REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO. 9 OF 2013

SIMON LANGAT & 6 OTHERS …..... APPELLANT

VERSUS

REBECCA CHEMUTAI SINEI …..... RESPONDENT

JUDGMENT

This judgment is the outcome of the appeal of S**imon Langat, David Langat, Richard Langat, Cheruiyot, Catherine Chebet and Helena Chepkemoi** hereinafter referred to as the 'Appellants', against the decision of Hon. Nancy Baraza learned Resident Magistrate delivered on 5th April, 2013 vide **Sotik S.R.M.C.C.C. NO. 24 of 2013.** The background of this appeal appears to be short and straightforward. On 13th February, 2013, one **Ludia Soi** passed on. The Appellants herein, being the children of Ludia Soi (deceased) began preparations to have the deceased's body interred on L.R.NO. Kericho/Saosa/Chemosit Block 1/(Chepchabas) 41, a parcel of land registered in the name of Rebecca Chemutai Sinei, the Respondent herein. When the Respondent learnt of the Appellants plans, she filed an action before the Sotik S.R.M'S Court vide the Plaint 15th February, 2013 in which she sought for interalia an order of permanent injunction to restrain the Appellants, their agents and or servants from burying the deceased's body on the aforesaid parcel of land. The Appellants filed a defence in which they denied the plaintiffs claim. The Appellants claimed that the deceased was entitled to be buried in the land in dispute because she was married to the Respondent. The suit was thereafter fixed for hearing on priority basis. A total of four witnesses testified in support of the Appellants' case while the Respondent testified alone in support of her case. At the close of the evidence the learned Resident Magistrate found the case in favour of the Respondent. Being aggrieved the Appellants preferred this appeal.

On appeal, the Appellants put forward the following grounds in their petition:

1. **The learned trial magistrate's finding that no expert opinion was availed by the appellants to prove the existence of a women to women marriage under Kipsigis custom cannot be supported when it is common ground that the custom is so notorious amongst the African communities that it requires no expert's proof in the present case. Alternatively, there is overwhelming evidence on record that the relationship entered between the respondent and the deceased is that of "a woman to woman marriage' even as demonstrated by the respondent's own words; I brought Ludia to my home to start fire for me which means for purposes of giving children for me so as to ensure my lineage'.**

2. **The learned trial magistrate misdirected herself in law and fact by failing to appreciate that the respondent had paid requisite dowry to the parents of the late Ludia as a marriage consideration prior to the respondent bringing the said Ludia to L.R. No. Kericho/Saosa/Chemosit Block(Chepchabas)/41 where she established a matrimonial home for her and her four sons and wherein she lived until her demise on 13th February, 2013.**

3. **The learned trial magistrate misdirected herself in law and fact by failing to appreciate that besides providing the above parcel of land as the appellants' homestead she also facilitated the wedding of DW1 – the first born of Ludia as any father would normally do.**

4. **The learned trail magistrate failed to properly or at all address her mind to the relationship between the respondent and the deceased Ludia on one hand and the interest the latter had in L.R. NO. Kericho/Saosa/Chemosit Block (Chepchabas)41 on the other, and as a consequence came to an erroneous finding that the respondent was not under an obligation to inter the remains of the 'spouse' on the aforesaid land.**

5. **The learned trial magistrate failed to properly or at all address her mind to the interests of the respondent on L.R.NO. Kericho/Saosa/Chemosit Block (Chepchabas)/41 on one hand and that of the appellants and their late mother Ludia on the other, and as a consequence she gave a decision in total disregard of the principles established in the well known case of Giella-vs-Cassman Brown & Company Limited [1973] EA 358 as regards the issue of order of injunction.**

6. **The learned trial magistrate erred and misdirected herself in law and fact in failing to consider arguments and authorities given to her by the appellants as a result of which she came to unbalanced finding.**

The main ground which the learned Resident Magistrate relied in awarding the Respondent judgment is that the Respondent did not pay for any dowry nor did she perform any ritual to seal the union between the deceased and the Respondent. In other words, the Respondent denied having entered into a marriage with the deceased. The learned Resident also concluded that since there was no payment of dowry nor the performance of certain rituals known as ratet under th Kipsigis customary marriage then there was no valid marriage. The learned trial Resident Magistrate also concluded by stating that since an expert opinion as to the existence of woman to woman marriage between the deceased and the Respondent, then the Respondent was not bound to bury the deceased.

The Appellants and the Respondent were allowed to file and exchange written submissions which they did. I have considered the submissions from both sides. I think the main question which this court must grapple with is whether or not the existence of woman to woman marriage was proved. Before I begin to analyse and re-evaluate the case that was before the trial court, I think it is important to give a brief background of the Kipsigis customary marriage of woman to woman matrimony. Let me start by stating that this is a custom which is well understood within this community though of late it is rarely practiced due to the influence of modern education and other cultures. The custom is also well documented hence it not something strange in the Kipsigis community. The custom is also common with the Nandi community. This practice should not be confused with that of same-sex union but it is a custom designed to care for barren women in the community thus giving them a chance to have a family. The female-to-female marriage is a socially approved way for a woman to take over the social and economic role of a male husband. It is allowed in instances where a woman either has no children or has daughters only. In **History of the Kipsigis 1998-2000, By Raja at Pg 78**, the author stated that a woman, who has passed the age of child bearing and who has no son, may marry a wife whether her husband is alive or not. It is further stated that the same ceremonies governing other forms of marriages apply to this marriage too as if the elder woman were a man of her husband's clan and age set. The elder women is called husband and the girl or woman married is called her wife. In practice, the wife will not refer to the elder woman as 'husband' but will address her as mother. The girl wife usually chooses the father of her children to be but if possible he must be a man of the husband's clan i.e the clan of the elder woman's actual husband. The author further explains the relationship between the parties. It is said that the children are not for the person who sired and that they have no duty towards him though they call him father. They do not also take his name nor inherit from him. The children take the name of the elder woman's husband, inherit their house's share of his property. The authority concludes that it is the ceremony of tying with the segutiet bracelet which constitutes a legally binding marriage and determines that the children of the union belong to the husband and inherit the spirits of his family and his property. Having given in detail this customary marriage, let me revisit the matter at hand.

It is the submission of the Respondent that there was no valid marriage between her and the deceased hence, the trial court was right in making the decision. It is said the Respondent did not pay the dowry to seal the marriage and that the appellants did not tender any evidence to show that the tying ceremony took place. The court further went ahead to find that an expert opinion as to the said custom was not availed. It is the evidence of the appellant's that a sum of Kshs.1,000/= representing a goat and a bull was paid to seek for the consent of the deceased parents for marriage and that dowry was to be paid later. It is not in dispute that the deceased's parents gave their blessings to the Respondent's request to marry the deceased when they accepted payment of Kshs. 1,000/= in substitution of a goat and a bull.

In the circumstances, was the Respondent obliged to bury the deceased? I have critically examined the evidence of Rebecca Chemutai Sinei (Respondent) given during cross-examination. She said that she brought Ludia Soi (deceased) to her home to start a family by siring children for her.

The deceased and her children lived on the Respondent's land for 23 years. The Respondent confirms her request to marry the deceased was given to her when the deceased's father received Kshs. 1,000/= and a bull. In fact the Respondent was categorical that the payment of Kshs.1,000/= and a bull was paid as dowry. There was also evidence that the deceased bore children who recognized the Respondent as father. The Respondent even attended the wedding of Simion Langat, the deceased's son. The Respondent admitted having lived with the deceased but at some stage they disagreed and that is when the Respondent told her to leave. The Respondent said she differed with the deceased when she refused to assist her to till and plough the land. The Respondent has heavily relied on the ground that other ceremonies were never performed and the fact that they did not cohabit together with the deceased to urge the court to find that there was no valid marriage between her and the deceased.

In the **History of the Kipsigis at page 78,** the author succinctly states that it is preferred the wife lives with the old woman or close by her, but sometimes she refuses if the woman is disagreeable or if the girl wife says she will not cook for a female. In such cases the girl usually goes to live with her *de facto* husband. In my view therefore, it was not mandatory for the deceased to have cohabited with the Respondent. The failure to do so did not in any way invalidate their marriage. It is the Respondent's evidence that she paid dowry which she sought for a refund when the deceased deserted the matrimonial homestead.

It is also clear in my mind that the deceased did not dessert the matrimonial home/homestead out of her own volition but was forced to do so by the Respondent. She cannot therefore be accused of desertion since the same was induced by the Respondent.

With great respect, I think the learned trial Magistrate fell into error when she stated that there was need for an expert opinion to prove the Kipsigis customary marriage of female to female yet the same is notorious and well documented hence the court will take judicial notice of the same under **Section 59** of the **Evidence Act**.

On the other hand, it is not also a must for all the other steps to be fully met and performed to validate such a marriage.

In the case before this court, part of the dowry was paid and the parties commenced cohabitation and the marriage consummated. The marriage has not been customarily nor judicially dissolved hence the same still existed until the wife (deceased) passed on. The Respondent cannot therefore run away from letting the deceased's body to be buried on her farm.

In the end and on the basis of the above reasons, the appeal is allowed. The judgment and the decree in Sotik S.R.M.C.C No. 24 of 2013 is set aside and is substituted with an order dismissing the suit. In view of the fact that the parties involved herein are closely related I direct that each meets his or her own costs both in the subordinate court and on appeal.

Dated, signed and delivered this 20th day of September 2013.

J.K.SERGON

JUDGE

In open court in the presence of Migiro for Appellant

N/A for J.K. Rono for Respondent

Respondent and Appellants present