



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
CIVIL APPEAL NO. 94 OF 2014

MARTHA WANJIRU KIMATA.....1ST INTENDED APPELLANT

JACINTA HITO GRISHON.....2ND INTENDED APPELLANT

VERSUS

DORCAS WANJIRU.....RESPONDENT

MARY WAMAITHA MWANGI.....INTERESTED APPELLANT

J U D G M E N T

(Being an Appeal from the whole of the Judgment of Honourable Acting Principal Magistrate Honourable E. Michieka (Mr.) delivered on 1st October, 2013 at Kikuyu Senior Principal Magistrates Court, Civil Suit No. 207 of 2013)

1. On 15th August, 2013 the Plaintiffs herein filed in Court a Plaint praying for judgment against the Defendant for:

a) A permanent injunction to issue against the Defendant either by herself, her agents, servants and/or any other persons whomsoever from interring the remains of the late DAVID MWANGI MWARANGU at Langata Cemetery.

b) A declaration that the Plaintiffs are entitled to participate in all burial and funeral meetings and arrangements at a neutral place and/or at the deceased's residence and also bury the deceased on plot no. 307 Ola-Label in Ngarua – Laikipia County.

c) The costs of this suit

d) Any other or further relief that this Honourable court may deem fit, just and expedient to grant.

2. The Defendant filed in court a Statement of Defence on 20th August, 2013 where she prayed for the Plaintiffs' suit to be dismissed with costs.

3. Having considered the suit, the Learned Magistrate ordered that:-

1. the deceased's mother has every right to participate and be involved in the burial plans of her deceased son wherever they may be held.

2. in respect to the 2nd Plaintiff the deceased being her daughter's father, she may participate in the burial arrangements to the extent in which the immediate family of the deceased will allow her.

3. That the body of the deceased herein DAVID MWANGI MWARANGU be and is hereby released to the defendant to perform the final rites as is customary in conjunction with the deceased's family, led by the 1st plaintiff for burial at a place to be determined by the defendant.

4. That the costs of preservation of the deceased's remains be borne by the plaintiffs jointly and severally.

5. That each party to bear its own costs of the suit.

4. Being aggrieved by the said judgment the Appellants filed the appeal and raised the following grounds of appeal:-

1. That the learned magistrate erred in law and in fact in holding against the 2nd Plaintiff on grounds that the deceased's actions did not confer on her any status, that of a wife or otherwise and thus the court could not presume existence of marriage.

2. That the learned magistrate erred in law and in fact in finding that the 2nd Plaintiff had not on a balance of probability, demonstrated that there was sufficient ground for the court to presume a marriage existed between her and the deceased.

3. That the learned magistrate erred in law and in fact in finding that the long cohabitation between the deceased and the Defendant amounted to presumption of marriage, while the cohabitation between the deceased and the 2nd Plaintiff did not amount to presumption of marriage.

4. That the learned magistrate erred in law and in fact in finding that in cases of burial disputes the wishes of the deceased person, should be given effect as opposed to the customary laws of the deceased.

5. That the learned magistrate erred in law and in fact in speculating the wishes of the deceased and proceeding to hold the speculated wishes of the deceased superior to customary law.

6. That the learned magistrate erred in law and in fact in holding on a balance of probability in favour of the defendant order that the body of the deceased be released to her to perform the final rites despite finding that the evidence of the defendant and her daughter was not conclusive in itself.

7. That the learned magistrate erred in law and in fact in ruling against the Plaintiff's suit.

5. The appellant therefore asks for orders that the appeal herein be allowed; that the said judgment be set aside and the Respondent to pay the costs of this Appeal and of the application in the Lower Court.

6. The application was prosecuted by way of written submissions. The Appellant's written submissions were filed on 25th November, 2014. There are no written submissions filed on the part of the Respondent.

7. It was submitted on behalf of the Appellants that customary burial is specifically excluded by Section 2 of the Magistrate's Courts Act and therefore a Resident Magistrate's court lacked jurisdiction to hear disputes that relate to customary burial. Further, that the court should rely on Customary Law to establish the place of burial in this matter. They relied on the case of **Virginia Edith Wambui Otieno Vs Joash Ochieng Ougo & Another (1987) eKLR**, and **Josinda Katumba Kamau Vs. Annah Ngendo (1998), eKLR** and beseeched this Court to order that the deceased's remains be interred at his ancestral home in

plot No.37 Ola-Label in Ngarua, Laikipia County.

8. It is their submission that the trial court erred in fact and in law in failing to find that the long cohabitation between the Plaintiff and the 2nd Appellant conferred on her the status of a wife. They contend that evidence was adduced in the court below that the 2nd Appellant and the deceased had a daughter, and that the deceased was paying the rent for the house the Appellant was living in with her daughter. Further that besides the 1st Appellant, **DW2** and the interested party testified that during the deceased's lifetime he was treating the 2nd Appellant for all intents and purposes as a wife.

9. This court has carefully considered the appeal herein, the grounds proffered, the Appellant's submissions and the orders appealed against. This court is alive to the fact that it did not hear the witnesses testify nor did it observe their demeanour, and therefore should be slow to reverse the trial court's decision. It is however, not lost on this court that an appeal is in a way a retrial and the court must therefore reconsider the evidence, evaluate it itself and draw its own conclusions. See the case of **Peters – vs- Sunday Posts Ltd [1958]E.A. 424** at page 429, where the Court of Appeal had stated thus:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the Judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution, it is not enough that the appellate court might itself have come to a different conclusion.”

10. Counsel for the Appellant submitted that customary burial is specifically excluded by Section 2 of the Magistrate's Court Act and therefore the trial court lacked jurisdiction to hear disputes that relate to customary burial. The said Section 2 of the Magistrates' Court Act (Cap 10 Laws of Kenya) states that:

“In this Act, unless the context otherwise requires –“claim under customary law” means a claim concerning any of the following matters under African Customary Law –

- (a) Land held under customary tenure;*
- (b) Marriage, divorce, maintenance or dowry;*
- (c) Seduction or pregnancy of an unmarried woman or girl;*
- (d) Enticement of or adultery with a married woman;*
- (e) Matters affecting status, and in particular the status of women, widows and children, including guardianship, custody, adoption and legitimacy;*
- (f) Intestate Succession and administration of intestate estates so far as not governed by any written law.”*

11. There are two schools of thought on this issue. The first school of thought can be discerned in decisions such as that of Kimaru J in **Kiplagat Korir v Mutai HCC App No. 52 of 2005** at Kericho (unreported), in which he stated that:

“A resident Magistrate's court can only hear customary law disputes as specified in section 2 of the Magistrate's court Act. A Resident Magistrate cannot extend jurisdiction and hear matters which are not specifically provided for in section 2 of the Act.”

The second school of thought is such as can be found in the decision of Mwera J (as he then was) in **HCC App No. 19 of 2008** (unreported). Mwera J was of the view that a Magistrate's Court had jurisdiction to determine a burial dispute. In particular the judge had this to say:

“...And on this point this court would, with respect, disagree with the Kiplagat Korir case which held that a resident magistrate had no jurisdiction to adjudicate over a burial dispute. Quite probably Section 9 of Cap 10 was not brought to the attention of the learned judge presiding over that appeal.”

12. I have considered the pertinent provisions of the law and I am of the view that Section 2 should not be read in isolation, but rather it should be read together with Section 9 of the Magistrates Court's Act. Such a reading indicates that the magistrate's Act does not oust the jurisdiction of the magistrate's court to determine burial disputes. I am therefore, of the same persuasion as the school of thought held by Mwera J above. In any case the issue of jurisdiction is not a ground in the appeal herein and only seems to emerge in the submissions.

13. What law is applicable to burial disputes? It is now settled law that where the issue of place of burial is to be decided by a court of law, the court relies on Customary Law to establish the place of burial. The Appellants relied on the case of **Virginia Edith Wambui Otieno Vs Joash Ochieng Ougo & Another (1987) eKLR**, where the court stated that:

“the deceased was born and bred a Luo and as such under Luo customary law his wife on marriage became part and parcel of her husband's household as well as a member of her husband's clan. Their children are also Luo as well as members of their deceased father's clan. On the death of a married Luo man the customs are that the clan takes charge of his burial as far as taking into account the wishes of the deceased and his family. Under the Luo custom to which as we have said she is bound, she has no right to bury her husband and she does not become the head of the family upon the death of her husband. As with other African communities a man cannot change his tribal origin.....”

and the case of **Josinda Katumba Kamau Vs. Annah Ngendo (1998), eKLR** in which the court held that:

“.....it is important to recognize that in the Otieno case customary law is what was used as a guide in deciding the case. The principle outlined above can also be adopted here, namely that the wife becomes part of the husband's clan. A man cannot change his tribal origin. If we apply these principles to this case we find that the deceased was born and bred a Kikuyu by tribe. His wife by marriage according to DW4 becomes part of the clan member. It thus means that the deceased clan is known and were in control of his affairs as burial is concerned”.

The law applicable to burial disputes for the time being is therefore customary law, since there is no statute law in place as yet.

14. Having established that the law applicable to this dispute is customary law, the court went on to determine the question of who in the circumstances of this case had the duty and/or right to inter the deceased. The Appellants invited this court to consider customary law and cited various authorities in support of their argument. Customary law like all laws is dynamic. It is especially so because it is not codified. Its application is left to the good sense of the judges who are called to apply it. It is worded the way it is to allow the consideration of individual circumstances of each case... - **See the Court of Appeal in Edwin Otieno Ombayo.**

15. In the case of **Ruth Wanjiru Njoroge v Jemimah Njeri Njoroge & Another [2004] eKLR**, Ojwang J (as he then was) held thus:

“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. ”

16. In the circumstances of this case such a person would be the wife. I have gone through the record, and I am satisfied that a marriage between the Defendant and the deceased was rightfully presumed by the trial court on the basis of a long cohabitation. The Appellant on the other hand did not establish any custom, habit or repute that could accord her position legitimacy, in relation to the family life of the deceased. Besides the fact that she met the deceased in 1980 and they had a child together, they do not appear to have cohabited continuously together nor was she introduced to the 1st family as part of the deceased's family.

17. The second Appellant therefore did not bring any satisfactory material before the court that would make the court to presume a marriage between her and the deceased. The facts and circumstances of this case would not move this court to hold that a marriage existed between them. In the case of **MARY WANJIRU GITHATU VS ESTHER WANJIRU KIARIE, CA No 20 of 2009 (Eldoret)** Bosire, JA stated that:

“in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties, by along cohabitation or other circumstances, evinced an intention of living together as husband and wife.”

18. It is evident that the deceased set up his matrimonial home at Thogoto. The Respondent and her daughter led evidence that the deceased had wished to be cremated, and that the Respondent talked him out of it, and they settled for Langata Cemetery. This is the evidence the trial court found probable on a balance of probability, noting that the evidence itself was not conclusive. Having said so, the court was inclined to giving effect to the deceased's wish.

19. **It is trite that there cannot be property in a dead body and a person cannot dispose of his body by will, but it should be noted that courts have long held 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. See - Law JA in *Apeli vs. Buluku* [2008] 1 KLR (G&F) 873. Clearly, there is nothing in the wishes of the deceased person herein that can be said to be illegal, offensive or unenforceable. Neither were they contrary to custom, or to the general law or to public policy.**

20. **Nothing would have been easier than for the parties to strike an amicable agreement as to the place of burial of the deceased person herein and accord him a befitting send off. Unfortunately, that is not the case and the court has been called upon to settle the matter. In *John Omondi Oleng and another vs. Sueflan Radal* (2012) eKLR Mabeya J had this to say:**

“...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...”

In view of the foregoing, this court finds that the Appellant's appeal lacks merit and is hereby dismissed.

Orders accordingly.

SIGNED DATED and DELIVERED in open court this 24th day of February 2015.

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L. A. ACHODE

JUDGE