



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.10 OF 2016

PAUL OTIENO ORWA.....PLAINTIFF

VERSUS

JULIUS OFWA LARO.....DEFENDANT

JUDGMENT

Elizabeth Aluoch Nyamwaya (hereinafter, the deceased) died on the 15th February, 2016. Details available indicate that she has led an eventful life joining motherhood at the age of twelve (12), subsequently getting three (3) other children and ultimately controversy following her to her death with two (2) men each claiming to be her rightful husband.

By way of a complaint, Paul Otieno Orwa (hereinafter the plaintiff) sued Julius Ofwa Laro (hereinafter the defendant) for orders:

- a) Restraining the defendant, his agents and/or servant from interfering with the burial and/or burial arrangements of the deceased in any manner.***
- b) Damages***
- c) Costs of the suit***
- d) Any other further relief as may deem fit to this honourable court to grant.***

It is the plaintiff's case that Elizabeth Aluoch Nyamwaya, who is now deceased was his wife having married her under Luo Customary Law. He avers that the defendant has threatened to stop the burial of Elizabeth Aluoch Nyamwaya claiming to be married to her a fact that is incorrect.

The claim is wholly denied and in a written statement of defence the Defendant avers that the plaintiff was never married to the said Elizabeth Aluoch Nyamwaya. It is denied that the plaintiff has been raising the three (3) children of Elizabeth and further that the plaintiff is recognized by the in-laws as the legal husband of the deceased.

In a nutshell, the plaintiff's evidence is that he met deceased in 2003 at her business place along Kanu Street. They became friends. The deceased had three (3) children. By then the deceased was living at Lakeview Estate with her three (3) children. The deceased told the plaintiff that she had three (3) children with the defendant who was husband to the deceased's elder sister, Mary.

The deceased lived with the family of the defendant before venturing out on her own. He added that he paid dowry in form of two (2) cows on the 5th February, 2015. The dowry was received by the deceased's mother and an uncle by the name Opollo. He produced two receipts for the purchase of the said cows at Homa Bay County. At the time of taking the dowry, the parents did not indicate that any other dowry had been paid in respect of the deceased. The plaintiff added that he was the one taking care of the hospital bills incurred by the deceased. He produced receipts in evidence.

P.W. 2 told the court that he is a brother to the father of the deceased. He was present and received dowry paid by the plaintiff in respect of Elizabeth, the deceased. Elizabeth had been living with the defendant's family. She had come to Nakuru as a child. She was in school. The deceased got a 1st child with the defendant while living at the defendant's home. The defendant was summoned home but he did not heed the summons. For a long time, the defendant was asked what plans he had for the deceased to no avail. It is then that the deceased went home and reported that she had gotten her own man, the Plaintiff'.

On cross-examination, P.W.2 said that Mary Akinyi, the wife of the defendant complained at some point that the deceased was spoiling her home home. The family forgave the defendant for impregnating the deceased when she was a student.

P.W.3, the mother of the deceased corroborated the evidence of P.W.1 and P.W.2 that the plaintiff paid dowry (2 cows) in respect of the deceased. She said the defendant is married to her daughter, Mary Akinyi. On 30/5/2015 the defendant brought a cow without notice in regard to dowry for Mary. The family refused to receive the cow initially as there was no notice. At no time did the Defendant ever tell P.W.3 that he wished to marry the deceased.

The defendant paid two (2) cows in dowry for Mary Akinyi. P.W.3 added that the defendant made the deceased pregnant forcing her to drop out of school. She stated that the elders at her home, Kosele, have decided that the deceased be buried at Bondo where she is married by the plaintiff.

P.W.4 told the court that the Defendant was her biological father while the plaintiff was her step father. She said that her mother told her that the plaintiff was her husband. They were living together at Freehold Estate. She has two (2) brothers. One by the name Collins was living with them but left in 2015 to live with the biological father.

The defendant testified that the deceased came to live with his family when she was a child in school. He got into a relationship with her and got a child with her. The deceased went back to school. The deceased then got a 2nd child with the defendant and dropped out of school in form 3.

The defendant added that he paid dowry in 1998 to Harrison Nyamwaya Obede, the father of the deceased and his (defendant's) first wife Mary. His 1st wife was present when dowry was paid.

He added that in 2007, they had a small misunderstanding between him and his wife (deceased). They separated. There was no divorce. When the deceased got an accident, the defendant avers that he took care of bills and even took her to Dr. Ogada and Dr. Podho.

In December, 2015 the deceased was taken to Nairobi Women's Hospital by the defendant's daughter Lydia Ofwa and Collins Ofwa.

The defendant added that he later took another cow to Elizabeth's parents on 28/5/2015. He was not well received at the home. He was actually beaten by one Michael Omondi, a brother to the deceased and other young men. He asked the court to allow him bury his wife Elizabeth Aluoch at his home in Kano.

On cross-examination, the defendant acknowledged that by 1991, the deceased was 13 years when she conceived the 1st child. That is assuming she was born in 1978. But her identity card shows she was born in 1979 making her 12 years by the time she conceived the 1st child. The defendant stated he is aware the law does not allow him to marry a girl below the age of 18 years. He also acknowledged that he was aware he ought to have been charged with defilement. He said the deceased consented to the

marriage.

Questioned on evidence of support to deceased, he said he paid monies in respect of hospital bills for the deceased but the receipts were kept by his daughter Mercy who has refused to release them to him. On further cross-examination, the defendant was unable to offer any evidence of treatment of the deceased at Dr. Phodho's or Dr. Ogada's clinics. He stated that since marrying the deceased since 1991, she has not been married to anyone else.

D.W.2, Mary Akinyi, is the wife of the defendant. She said that the deceased was brought to Nakuru to live with her. She was in school. She had an affair with the defendant and bore a child. She was at Kisulisuli Primary School. Her parents suggested that the Defendant marries the deceased. In 1998, the defendant took cows and dowry to their home. D.W.2 denied knowledge of the plaintiff.

On cross-examination, D.W.2 said she did not know Opollo (P.W.2). On further cross-examination, she acknowledged that getting a child with someone does not mean a marriage has occurred. Again she acknowledged that it is the deceased's parents who had the duty to decide where deceased would be married.

D.W. 3, Collins Laro is a son of the deceased with the defendant. He said that in 2011, there was a misunderstanding between the deceased and his father (the defendant). The deceased went to live alone. He said he found the plaintiff at his mother's house last year. His mother (the deceased) told him that the plaintiff was a friend. The plaintiff used to beat the deceased.

D.W.4, David Ofwa Laro (a minor) is a son of the deceased with the defendant. He said he has been raised by both his parents.

By a consent of the parties, David Odhiambo Kombe, the Assistant Chief, Kawele Sub-location, Kamanyaki Location was called to testify to establish the relationship between John Ochieng' Opollo and the late Harrison Nyamwaya Obede. He produced two reports, one from the local village elder and the other from the local chief. The reports confirm that John Ochieng' Opollo is a step-brother to Harrison Nyamwaya Obede. The mother of John Ochieng' Opollo had been inherited by Charles Obede Odele, the father of Harrison Nyamwaya.

Both parties filed written submission.

Counsel for the plaintiff submitted that the essentials of marriage are 2 viz; capacity and consent. He stated that it is a fact that the deceased was born in 1979 as per her identification card. It follows then, therefore that the claim by the defendant that he married the deceased in 1991 cannot stand. By then the deceased was 12 years old. She lacked the capacity and could not give consent. Even if any marriage of any sort would have taken place then, it would have been null and void. It is counsel's submission that the issue of presumption of a marriage does not arise as no evidence was offered to show that the defendant and the deceased ever resided in a house together as husband and wife. The only evidence available is that of the deceased living in the home of her elder sister Mary Akinyi, who was married to the defendant.

It is submitted that the plaintiff has proved his case on a balance of probability. The defendant's position that he married the deceased is an afterthought and poorly executed. His case is based on lies and his witnesses were openly encouraged to lie in court. For instance, D.W.2 appears to have been instructed to lie in court that she did not know her uncle. Only the defendant's wife supported the defendant's case as opposed to the plaintiff's case and position which was supported by the family of the deceased.

Counsel for the defendant submitted that the defendant has proved that a Luo Customary marriage was contracted between the defendant and the deceased and no divorce proceedings have been presented in court to show that the marriage had broken down. The defendant and the deceased had also lived together thus raising a presumption of marriage.

It is urged that if there was any marriage between the plaintiff and the deceased, the same is an illegality and void pursuant to the **Marriage Act 2014** because the first marriage of the deceased to the defendant had not been dissolved.

I have had occasion to consider the pleadings, the evidence and submissions on record. The issues for determination crystalize into 4 viz:

- 1. To whom was Elizabeth Aluoch Nyamwaya married?**
- 2. Should the defendant be restrained from interfering with the burial of the deceased?**
- 3. Who bears the costs of this suit?**
- 4. What other relief does the court deem fit to grant?**

At the outset, the marital status of the deceased is a vital question to be answered as every other issue for determination herein will turn on the answer to this question. The parties have in their respective cases acknowledged the fact that the merits of this case are to be determined on the basis of the questions pertaining to marital status of the deceased.

The plaintiff has tendered evidence that he met the deceased when she already had three (3) children with the defendant. She cohabited with her and eventually paid two (2) cows in form of dowry to her parents. The dowry was received by P.W.2, an uncle of the deceased and P.W.3 the mother to the deceased. The plaintiff produced receipts for purchase of the two (2) cows that he took as dowry. He has tendered receipts showing payment of hospital bills incurred by deceased. P.W.2 and P.W.3 corroborated this evidence.

On the other hand, the defendant has testified that the deceased came to live with him and his wife when she was in school. He had an affair with her. A child was born. Subsequently, three (3) others were born. He says he took dowry in 1998 to the father of the deceased. His evidence is supported by his wife, a sister of the deceased and two (2) children of the deceased.

For a Luo Customary marriage to exist and indeed as in most communities in Kenya, dowry must be paid. A clear distinction must be drawn between the siring of children with someone and marriage.

The best placed person to confirm that dowry is paid for a daughter would inevitably be the parents of the daughter. In our instant case, the plaintiff has called the mother and uncle of the deceased who have confirmed receiving dowry for their daughter, the deceased, from the plaintiff. Indeed receipts for the purchase of the cows are on record.

The defendants evidence as supported by his wife and children cannot possibly be true in light of the evidence of P.W. 2 and P.W.3. It is strange that for a man who purports to have taken dowry to the parents of the deceased, there exists no independent witness even from his family side to show that such a ceremony did take place. I listened to and observed the demeanour of all the witnesses. D.W. 2, the wife of the defendant appeared to the court as dishonest and one who had been encouraged to stick to a particular position notwithstanding its unsustainability. Of note is that she went ahead to deny knowledge of John Ochieng' Opollo necessitating the calling of the assistant chief of Kawele West Sub-location who confirmed that John Ochieng' Opollo was a step-brother to Harrison Nyamwaya, the father of D.W.2. For the witness D.W.2 to totally deny knowledge of this man, who was even acknowledged as a family member by her (D.W.2's) own mother (P.W.3) smacks of the highest level of dishonesty. Never mind that the said John Ochieng' Opollo was a son of an inherited wife. As correctly put by the assistant chief, the said John was a son nonetheless.

The defendant's case is not helped by the calling of two (2) children to prove that their mother was married to him. First, it is highly improbable that children would be in an appropriate position to determine who has married their mother. Secondly, the evidence of D.W.3 was clearly tailored to achieve

a particular effect. He comes up with claims of the plaintiff beating his mother. Nobody bothers to explain why a married woman (assuming the defendant was the husband) would live in a house with a man who was beating her with no action or response at all from the purported husband.

I agree with counsel for the plaintiff when he states that the defendant's case is based on lies and his witnesses were encouraged to lie openly in court.

The truth of the matter based on the evidence before me is that the defendant met the deceased in circumstances that required him to be a caretaker. He turned out to be a wolf in sheep skin, impregnated the deceased when she was 12 years old, impregnated her again causing her to leave school and sired two (2) other children with her. There is no evidence of his marrying her. In any event, in 1991 the deceased was 12 years old. She had neither the capacity to marry or capacity to give consent. Indeed the actions of the defendant raise a cognisable offence and he is lucky to be a free man despite what was clearly a case of defilement. He and the society and more so the parents of the deceased and D.W.2 must take the flak for condoning these activities.

It is said the parents kept summoning the defendant and asking him what plans he had for the deceased. That may be so but there is no evidence at all that the defendant ever took any step.

The deceased matured, met the plaintiff and cohabited with him and the plaintiff took her as a wife and paid dowry for her a fact acknowledged by her parents. On a balance of probability, the plaintiff has proved that a ceremony of a customary marriage took place and he paid two (2) cows in dowry for the late Elizabeth Aluoch Nyamwaya. He has been accepted in the family as a son-in-law. He is the lawful husband to the said Elizabeth .

On whether the defendant should be restrained from interfering with the burial of the deceased, I take refuge in the decision of this court (Ojwang' J as he then was) in the case of **Ruth Wanjiru Njoroge V. Jemimah Njeri Njoroge & Another**, [2004] eKLR where it was held:

“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 relationship 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.”

In our instant case, the plaintiff has proved to this court that a Luo customary marriage existed between the plaintiff and the deceased. It is only natural that having proved his fundamental proximity in Law to the deceased, he has the colour of right of burial ahead of any other claimant. The defendant or any other person for that matter must be restrained from interfering with the burial of the deceased.

On the question of what other relief this court deems fit to grant, I note that the deceased died on 15th February, 2016. Were it not for the existence of this case, she would have been buried by now. It is noteworthy that mortuary fees have continued to accrue. It is only fair and just that the defendant meets the costs incidental to the preservation of the body upto the date of this judgment.

On costs, the same follow the event and the defendant shall bear costs of the case.

With the result that there shall be judgment for the plaintiff against the defendant in the following terms:

- a) The defendant, his agents and/or servant is restrained from interfering with the burial and/or burial arrangements of the deceased in any manner.
- b) The defendant shall meet all mortuary fees incurred upto the date of this judgment.
- c) Costs of the suit to the plaintiff.

Dated, Signed and Delivered at Nakuru this 21st day of April, 2016.

A. K. NDUNG'U

JUDGE