



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

HIGH COURT CIVIL APPEAL NO. 31 OF 2016

FRANK ANGATIAAPPLICANT

VERSUS

CHRISANTUS LUBEMBERESPONDENT

J U D G E M E N T

Introduction

1. The appeal herein emanates from the ruling of the Magistrate's court in Kakamega CMCC No. 76 of 2016 which gave the Respondent the right to bury one MERCY OMWENJE ANGATIA (Deceased)

The appeal

2. The appellant being aggrieved and dissatisfied by the said ruling issued on the 7/4/2016 has filed this appeal based on the following grounds;-

- (i) The trial Magistrate erred in law and fact by presuming the existence of marriage between the respondent and the deceased when none of the parties had pleaded that fact and made it an issue for determination.
- (ii) The trial Magistrate misdirected himself in law on the issue of burden of proof when he required the appellant to prove his case beyond reasonable doubt.
- (iii) The trial Magistrate erred in law and in fact by holding that the appellant's averment that the Respondent and the deceased were cohabiting as man and wife amounted to a presumption of marriage between the two.
- (iv) The trial Magistrate erred by failing to make a finding that the previous marriage of the deceased had not been dissolved under Luhya Maragoli/Bunyore customary law.
- (v) The trial Magistrate erred in law in failing to find that the Respondent had not proved his allegation that he was married to the deceased under Luhya/Isukha customary law.
- (vi) The Trial Magistrate erred in law and misdirected himself on the issue of payment of dowry.
- (vii) The trial Magistrate erred in law and in fact by mixing himself up on the issue of common law marriage and marriage under luhya customary law and as a result occasioned a miscarriage of justice.

(viii) The trial Magistrate erred in law and fact by holding that a mere separation between the deceased and the intended interested party amounted to a dissolution of their customary marriage.

(ix) The trial Magistrate erred in law by failing to enjoin the third party in the suit.

3. The appellant prays that the appeal be allowed with costs and the decision of the lower court be set aside and or varied and be substituted with the following orders;-

1. That the intended interested party be and is hereby enjoined as a party to this suit.

2. That the appellant and the interested party be granted the right to bury the deceased.

4. The appeal was canvassed by way of written submissions which submissions were supported by various authorities which this court has keenly studied.

Duty of this Court

5. Being a first appeal the duty of this court will be to look into the evidence afresh and reevaluate the same and make its own findings. In the instant case, the evidence relied on by the trial court was mostly affidavit evidence. No oral evidence was adduced and as such, there was no expert witness called to explain the various customs which the parties herein depended upon in making their submissions to the trial court, although there is no doubt that under section 3(1) of the Judicature Act the Subordinate Courts have jurisdiction to hear and determine issues that arise from African customary Law.

The Submissions

6. There were two applications to be determined by the trial court. The first application is dated 11/05/2016 which sought injunctive orders to restrain the respondent from removing and burying the body of MERCY OMWENJA ANGATIA while the second application dated 17/03/2016 sought an order to enjoin one Benard M. Busaka as a party to the suit. The two applications were canvassed together by way of written submissions. Counsel for the appellant in his submissions contends that the two applications were meant to maintain the status quo regarding the subject matter as they waited for the hearing and determination of the dispute but as it turned out, the interlocutory applications determined the matter fully. It is argued that interlocutory applications are not meant to determine matters in their entirety but they are meant to maintain status quo as parties prepare evidence for their main suit, and that in the circumstances of this case, the trial court was wrong in going ahead and issuing orders which seem to have determined the suit herein in its entirety. I agree that the dispute herein being African Customary Law related ought to have been based on cogent evidence and not presupposition, inferences, speculations or assumptions. In this case, I agree with the position taken by Makhandia Judge (as he then was) in the case of **Nyariba Nyankomba – vrs – Mary Bonareri Munge (2010) eKLR**. When he stated that;-

“Time and again it has been stated that in cases resting purely on customary law it is absolutely necessary that experts versed in the customs be summoned to testify so as to assist the court reach a fair verdict since the court itself is not well versed in those customs and traditions. In the absence of such expert testimony, there can only be one conclusion, such claims remain unproved”

7. It does not mean that the affidavit evidence filed by the parties herein was not good or proper evidence. What I am saying, is that for the trial court to have had a proper appreciation of the customary law relating to marriage and divorce, there was need for expert evidence to be called to that effect. Without such evidence, and though here were guiding authorities, the trial court could not effectively interrogate the twin issues before it: The issues of marriage and dissolution of marriage between the respondent and the deceased. The determination of these two issues, together with the issue of presumption of marriage were too complex to be left to affidavit evidence.

8. On the issue of the trial court’s failure to enjoin Benard M. Busaka as a party to the suit, I will rely on the provisions of order 1 rule 10(2) of the Civil Procedure Rules 2010 and the persuasive decisions in the

case of **Omunde Kokore – vrs - The Town Clerk & Others-Kisumu HCCC No.834** of 2005 the effect that a court called upon to decide an application for joinder should exercise its discretion liberally in favour of the applicant.

9. It is the appellant who filed the application dated 17/03/2016 to enjoin Benard M. Busaka as a co-plaintiff to the proceedings herein. The main ground by the appellant in the said application was that Benard M. Busaka was legally married to the deceased MERCY OMWENJE ANGATIA under Maragoli/Bunyore customary laws and that the said marriage had not been dissolved and or annulled, though the deceased and the intended interested party were separated as at the deceased's death. The appellant felt that full relief cannot be granted in this case unless the said Benard M. Busaka was enjoined since, in the appellants view, Benard M Busaka is the one entitled to the reliefs sought by the respondent.

10. It is my considered view that the trial court ought to have enjoined the said Benard M. Busaka as a party to this suit because such joinder would help determine the real issues in dispute, the main issues being dowry and marriage under Luhya Isukha/Maragoli customary law and the impact thereof.

11. There is no doubt that the main issue in this matter is the burial of the deceased. Burial is taken very seriously by most if not all the communities in Africa. It is in the interest of justice that the deceased be given a decent sendoff (burial) by all concerned but before such a solutrality, the court has to get to the truth of who is entitled to bury her. This can best be done by giving of oral evidence by experts who in this case are persons who are familiar with the customs of the warring parties herein.

Conclusion

12. The upshot of my above findings is that the appeal is allowed to the extent that Benard M. Busaka is enjoined as a party to the proceedings herein. The prayer allowing the respondent to bury the deceased is also set aside. The case is referred back to the subordinate court for hearing and determination of who among the appellant, the respondent and the interested party has the right to bury the deceased. It is imperative that oral evidence be called on the issues of marriage and dissolution of marriage among the Isukha, Maragoli and Banyore sub-tribes of the Luhya tribe. Once the case goes back to the Chief Magistrate's Court, it shall be heard by a Magistrate other than the trial Magistrate who gave the ruling giving rise to this appeal.

Orders accordingly,

Judgement delivered, dated and signed in open Court at Kakamega **this 16th day of August 2016**

RUTH N. SITATI

JUDGE

In the presence of ;-

M/S AMasakha & Co (absent).....Appellant

Mr. Mango (present).....for Respondent

Miss Kadenyi(present).....for Intended Interested Party

Mr.Lagat.....Court Assistant