



REPUBLIC OF KENYA

High Court at Bungoma

Civil Appeal 67 of 2012

(Appeal from Hon. C. L. Yalwala Senior Resident Magistrate in CM CC No.375 of 2012)

MAURICE KHAOYA **APPELLANT'**

versus

MARTIN SIKUKU NDINYO
RESPONDENT

JUDGMENT

The Appeal

[1] The appeal contains the following five (5) grounds:

1. *The learned trial magistrate erred in his findings when throughout his ruling he centered on the issues of legality of marriage which was not in dispute instead of determining which place was suitable in burying the remains of Christine Namuyemba Khaoya.*
2. *The trial magistrate should have come to a finding that by Respondent relocating the deceased to Kibisi Scheme in Kimilili from his ancestral land in Mukhweya, and allowing dowry negotiations to take place in Kibisi Scheme instead of Mukhweya, then the deceased had formally relocated and her matrimonial have ceased being in Mukhweya.*
3. *PW3 stated how he sold the deceased ½ an acre of from L.R. No. E. Bukusu/S. Nalondo/288 which fact the trial magistrate agreed with in his judgment and should have come to a finding that if the Kibisi farm was sold, and another bought from E.Bukusu/S.Nalondo/288 then, the proper place to inter the remains of deceased was on her newly purchased land since burial dos not need a house first.*
4. *The trial magistrate should have come to a finding that the deceased staying in a rental house did not stop her from being buried on her parcel of land.*
5. *Trial magistrate should have come to a conclusion that the Respondent was not the registered owner of parcel number E.Bukusu/N.Nalondo/685 on which he intended to bury the deceased and on which land he (Respondent) had re-located the deceased person with the consent of PW3 should be buried on E.Bukusu/S.Nalondo/288.*

Evidence Analysis

[2] This being the first appeal, I embark on the mission to analyze the evidence as recorded by the trial court and make my own conclusions and findings.

[3] In the plaint filed in the lower court, the Appellant was seeking for:

a) A permanent injunction to restrain removal of the body of the deceased from where it is being preserved for burial by the Defendant.

b) An order that the Appellant be allowed to bury the deceased in LR No.E.Bukusu/S.Nalondo/288.

c) Costs of the suit.

[4] The Respondent filed a defence and a counterclaim and prayed for dismissal of the suit and he be allowed to bury the remains of the deceased in East Bukusu/North Nalondo/1685 which was the matrimonial home for the deceased and the Respondent.

Evidence by the Appellant

[5] The Appellant testified as PW1 and he called three witnesses. He is the father of the deceased. He confirmed that her deceased daughter married the Respondent and part of the dowry was paid i.e. four (4) heads of cattle, one goat and Ksh.2000/=. On being married, the deceased and the Respondent cohabited together and first lived at Mukhweya, moved to Kimilili then, to Kibisi. The deceased was later separated from the Respondent and she moved back to the Appellant's home. Later, the deceased sold the land at Kibisi and purchased another land at Nangwe. She did not erect a house at Nangwe. She later died while she was living alone in a rented house at Bokoli.

[6] The other two witnesses supported the evidence of the Appellant, particularly PW3, Simon Shiundu Talemi, confirmed that he sold ½ acre in E.Bukusu/S.Nalondo/288 to the deceased at a total price of Ksh.110,000/=.

Evidence by the Respondent

[7] The Respondent who testified as DW1 called three witnesses. The Respondent was the husband to the deceased. He confirmed that he paid part dowry as narrated by the Appellant. He insisted that he had a share in E. Bukusu/N.Nalondo/1685 as a beneficiary. The said land was in the name of his late father. The Respondent claimed the land was his ancestral land and he owns a defined portion that had been specifically shown to him by his late father. He insists that he and the deceased had established the matrimonial home on that land. It is therefore the rightful place of burial for the remains of the deceased. In any event, he is the husband of the deceased as no divorce that had been obtained to dissolve their marriage, and therefore he should bury the deceased.

[8] The other two witnesses, DW2 and DW3 were present during dowry payment ceremony and they confirmed dowry was paid as narrated by the Appellant and the Respondent.

Submissions by the Appellant

[9] Madam Mumalasi, submitted on behalf of the Appellant. She argued that the Respondent's insistence on burying the deceased is tantamount to laying on claim on the body of the deceased whom he had no interest during her life time. She relied heavily on the petition of divorce that dramatized a troubled marriage that was characterized by cruelty, desertion, threats and blackmail on the part of the Respondent. She therefore termed that insistence by the Respondent just because he is the husband as being repugnant to morality, justice and the law. She relied on the case of **KERICHO HCCC NO.52 OF 2005**, that any customary law that entitled a person to bury another is repugnant to law, justice and

morality. She further argues that there is no property in a dead body.

[10] According to madam Mumalasi, the administrators of the estate of the deceased are the ones who should be allowed to bury the remains of the deceased. To her, these are her children, who are minors, but speaking through their grandfather, the Appellant herein.

[11] Counsel further argued that, the land on which the Respondent intends to bury the remains of the deceased belongs to the Respondent's late father. There is high likelihood that issues of distribution during succession might arise, and these could hinder the right of the children to access their mother's grave. It is therefore imprudent to bury the deceased on a land that is yet to be taken through succession process. It is safer to bury the deceased on her land that she had purchased.

Submissions by the Respondent

[12] Mr. Situma on behalf of the Respondent submitted that the argument by madam Mumalasi that it is unsafe to bury the remains of the deceased on a land that has not gone through succession process, as being self defeatist. He pointed out that even the land purportedly purchased by the deceased belongs and still stands in the name of a deceased person and the same is yet to go through succession. Therefore the argument by madam Mumalasi should apply *mutatis mutandis* on E. Bukusu/S. Nalondo/288. The purchase of the said land by the deceased is even in doubt as no proper agreement was ever produced. To him, that was not the proper place to lay the remains of the deceased.

[13] Counsel for the Respondents urges further that there is no doubt that the deceased was still married to the Respondent at the time of her death. Dowry had been paid albeit partly and so a valid marriage subsisted. That is why the deceased had commenced divorce proceedings. Non observance of the rituals of “*eng'anana*”, “*sitiso*” and “*sitekho*” do not affect the marriage. Some rituals could only have been done with the participation of the deceased. Other rituals need be done before interment of the remains of the deceased, but the body is yet to be buried.

[14] Mr. Situma submitted that the Respondent was shown by his late father where to put up a house and established the matrimonial home on LR. NO. E. BUKUSU/N. NALONDO/1685. Mr. Situma is of the view that the fact of marriage and establishment of the matrimonial home are the major determinant factors as to where the interment of the remains of the deceased should take place and by whom. He argues it must be done by the husband as that is the most logical thing to do. He claims that the Appellant is the one who is engaging in ventures that are repugnant to morality by insisting that the Appellant, who is the father in law should be allowed to bury the deceased, who was still married to the respondent, on some land that is not the matrimonial home of the deceased. In the absence of divorce, these two issues must bear on the place of interment of the deceased.

COURT'S VIEW

[15] The appeal herein is basically on where and by whom the remains of the deceased should be interred. The deceased did not leave behind a *Will* or anything in writing expressing her wishes on the final rest of her remains. It is a matter that should be determined by looking at the circumstances of the case. The approach by the trial magistrate to analyze the entire circumstances of the case was correct. I agree with the trial magistrate, and counsel for the Respondent that there are three (3) major considerations on which the decision on where and by whom the interment of the deceased should be, turn. These are:

- 1) *Existence of marriage*
- 2) *Establishment of matrimonial home*
- 3) *Justice of the case given the circumstance.*

[16] The trial magistrate was alive that existence of the marriage between the deceased and the Respondent was a critical factor in deciding where the remains of the deceased ought to be interred. Ground 1 of the appeal therefore fails from the onset. There is no dispute that there existed a marriage

between the deceased and the Respondent. Thus, the Respondent was the husband of the deceased. The fact that dowry had been paid in part, and a petition of divorce had been filed do not change the fact of marriage herein. Indeed, in Luhya custom, a marriage is created when part of the dowry has been paid. See *Case Book on Kenya Customary Law* by Eugene Contran at Page 47:

...in Luhya Law ...a marriage will arise if "bukhwi" is partly paid. "Bukhwi" is the dowry.

[17] The second factor is where the couple had established their matrimonial home. Madam Mumalasi was of the view that the matrimonial home was initially established at Mukweya then moved to Kibisi. But when the land at Kibisi was sold and the deceased moved into a rented house at Bokoli, there was really no matrimonial home, especially because at that time the marriage had completely broken down and the two were separated. A divorce cause had even been filed.

[18] It is true that the deceased and the Respondent had a matrimonial home at Mukweya but at some later time or other, they had lived at other places. The two were married under traditional customary law and despite the movements to other places of abode, at the time of death there was no other matrimonial home except Mukweya. In the circumstances of this case, Mukweya remained the recognized matrimonial home. Exigencies of work and the troubled marriage are generally responsible for the movements seen in this case. I am not persuaded therefore that the two did not have a matrimonial home. The land parcel No.E.Bukusu/N.Nalondo/1685 was the ancestral land of the Respondent, and that is where the two, on marriage, erected a house and lived therein. That house is still there, and constituted the matrimonial home for the deceased and the Respondent.

[19] Before I consider the last factor, that is, the overall impression of the justice of the case, I wish to make a determination of some important issues in the appeal.

[20] First, I agree with Mr. Situma that succession issues would arise on both pieces of land, i.e. E.Bukusu/S.Nalondo/288 and E.Bukusu/N.Nalondo/1685. I do not think it is really a strong point in this appeal and no weight should be apportioned to that argument by Madam Mumalasi.

[21] Second, the purchase of E.Bukusu/N.Nalondo/288 was not proved to the required standard as the alleged sale agreement was not produced. After all, the seller was not the administrator of the estate of the deceased owner of the land in question, and in law, he did not have legal authority to sell the land that was part of the estate property. Any sale of immovable property belonging to the estate of the deceased will need authority of the court. All these legal requirements were absent in the purported sale of part of E.Bukusu/S.Nalondo/288 to the deceased. The trial magistrate did not also make a conclusive finding on the proprietary ownership of the portion of land sold to the deceased out of E.Bukusu/S.Nalondo/288. The trial magistrate quipped:

If the right procedure was followed and the transaction completed, then that land belongs to her.

Consequently, that finding of the magistrate on the purchase of part of E.Bukusu/S.Nalondo/288 by the deceased was not conclusive due to the legal intricacies involved in the matter. The Appellant cannot rely on that observation by the trial court to found a claim that the deceased should be buried there. Ground 3 of the appeal therefore fails.

[22] Third, the children of the deceased are minors and do not qualify under the Law of Succession Act to be administrators of the estate of their deceased mother. Their grandfather, particularly now that the deceased was still married to the Respondent, would rank below the Respondent in the order of priority. In other words, according to the general guide under section 66 of the Law of Succession Act, the Respondent being the spouse will rank first on the right to apply for letters of administration. The children of the deceased are also children of the Respondent and that has not been controverted.

UP-BEAT

[23] Before I pronounce my final decision, with a lot of trepidation on the circumstances of this case,

my only hope is that, this ruling will assist the posterior life of the children of the deceased, and wreck the anxious moments those children have had to endure during the pendency of this case, whilst the body of their beloved deceased mother remained at the mortuary. From the evidence, the children of the deceased are the children of the Respondent. I want to believe that the parties in this case will conscientiously work out a deliberate formula, based on the intuition that a human being should naturally possess, in order to end the agony which such disputes would visit upon the bereaved children. I also hope, the bond between the unwritten vivid memoirs of the deceased, the Respondent, the children and the Appellant shall remain a relationship full of the talent of benevolence, responsibility and tolerance, especially for the sake of the children herein.

THE DECISION

[24] In the best interest of justice in the case, the trial magistrate was right in allowing the Respondent to bury the remains of his deceased wife, late Christine Namuyemba Khaoya, in his ancestral land LR. No. E.Bukusu/N.Nalondo/1685. I uphold that decision by the trial court.

[25] The Appellant shall pay fee for preservation of the body at the mortuary up to the date of this ruling as had been earlier ordered on 21st December, 2012.

[26] The upshot, the appeal is dismissed.

[27] Each party to bear own costs in the appeal and in the lower court.

Dated, signed and delivered in open court at Bungoma this 17th day of April, 2013.

F. GIKONYO

JUDGE

In the presence of:
Mr. Situma for the Respondent
Mr. Juma for Mumalasi for Appellant
Khisa Court Assistant.

F. GIKONYO

JUDGE