



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL CASE NO. 58 OF 2015

MATHEWS MABUSI PLAINTIFF

VERSUS

WILLIAM SITUMA 1ST DEFENDANT

EDNA SITUMA 2ND DEFENDANT

J U D G M E N T

Mathews Mabusi brought up this suit on 21st April, 2015 against **William Situma** and **Edna Situma**, the 1st and 2nd defendants respectively. The suit contest is on who between the plaintiff and the defendants has a right to inter the remains of a deceased person, one **Christine Nanjala Situma**.

The defendants are the parents of the deceased while the plaintiff claims to be her husband, having married her in the **year 2002**, in accordance to **Bukusu Customary Law**. This claimed marriage is seriously contested by the defence and forms basis of this suit.

The plaintiff in his evidence in chief stated that when he got married to the deceased, they established their matrimonial home at Kapkoi West Farm. The said marriage was blessed with five issues namely:-

- (i) C N - (deceased)**
- (ii) G N - 9 years**
- (iii) V M - 7 years**
- (iv) E S- 5 years**
- (v) P S - 2 years**

The plaintiff was working away from home at Matunda Secondary School where he is a teacher, while the deceased remained with children at Kapkoi West Farm home, as a homemaker. The marriage was blissful with no serious issues. He used to travel home on weekends. His family also had a very warm relationship with the in-laws.

On 10/4/2015 four family members fell ill. The deceased was one of them, suffering from typhoid and malaria while 3 children had malaria and flu. He took them to Korongoro hospital where they were treated and discharged. However V M situation worsened and was admitted at Kitale hospital. A sister to

the deceased is a nurse and moved in to assist. She was left with the boy in hospital as the plaintiff went home to take care of the other sick family members. The deceased was complaining that she was feeling as if there was something in her lungs. The plaintiff organized to take her to hospital for check up. He had also ran short of cash and went to Mwalimu Sacco for a loan. He applied for 200,000/= to offset another loan and remain with 43,401.65cts. He did that on 16/4/2015. He gave his sister-in-law (the nurse) 2,000/= to take the deceased to test. The deceased was eventually admitted in Ward 7, next to V M who was in Ward 8. E S was still sick at home. The plaintiff went to take him to the hospital. While at home he was told by his sister-in-law that the deceased was struggling. At about 2.00 am he was called and told there was deficiency of oxygen in the district hospital. They agreed to transfer her to Chelangani Nursing Home. She was transferred and at 1.00 pm the plaintiff was informed that she has passed on. The plaintiff waited for the children to get well and organize for the burial of his wife.

Joseph Soita, an elder brother to the plaintiff, went to the defendants home, and he returned with a report that the plaintiff will not be allowed to bury his wife. He went to the area chief and was told he could not bury his wife as he had not paid dowry. The plaintiff said he had paid dowry partly through school fees for one **Immanuel Situma**, to the tune of **35,000/=** and another **25,000/=** of which he paid to his brother-in-law via Mpesa on 26/6/2013. He claimed that he could not have paid it to his father-in-law as expected as the said father-in-law is mentally ill and incapable of receiving it. In Bukusu custom, women do not receive dowry hence he could not have paid to his mother-in-law. Michael, their eldest son received the 25,000/= on their behalf as the custom would allow.

The plaintiff therefore urges this court to declare that under Bukusu Customary Law the plaintiff is entitled to bury the body of the his deceased wife, Christine Nanjala Situma. He also claims for cost and interest.

The defence called three witnesses led by **Edna Situma**, the mother of the deceased. Their case is that the deceased left her parent home and went to live with the plaintiff in the year 2002. They had 5 children together. Dowry has never been negotiated in a meeting known as *eng'anana*, and the plaintiff has never paid dowry. It was also alleged that the plaintiff was not taking care of his family and Edna Situma assisted by giving them food and also school fees. When the deceased fell ill, he as well did not take good care of her. Its her sister Elemina Situma and her brother Daniel Situma who took care of her till she met her death, and are the ones who took her body to mortuary. They paid 9,550/= the initial preservation deposit fee.

They accordingly urges this court to declare that the deceased was not married to the plaintiff under any known system and he is therefore not entitled to bury her remains. The defendants being her parents be declared the rightful persons to bury her remains, and dismiss the plaintiff's suit with costs.

I have considered the evidence and the submission by both parties. The plaintiff claims that he was married to the deceased customarily. They are Bukusu. Its not in dispute that for such a marriage to be recognized dowry need be paid. Its negotiated by the two clans and is paid in terms of cattle of which can be given monetary value and paid monetarily. This is known as "*bukwi*" according to **Eugene Contran** in his book *The Law of Marriage and Divorce*. The said dowry can be paid by installment. The plaintiff claims he paid dowry by installment and in cash when he paid school fees amounting to **35,000/=** for **Immanuel Situma**, and gave **Michael 25,000/=** via Mpesa.

While modern developments may change the mode of payment of dowry, such dowry before payment is negotiated and agreed upon, by the clans. Its never a two persons business. There are witnesses to the negotiation and payment. The amount claimed to have been paid by the plaintiff could have been anything else apart from "*bukwi*" part payment. I am therefore given the evidence, unable to make a finding that he paid dowry for his claimed wife, now deceased, and that he was married to her in accordance to Bukusu Customary Law.

However, the two had lived together in their matrimonial home at Kapkoi West Farm for more than 12 years. Its not disputed they had five children born out of the relationship, and during the period prior to the demise of the deceased the defendants treated the plaintiff as her husband. There were no serious

issues of disagreement in the said relationship which from the evidence, mostly of the plaintiff was blissful. By the time the deceased met her death she was living with the plaintiff as his wife. Such a relationship, in those circumstances calls for a presumption of marriage, as it was not under any known legal system. I therefore find that the circumstances of the relationship between plaintiff and the deceased, indeed established presumption of marriage between them, which hands the plaintiff the right to bury her remains. His suit succeeds with cost to him. He should however meet the remaining mortuary charges. The defendant should be allowed to participate in the burial arrangements and to take part in it if they so wish.

Judgment read and signed in presence of Mr. Sifuna for the Defendants and Mr. Wafula for the Plaintiff.
This **28th** day of **October, 2015**.

Right of appeal 21 days.

S.M. GITHINJI

JUDGE

28/10/2015