 2016 and 2018. On the other hand, the Plaintiff was adamant that he was cohabiting with the deceased until the time she fell ill.

20. This court therefore formed the opinion that it was necessary for evidence to be called to establish if the deceased was living alone at the time of her death and if, so, for evidence to be adduced to explain under what circumstances she stopped cohabiting with the Plaintiff, if at all or if the Plaintiff did in fact pay dowry as per the Luo customary law and that they were still cohabiting until the time of her illness as he had contended. Indeed, there was no way of establishing whether or not the Plaintiff was living with the deceased as at the time of her death without evidence being adduced herein.

21. Appreciably, the cases that were placed before me as precedents show that all the cases, save for one (1) case, were determined after *viva voce* evidence was adduced in court. It was the considered view of this court that unless there are compelling reasons, burial disputes ought to be determined after hearing all parties. Once a deceased is interred, he or she should be left to rest in peace. Determining this case on affidavit evidence could deny the court a chance to give a conclusive decision based on evidence that has been adduced by both parties and lead it into coming to an erroneous conclusion. It is traumatic for a deceased to remain uninterred while a case is on-going but that is a necessary evil to avoid the trauma of exhuming the body if a decision, based on affidavit evidence, is overturned.

22. Accordingly, having considered the parties submissions and the case law which the court opted not to analyse as doing so would have led it to considering the merits or otherwise of the parties cases based on affidavit evidence, this court came to the firm conclusion that the balance of convenience tilted in favour of the Plaintiff being granted an injunctive order pending the hearing and determination of the case herein. Conversely, this balance of convenience dissuaded this court from vacating and/or setting aside the interim injunctive order that was granted by Mbogholi J on 2nd July 2018.

DISPOSITION

23. For the foregoing reasons, this court's decision was that the Plaintiff's Notice of Motion application dated and filed on 29th June 2018 was merited and the same is allowed in terms of prayer No (c) therein. The effect of this decision is that the Defendant's Notice Motion application dated and filed on 13th July 2018 was not merited and the same is hereby dismissed. Costs of both applications shall be in the cause.

24. In view of the nature of this matter, the Plaintiff is hereby directed to fix the same for Pre-Trial Directions before the Deputy Registrar High Court of Kenya Civil Division within the next seven (7) days from the date of this Ruling failing which the Defendants will be at liberty to apply to court for necessary orders towards the internment of the deceased herein.

25. This court hopes that once the Pre-Trial Conference is concluded, a very early date will be given to enable this matter being heard in a full trial expeditiously.

26. It is so ordered.

DATED and DELIVERED at NAIROBI this 24th day of September 2018

J. KAMAU

JUDGE