



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Hcca Appeal No. 512 Of 2012

CONSOLIDATED WITH

HCCA APPEAL NO. 530 OF 2012

SARAFINA WANJIKU KANYANJUI & 5 OTHERSAPPELLANT

VERSUS

ELIZAPHASON KNYANJUI MUKORA..... RESPONDENT

***(FROM THE JUDGMENT AND DECREE OF A. LOROT, SENIOR PRINCIPAL MAGISTRATE,
IN NAIROBI CMCC NO.4915 OF 2012)***

J U D G M E N T

This appeal arises from the lower court's orders to the effect that the remains of the deceased, Esther Nyarukahu Kinyanjui, lying in Kenyatta University Hospital Mortuary, be released to the Respondent herein, Elizaphason Kinyanjui Mukora for his arrangement for burial at a place he chooses, in consultation or conjunction with the deceased's children who herein are the Appellants. Two other orders which were also appealed from were that in the meantime, both sides would share the hospital's body preservation bill and bear own costs of the suit before the lower court.

The facts of the case are that the Respondent is the father of the Appellants from the 1st wife Esther

Nyarukahu Kinyanjui – the deceased. They married about the year 1957 and settled on the family land, L.R No. Ndarugu/Karatu/537 in Gatundu (hereinafter called “Gatundu Farm”). In or about 1963, the Respondent secured another land in Kinangop known as L.R No. Nyandarua/Ol Arawai/206 where they settled. He soon married a second wife Fridah Njeri whom he also settled on the same land at Kinangop (hereinafter called “**Kinangop Farm**”). Both wives got children.

In the year 1970 (or 1985 according to the evidence of the Respondent), the first wife (herein the deceased) moved back to settle in Gatundu Farm. The Respondent’s evidence is that the deceased went to Gatundu Farm in 1985 to settle and tend the tea farm that the Respondent had planted there and that she did so voluntarily and as a family decision. The Appellants stated that their, mother returned to Gatundu Farm as a result of marital differences between their parents and their step mother Fridah Njeri.

What was not in dispute however, was that once she settled back in Gatundu Farm, she never again went back to reside at the Kinangop Farm until her death in September, 2012.

The Respondent in his evidence, testified that he and the deceased never had marital differences and never stopped to talk or visit each other except towards the last part of her life when both were old and inactive. The Appellants however testified that the two had serious misunderstanding because the Respondent abandoned the deceased and stopped to give her company, choosing to keep everything to and for their step mother. They argued that the Respondent left her so lonely and unattended that she could not continue living there since the mud house broke down and became inhabitable and she moved to her children’s homes to live with them. Respondent’s answer however was that they both were old and dependant on the help they could get from their children of both houses. There was evidence that towards the end the deceased had to move away to stay with one child or another. Esther Nyarukahu Kinyanjui died at the home of Sarafina Wanjiku, the 1st Appellant herein.

The issue which the lower court was to determine however, was this: who had the right to bury Esther’s body and who had the right to decide where she should be buried between the two farms both belonging to the Respondent.

The Appellants had testified and argued that the deceased should be buried at Gatundu Farm because she lived there most of her life and because it really was her home. They also argued that the Respondent had abandoned the deceased in preference to the deceased’s co-wife Fridah Njeri and should not appear to show affection to the deceased only when she is dead. That the deceased in any case had confided in Sarafina, the first Appellant, that she should be buried in Gatundu Farm where she had lived most of her married life and that her wish should be honoured as it was not illegal or intended to offend anybody.

On the other hand the Respondent, Elizaphason, argued that what separated the two was old age and not any marital differences. That as the deceased’s husband and family head, he had the right to decide where his wife or any other members of the family should be buried. The Respondent further argued that he had, for the welfare of the whole family composing of his two wives and all their children, except the female members who were securely married, set aside an area of two acres at Kinangop Farm as a family burial yard. He himself, his wives and other members of the family, if need arose, would be buried there. That in any case, he as the head of the family was not priorly informed of the deceased’s expressed intention to be buried at Gatundu Farm, a matter which ought to have been notified on him when the deceased was alive so that they would discuss it.

I have perused the grounds of appeal. I notice that the main issue raised in appeal is whether or not the Trial Magistrate on matters of fact was entitled to arrive at the conclusions he did. The Appellants also question the propriety of his conclusions in respect of the law as expressed in the legal authorities cited.

In his conclusions, in a very well reasoned out judgment, the Honourable Trial Magistrate took account of the fact that the Appellants accepted the Respondent’s right, as the husband of the deceased and as the head of the family to bury the deceased. The magistrate noted that even in the spirit of **Section 29 of the Law of Succession Act**, the Respondent in his capacity as husband to the deceased, was the nearest person entitled to take decisions relating to the deceased where such decisions concerned her

social and proprietary rights. That is to say, that being the surviving spouse, he was entitled to take decisions concerning the personal life rights of the deceased.

This court also observes that after he heard all the evidence including that of the Respondent and the Appellants and all their witnesses, the Honourable Magistrate in his wisdom and discretion, decided to believe or accept the testimony from the Respondent and his witnesses. In particular, he believed that there were no material marital differences between the deceased and the Respondent. He accepted that the deceased went back to Gatundu Farm not because of marital or any differences but because there was an agreement between them that she should go to tender the tea farm. Furthermore, that this did not happen in 1970 as suggested by the Appellants but in 1985. That way, it never mattered if the original suggestion to move to Gatundu farm came from the Respondent or not. The Honourable Trial Magistrate came out in his judgment having been strongly impressed by the demeanour and forthrightness of the Respondent and several of his witnesses whose evidence he accordingly believed and accepted. On the other hand he was not impressed by the testimonies of the Appellants of a painted picture of a broken down family, or of the alleged mistreatment of the 1st wife's house by the Respondent.

I have perused the record of testimonies of both sides. In my view the Respondent and his witnesses gave impressive evidence. They appear forthright and credible. The Trial Magistrate having heard and seen the witnesses testify and having been impressed by their evidence, he was entitled in his discretion to believe them. Unless the Appellants show that there are sufficient grounds upon which this court should take a different view, then this court has no basis upon which to arrive at different conclusions. This court can interfere with the lower court's conclusion on matters of fact only if the court failed to take into account matters that it should have taken into account or if it wrongly took into account matters it ought not have taken into account. The Appellants have not shown such a case.

The facts that this court accepts therefore are those accepted by the trial court. That is to say that the deceased went to Gatundu Farm by family agreement and not because she differed with the Respondent. This court secondly accepts that the only reason the deceased went to live with her daughter Sarafina is because the latter accepted to stay with her so that she could look after her in her old age. The court also accepts that she finally died while living with Sarafina which was merely incidental and that the Respondent himself being as well in a similar old age, depended upon his other children to look after him as Sarafina did to the deceased.

In the above circumstances, who should decide how and where the deceased, who is the 1st wife of the Respondent, should be buried on her death?

The lower court ordered that the body be released to the Respondent for burial arrangement at a place he chooses, in consultation and conjunction with the deceased's children who are the Appellants. This innocent order envisaged that the Appellants would eventually agree and co-operate with the Respondent if the latter stuck to his guns that the deceased should be buried at Kinangop Farm.

Unfortunately, the Appellants refused to give in into the Respondent's decision that the deceased should indeed be buried at Kinangop Farm. In this court's view the above orders made by the trial Magistrate should also have provided for what should happen if the two sides should disagree, as indeed, they have finally done. It therefore, behooves upon this court to make specific decision on the issue.

As found by the lower court the really dispute is not as to who should bury the deceased. The Appellants clearly agreed that the Respondent who is the husband of the deceased, and the head of the family, had the right to bury the deceased. It was stated by the lower court and this court reasserts it, that it would have been commendable if the Appellants and the Respondent would have struck an agreement as to where the deceased should be buried. Unfortunately that did not happen. As stated in **John Omondi Olang & Another Vs Sueflan Radal (2012) eKLR:-**

“.....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 the same case cited above, Mabeya J, further held as follows:-

“There has to be somebody to bury a deceased person. In my view a surviving spouse is the person with the greatest responsibility for laying to rest the remains of the deceased spouse. That is the only way marriage can have meaningful purpose. Even if the deceased had not said anything about the disposal of (the) remains, the Defendant (spouse) would still have carried the day.”

I totally concur with Mabeya, J in the above statement. In this case before me, the Appellants’ main arguments concerning the legal principle stated above, was that their deceased mother had expressed her wishes that she should be buried in Gatundu Farm when she passed on. That, therefore, those living and deciding as to where she should be buried, should not ignore her wishes. The Appellant indeed can further argue and with a lot of weight, that the deceased was not just a mere member of this family but a wife and in many ways, co-decision maker in the family. She was both legal and social, co-owner of the Gatundu Farm. Much more, she lived there most of her life, even until her death. Also, that the Respondent did not have one wife but two, and that the act to send her to live and tend Gatundu Farm indicated a kind of matrimonial property division which tended to assign Gatundu Farm to the deceased and her children.

However as facts in this case show, all these additional facts in favour of the deceased’s possible wishes and lifestyle were not fully asserted or proved before the trial court. Were these assertions proven by the Appellant, they could not have been ignored by the trial Magistrate and also by this court. Indeed the legal position that the right to bury the body of a married woman ordinarily rests in her husband which is what the Appellants tried to assert, is not absolute. To that end it was declared by the court in **Nairobi Civil Appeal No. 209 of 1996** in **Edwin Otieno Ombajo Vs Martin Odera Okumu** thus:-

“..... The right to bury the body of a woman... ordinarily rests in her husband. The right is not however absolute..... Customary Law, like all other laws is dynamic. Because it is not codified, its application is left to the good sense of the judge.... Section 3(2) (on customary law) is worded the way it is to allow the consideration of individual circumstances of each case. So, the conduct of the Respondent and his attitude towards the deceased generally were important considerations in determining the dispute between the parties here. The matters the Appellants raised against the Respondent should not have been viewed as intended to show that no marriage existed as between the deceased and the Respondent, but to show that, although he was the deceased’s husband, he was undeserving to bury the body.”

It seems clear therefore, that where a spouse is shown to have lived a lifestyle that was totally contrary to his/her marital duties, he/she might lose his/her rights of burial of her spouse. In one case the husband’s failure to maintain his wife and children may deny him the right to bury his said wife. In another, a spouse’s desertion of the family home and failure to provide the other spouse of marital obligations might deny him/her of the right to bury her spouse. There could be many varying cases and circumstances.

In this case, the court accepted the facts that failure by the Respondent as a husband to the deceased to provide material and marital assistance especially towards the end of the deceased’s life, was because of the old age of either case. That each depended on the care that came from their children, the deceased mainly from her own children and the Respondent mainly from his children from the 2nd wife. In the circumstances this court is of the view that the Respondent’s relevant conduct, did not amount to one that could deny him of the right to bury his 1st wife, the deceased.

Furthermore, and as earlier noted, the Respondent, long before the death of the deceased, had set aside a family burial yard. The sketchy evidence on the record shows that any member of the Respondent's family is destined to be buried on the said burial yard unless he/she was by other legal rights to be buried elsewhere. It is correct to say therefore, that the said burial yard was not set aside just for the deceased with a view to deny the deceased's children of the Gatundu Farm. If that were so, the children of the 1st wife may have a right to challenge such an obnoxious intention. The indication by evidence however, could be that the Gatundu Farm may be intended by the Respondent to be kept unencumbered to maintain its market value. For now however, the Respondent's intention is assumed to be fair and just and for the benefit of all the Respondent's children. If it is to be subdivided between the children, then likely the Kinangop Farm would equally and fairly be divided so that children of both houses equally benefit.

As for this case, it is the view and finding of this court that the Respondent, Elizaphason Kinyanjui Mukora is entitled to an order of this court to enable him to bury his wife, in whichever farm of his two farms, he chooses to do so. As to hospital expenses, it was not necessary for the Appellant's to stand on the way of their father when he had firmly decided to bury his wife in the family burial yard at Kinangop. They will accordingly bear those costs. This being matter of interest to all family members however, costs of the case are to rest where they are.

ORDERS

1. ***The Respondent, Elizaphason Kinyanjui Mukora is hereby granted full authority to bury the body of his 1st wife, Esther Nyarukahu Kinyanjui either in Kinangop or Gatundu Farm without any hindrance from any person.***

2. ***The Appellants are hereby ordered to bear and clear the Hospital mortuary charges.***

3. ***Each side of the case shall bear its own costs.***

DATED and DELIVERED at Nairobi this 20th day of June, 2013

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D. A. ONYANCHA

JUDGE