



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 567 of 2012

MARTIN MUGA OMUNY..... PLAINTIFF

VERSUS

MERCY OGURU OKELLO DEFENDANT

J U D G E M E N T

1. This suit involves a burial dispute. The Deceased, **Ann Juma Omenda**, was the mother of the Defendant. The Deceased at one time lived with the Plaintiff as his wife and they had several children together. The Deceased subsequently left the Plaintiff's home and was married by another man in a statutory marriage. This second union of the Deceased also produced a number of children, including the Defendant. The Defendant is not the Plaintiff's child. All the children are adults. The Plaintiff's case is that the Deceased was his wife under Luo customary law until her death, and that he is therefore the one entitled to bury her remains.
2. The Defendant on the other hand wishes to bury her mother. She is the Deceased's eldest child by her second union. Her father (the Deceased's "second" husband) died sometime back. The Defendant and her maternal uncles have taken it upon themselves to arrange the Deceased's funeral.
3. The Plaintiff will not countenance this. He claims that though the Deceased was separated from him for many years prior to her death, she remained his wife under Luo customary law because their marriage was never dissolved under Luo customary law. He does not recognize the Deceased's subsequent statutory marriage to another man (the Defendant's father). He therefore brought the present suit claiming one single main relief, a permanent injunction to restrain the Defendant from interfering with the Deceased's funeral arrangements made by him.
4. The Defendant duly entered appearance and filed a statement of defence dated 30th November 2012. This statement of defence contains mostly mere denials of the averments contained in the plaint dated 16th November, 2012. But the Defendant's case comes out more clearly in the replying affidavit she filed on 21st November 2012 in response to the Plaintiff's notice of motion dated 16th November, 2012. In that application the Plaintiff sought temporary injunction which, if granted, would have had the effect of disposing the suit itself. The parties' counsels therefore agreed that it would be more expeditious to hear and dispose of the suit itself.
5. The Plaintiff testified and called two witnesses. **Washington Omondi Muga (PW2)** is the first-born child of the Plaintiff with the Deceased. **Peter Ouma Omenda (PW3)** is a younger brother of the Deceased.
6. The Defendant also testified and called one witness, **Patrick Odongo Ongulu (DW2)**, a younger brother of the Deceased's "second" husband, **Romulus Okello**.

7. I have considered the testimonies of the parties and their witnesses, together with the written submissions made by their learned counsel.
8. The Plaintiff testified that he married the Deceased under Luo customs in 1968. He stated that he fulfilled all the requirements of a Luo customary law marriage. He did not state what those requirements were, but he paid dowry in the form of two head of cattle, one sheep and KShs 900/00. He paid the same to the Deceased's mother and male elders as her father was then already deceased.
9. The Plaintiff further testified that in 1978 the Deceased deserted his home and went away. Later he learnt that she had gone to Nairobi. He looked for her the same year but did not find her. But the following year, 1979, he found her in Nairobi. He then returned with her to his home in Siaya but after about a month she deserted his home again and remained away until she died in late October 2012.
10. The Plaintiff asserted that his marriage with the Deceased was never dissolved because no part of the dowry he paid for her was ever refunded to him.
11. The Plaintiff also testified that he had four children with the Deceased, all born during the 10 years of their cohabitation. He knew the Defendant as the Deceased's daughter, but that she was not his child.
12. In cross-examination the Plaintiff stated that he never demanded back his dowry after the Deceased deserted him because he still wanted her back. He asserted that he never learnt that the Deceased was married elsewhere until he came to court. He said in Luo customs a woman could not have more than one husband at the same time. He therefore did not recognize the Deceased's second marriage as a valid marriage. He said further that he did not even know that she lived with another man, though he knew that she got five other children, including the Defendant, that were not his.
13. With regard to the Deceased's burial, the Plaintiff stated that it was his right and obligation, under Luo customary law, as the Deceased's husband, to bury her remains. He stated further that it was in fact the Deceased's brothers, not the Defendant, who were arranging the Deceased's burial. But, he further explained, he sued the Defendant because she did not allow him to take the body away to bury it.
14. The testimonies of PW2 and PW3 supported that of the Plaintiff. In addition PW3 testified that he had heard the Deceased express her wish to be buried at her first husband's home. No one was called to corroborate this. He further testified that he had heard that the Deceased was married to another man in Nairobi whom he knew. He acknowledged photographs of himself and that man.
15. The Defendant was 31 years old when she testified. She was the second child of the Deceased and her father. Her elder brother died as a child.
16. The Defendant testified that she knew the Plaintiff as the first husband of her mother, the Deceased. She learnt that the Plaintiff and the Deceased had separated in 1978. In 1979 the Deceased started living with the Defendant's father, Romulus Okello. Together they had five children (including the Defendant). In December 1985 they formally married in church. She produced in evidence their **marriage certificate (Exhibit D1)**. It shows that the Deceased and Romulus Okello married on 1st December 1985 at St. Benedict's Parish in Nairobi. The marriage certificate is No. 562647 issued under the **African Christian Marriage and Divorce Act Cap. 151**.
17. The Defendant further testified that her father died in 2004. She denied that the Deceased ever expressed the wish to be buried at her first husband's home as testified by PW3. She said she was present at the occasion mentioned by PW3, and she never heard her mother express any such wish.
18. The Defendant conceded that the dowry paid by the Deceased's first husband was never refunded. But she said that it was not refundable under Luo customary law because the Plaintiff and the Deceased had children together.
19. As already noted DW2 (Patrick Odongo Onguru) was the elder brother of Romulus Okello, the

Deceased's "second" husband. His testimony was that his brother and the Deceased first married under Luo customs and subsequently in church under statute. They lived in Nairobi until Romulus died. He said that PW3 assisted in the burial of Romulus.

20. In cross-examination he stated that Romulus did not give any animals in dowry for the Deceased; instead he paid cash. He conceded that under Luo customs a woman cannot have two husbands at the same time. He also conceded that a man and a woman could live together and have children without necessarily being lawfully married to each other.

21. Learned counsels for the parties filed written submissions which I have considered.

22. The following appear to me to be the main issues to be decided in this suit -

(i) Whether there was a valid marriage under Luo customary law between the Plaintiff and the Deceased, and if so, whether the same was subsisting at the time of the Deceased's death?

(ii) Whether the marriage of the Deceased and Romulus Okello was valid?

(iii) Whether the Deceased expressed any clear wish as to her place of burial?

(iv) Whether the Plaintiff has proved his case on a balance of probability?

23. In determining the issues raised in this suit I must point out that customary law is a matter of fact to be proved as such by way of expert evidence. Neither party called any expert witness on Luo customary law pertaining to marriage and divorce. They also did not quote any learned treatise on such customary law. None of the parties themselves or their witnesses claimed to be experts in that field.

Issue No. (i): Was there a valid Luo customary law marriage between the Plaintiff and the Deceased?

24. The Plaintiff said he paid dowry of two cows, one sheep and KShs 900/00 for the Deceased. He led no expert evidence of the essential requirements for a Luo customary law marriage. It is thus not possible for the court to know if such essential requirements were met. The facts alone of having lived with the Deceased for 10 years and begotten children with her does not fill that gap.

25. The Deceased subsequently deserted the Plaintiff's home from 1979 until she died in October 2012, a period of 33 years. During part of those 33 years she lived with another man until he died in 2004, a period of 25 years. That other man took the trouble to marry her under statute. He had five children with her.

26. In the meantime the Plaintiff did not seem to care that the Deceased left his home and was living with another man as man and wife. If he did not bother to claim her in the 33 years she lived away from his home, why should he be allowed to claim her in death?

27. I find that there was no proper proof of the Plaintiff's claimed Luo customary law marriage with the Deceased, and none existed at the time the Deceased died.

Issue No. (ii): Was the Deceased's marriage to Romulus Okello valid?

28. From my findings in Issue No. (i), the Deceased was free to get married to Romulus. Their marriage was a statutory one under the Christian Marriage and Divorce Act, Cap 151. The marriage lasted until 2004 when Romulus died.

Issue No. (iii): Whether the Deceased expressed any clear wish as to her place of burial?

29. There was no proper evidence of this. Only PW3 testified to it. The Defendant, who was present when the Deceased purportedly expressed the wish, heard no such thing. Though PW3 said there were

other persons present who heard the Deceased, none of them were called to testify.

30. Besides, it is an unlikely story. Why would the Deceased have wanted to be buried in the home of a man she ran away from so long ago, and after she had gotten duly married to another person?

Issue No. (iv): Whether the Plaintiff has proved his case?

31. Upon my findings in Issues Nos. (i), (ii) and (iii) above, I find that the Plaintiff has not proved his case on a balance of probabilities. He has not proved his claimed Luo customary law marriage to the Deceased. On the contrary, the Defendant has proved on balance that there was a valid statutory marriage between her parents (the Deceased and Romulus Okello) which was contracted in 1985. The marriage ended only with the death of Romulus in 2004. Their children (including the Defendant) who are all now adults surely have a better claim to bury their mother than the Plaintiff, an estranged “husband” whom the Deceased deserted some 33 years ago!

32. The Plaintiff’s suit is hereby dismissed with costs. The interim injunction in place is hereby lifted. Those will be the orders of the Court.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT THIS

18TH DAY OF JANUARY 2013

H. P. G. WAWERU

JUDGE