



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

HCCC NO.1 OF 2011

TABITHANZAKYE MWANGANGI.....PLAINTIFF

VERSUS

MWENDE MWANGANGI.....DEFENDANT

RULING

- (1) Tabitha Nzakye Mwangangi (*the Plaintiff*) filed this suit on the 5th January, 2011 against Mwendu Mwangangi (*the Defendant*). In her Plaint dated the 5th January, 2011, she says she is the first wife of Mwangangi Mutua who died on the 25th November, 2010 and that the second Defendant is his second wife. That according to Kamba customs and rites when the husband dies and has more than one wife the custom allows that the husband be buried by the 1st wife in her homestead. And that because the Defendant is planning on burying her husband, the Plaintiff prays for judgment for an order permitting the plaintiff to bury her deceased husband in her homestead in Mathyakani sub-location Kanzanzu location.
- (2) In her defence filed on the 27th January, 2011, the Defendant denies that she is secretly planning to bury the deceased and also denies the Plaintiff claim that she has the right to bury the deceased under Kamba customary law and puts the plaintiff to strict proof. She contends that the suit is provocative and incompetent and prays for its dismissal.
- (3) The Plaintiff also took out a Chamber Summons on the 5th January, 2011 under order 39, rules 1, 2, 2A and 9 of the Civil Procedure Rules. She states the main orders, namely that she be granted authority of burying her husband's body in terms of the prayer in the Plaint and secondly, that the Defendant be restrained from burying the body of the deceased. The application is made upon the same grounds stated in the Plaint and is supported by the Plaintiff's own supporting affidavit made on the 5th January, 2011. In paragraph 5 and 6 thereof, she says that before his death the deceased was living and or being nursed by the Plaintiff in her homestead and in Nazareth Hospital and that he had expressed his willingness to be buried at the homestead of the Plaintiff.
- (4) The Defendant filed a Replying affidavit on the 27th January, 2011. She denies that the Plaintiff by virtue of being the first wife of the deceased has an overriding interest over the Defendant or the second wife when burying their deceased husband. In paragraphs 5 and 6 of her affidavit, the Defendant deposed that her deceased husband had in the Twenty-two (22) years of their marriage informed her that he had ceased cohabiting with the Plaintiff; that she had since the year 2003 looked after the Deceased when he was ailing in health and that the Deceased had expressly informed her that on death, he did not wish to be buried at the Plaintiff's home. She also says that the same wish as to his burial had been conveyed to his mother and also to his brothers (paragraph 8).

(5) The Defendant filed a Notice of Motion dated the 12th March, 2011 on the 14th March, 2011 seeking an order for security against Plaintiff in respect of the mortuary expenses incurred at the Mwingi District Hospital Mortuary at the rate of KShs.500/- per day for the preservation of the body of the Deceased, Mwangangi Mutua with effect from 3rd December, 2010. The application is supported by the Defendant sworn on the 12th March, 2011. The Plaintiff opposes the application on the basis of her replying affidavit made on the 28th June, 2011.

(6) By consent of the parties, the Plaintiff's said Chamber Summons application and the Defendant's Notice of Motion were heard together and each party called oral evidence. The Plaintiff, in addition to her own testimony, called Nelson Mue Kilonzo [PW.2] Festus Mulwa Mwendu [Pw.3] and Japheth Kitonga Musemba [PW.4]. Their evidence essentially was that as the first wife of the Deceased, the Plaintiff was enacted to bury him in her homestead.

(7) The Defendant also gave evidence and called Ruth Kangwelale [DW.2], Musemba Mwanzi [DW3], and Paul David Mutua [DW 4]. Their evidence sought to establish that the Deceased has expressly informed the Defendant, his mother and his brothers and uncles that he did not wish to be buried at the homestead of his first wife the Plaintiff, but rather in the homestead of his second wife in Maai Village Nguni Division.

(8) I have considered both the applications in light of the various affidavits on record and the respective testimonies of the witnesses called by the Plaintiff and the Defendant respectively. It is common ground that the Plaintiff is the first wife of the Deceased and that the Defendant is his second wife. It is also common ground that as a general rule under Kamba customary law, a husband with more than one wife would ordinarily be buried in the homestead of the first.

In the applications before me, however, the Defendant contends that the Deceased had expressly stated the wish that he is not to be buried by the Plaintiff in her homestead but by the second wife the Defendant in her homestead in Nguni. The mother of the Deceased [DW2] in her evidence recalled that as long ago as the year 2004 the Deceased had visited his father and mother and told them that because the Plaintiff had become a troublesome wife, refusing to cook for him when he was sick and abusing him, the Deceased had decided that he wished to be buried in Nguni in the homestead of his second wife, the Defendant. This witness also testified that following a misunderstanding with his first wife, the Deceased had moved to live with his mother for a period of over eight (8) months. Further, Mama Ruth Kangwelele recalled a meeting in the year 2009 after her husband's death when the Deceased summoned his brothers and uncles and expressed the same wish to be buried in Nguni. Mzee Musembi Mwangangi [DW.3] who was at the meeting in 2009 confirmed the same. He had been summoned to the meeting by Paul David Mutua [DW.4] a younger brother of the Deceased. DW.4 testified that on the 20th December, 2009, he was summoned by his late brother Mwangangi and sent to call his brothers and uncles. They met at the Mwangangi house in the presence of his mother [DW.2] on 29th December, 2009. It was then the Deceased revealed to them his troubles with his first wife and his wish to be buried in the house of the second wife in Nguni.

(9) Upon evaluating the evidence before me, I find that the Deceased, Mwangangi Mutua did expressly inform his second wife, the Defendant, his mother and his brothers and uncles of his wish not to be buried by his first wife, the Plaintiff, but by his second wife, the Defendant in the Cow Boma in her homestead in Maai Village Nguni Division. I also find that the Plaintiff was not made aware of the decision of the Deceased until the meeting held on the 27th November, 2010 when the members of the family met at the homestead of the Plaintiff to make arrangements for the burial of the Deceased.

(10) Having made a finding on the evidence that the Deceased had expressly expressed the wish to be buried at the homestead of the second wife, the Defendant, the application dated and filed on the 5th January, 2011 cannot succeed.

(11) As regards the Defendant's application in the Notice of Motion filed on the 14th March, 2011 and having made a finding that the Plaintiff was not aware, until after the death of the Deceased at the meeting of the 27th November, 2010 that the Deceased had expressed his wish as to his burial place, the Plaintiff would appear to have brought this suit in the genuine belief (which but for such wish expressed by the Deceased is not contended) that as the first wife she is entitled under Kamba Customary Law to bury her deceased husband. In light of the final orders granted herein, the application also fails.

(12) In the result, it is ordered as follows:

(i) The Plaintiff's Chamber Summons application dated and filed on the 5th January, 2011 be and is hereby dismissed with no order as to costs.

(ii) The Defendant's Notice of Motion dated the 12th March, 2011 and filed on the 14th March, 2011 be and is hereby dismissed with no order as to costs.

(iii) The body of Mwangangi Mutua (Deceased) currently lying at the Mwingi General Hospital Mortuary be released forthwith to Mwendu Mwangangi, the Defendant for burial in accordance with the wish of the Deceased in the Defendant's

home in Maai Village Nguni Division.

(iv) The mortuary expenses incurred to date at the Mwingi General Hospital Mortuary shall in the first instance be fully paid by the Plaintiff but shall be shared equally by the two (2) houses and borne by the Estate of Mwangangi Mutua (Deceased) when his estate is administered and distributed.

Orders accordingly.

Dated and delivered in open court in Machakos this 21st day of **July, 2011** at 3.35 p.m. in the presence of both parties and counsel for the Defendant.

P. Kihara Kariuki
Judge