No. 154

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 25 OF 2010

NYARIBO NYANKOMBA ....APPELLANT

-VERSUS-

MARY BONARERI MUNGE...RESPONDENT

JUDGMENT

(Being an appeal from the judgment and decree in Keroka SRMCC NO. 17 of 2010

delivered on 23rd day of February, 2010 by Were Esq SRM.)

The respondent was the plaintiff whereas the appellant was the defendant in the suit commenced by the respondent in the Senior Resident Magistrate's court at Keroka being SRMCC No. 17 of 2010. In the suit the respondent sought as against the appellant the following orders:-

"i) A permanent injunction restraining the defendant from denying the plaintiff her portion/and or share of her matrimonial property or piece of land where they will bury, inter and or dispose off the remains of the late Joseph Ocharo Nyaribo.

ii) The staggering mortuary charges be borne by the defendant who is the head of the plaintiff's family.

iii) The defendant's sons to my co-wife be restrained from disrupting and or disturbing my peaceful lifestyle at my matrimonial home Nyamakoroto.
iv) Costs of this suit to be paid by the defendant."

The suit was informed by the fact that according to the respondent, she was the wife of the appellant having married him in 1959 under Gusii customary law. They were blessed with six children including **Joseph Ocharo Nyaribo**. The latter passed on in a road traffic accident on 19th November 2009 along Keroka – Sotik road. Under Gusii customary law, the appellant was obligated to inter the remains of his aforesaid son at the matrimonial home at Nyamakoroto village. However the appellant had refused to do so claiming that he had never married the respondent and as a result he could not bury her deceased son. This forced the respondent to keep the body of the deceased at a mortuary. Hence the suit.

As for the appellant his case as can be gleaned from his statement of defence is that the respondent was not his legal wife. Though he had married her in or about 1958 under Gusii customary law, that marriage only lasted 2 months after which it was dissolved customarily and that the dowry that he had paid refunded. He denied having sired with the respondent six children including the deceased or indeed any other children. Accordingly he was not duty bound to bury the deceased at his home. Otherwise he

was lawfully married in church to his current wife following the dissolution of his earlier marriage to the respondent.

Looking at the prayers in the plaint vis a vis the pleadings it is difficult to understand whether a cause of action known in law is actually disclosed. Is what is averred in the pleadings and the prayers in the plaint justiciable? In other words do the pleadings carry the prayers in the plaint? I have my own doubts. However since the issue was never raised or canvassed in the trial before the subordinate court, I do not wish to belabor the point.

Simultaneously with the filing of the suit the respondent filed an application for interim orders but at the hearing of the same interpartes, it was resolved and agreed by the parties to abandon the application and proceed with the substantive hearing of the main suit instead.

The respondent called a total of 4 witnesses while the appellant called 2 witnesses. The respondent testified that she stayed at Keroka though her home was at Nyamakoroto, the appellant's village. The appellant was her husband. She got married to him in or about 1959 when dowry was paid and she moved in with him in 1960. Their go between were **Orucho** and **Sarah.** They also witnessed the payment of dowry. Thereafter she stayed with the appellant peacefully until he married his current wife as a second wife. Things then suddenly took a worse turn. Their union though was nonetheless blessed with a son and some daughters. Their only son, **Joseph Ocharo Nyaribo** however passed on in a road traffic accident. When she informed the appellant of the death aforesaid, they had a meeting together with her daughters and in the presence of the assistant chief. All went on well. However, during the second meeting things turned rowdy after the sons of her co-wife chased them away with pangas. It was her evidence that the step sons pressurized the appellant not to allow her bury her son on the matrimonial property claiming that she was not a wife to the appellant.

In cross-examination she stated that her I.D card read **Mary Bonareri Munge** and was issued to her in 1996 at Borabu settlement scheme. She reiterated that she got married to the appellant in 1960 after dowry was paid in 1959. She got married at Nyamakoroto and after she had the children she moved to the farm in Borabu. She had a house at Nyamakoroto when she left. She went there last about the time Kenyatta died (1978) and found the roof on her house removed. She moved to the farm to work and would do casual work jobs. The deceased was their only son and died aged 40 years. He had a wife. The deceased had not built a house. He had 4 sons and 2 daughters though with his wife. She testified further that she came to Keroka in November 2009 intending to go back to Nyamakoroto to rebuild her house. However a month or so later their son passed on as aforesaid. She denied that she refused to accompany her husband, the defendant to Kipkebe and also denied that she assaulted her husband's brother, **Marando** with a stick, or that the alleged assault caused the breakup of the marriage. She also denied that the dowry was returned thus ending her marriage. She reiterated that when her son died the appellant who had been receptive initially to the idea of burying the deceased in his home suddenly changed his mind during the 2nd meeting.

Florence Nyarinda is a sister-in-law to the respondent. It was her evidence that the cows that the appellant paid as dowry for the respondent were used for her dowry. The respondent thereafter stayed with the appellant for a while at Nyamakoroto before going to stay at Borabu (farm). The dowry was never recovered.

In cross-examination, she reiterated that the dowry paid for the respondent was also used to pay dowry for her. She added that the respondent stayed for many years at Nyamakoroto before going to Borabu. She also stayed at her home for about one year and then proceeded to Kericho. On returning she did not find the respondent at Nyamakoroto. She could not recall the year she left for Kericho. She recalled the respondent and the appellant having a dispute but she could not tell what it was all about.

Edwin Wahome is a purported son-in-law to both the appellant and respondent as he is alleged to be married to their daughter, **Teresa Moraa**. However he had yet to pay dowry. He testified that both the respondent and appellant visited them in 1992. They also visited them again in 1993. He reiterated that the deceased is his brother-in-law.

In cross-examination, he stated that he married **Teresa Moraa** in 1989 but had not been to her home in Nyamakoroto.

Teresia Nyaribo, testified that she had been staying in Sotik since 1989. She stated that previously she stayed at the scheme with her parents. Her dad, the appellant however stays at Nyamakoroto. She had been in the company of the respondent when they went to visit the appellant after the death of her brother but on the day of the 2nd session, they were chased away by her step brothers. She stated in cross examination that their home is at Nyamakoroto but she used to stay at Isoge with the respondent. She

added that the first time she went to talk to her dad, she was with her siblings as the respondent was unwell. The second time she went with the chief as they had disagreed.

In his defence, the appellant testified that he married the respondent in 1958 under Gusii customary law and paid dowry. They stayed together as husband and wife for 2 months and then PW1 declined to continue being his wife and took off. He sent emissaries to bring her back as tradition then demanded but she instead picked a jembe and assaulted his brother – **Peter Maranga.** Later, the dowry he had paid was returned to him and that ended their marriage. He had not sired any children with the respondent at the time including the deceased. He testified further that after the respondent deserted him, he married **Salome Kwamboka** in a wedding at Ichuni Catholic church in 1961 and they have lived together since.

He stated in cross-examination that he met the respondent while working at Kipkebe and after leaving his nursery school teaching job. He reiterated that he married the respondent in 1958 but she later rejected him. He denied that he chased her away. After the respondent deserted her, the dowry was returned to him. He denied that he sent the respondent to stay in the scheme. It was also in his evidence that the deceased never built a house at Nyamakoroto. He admitted that he had a meeting with the village elder and also the chief. He admitted as well going to Sotik with one **Mainye Orucho** but it was to receive bonus and not to visit his daughter. He denied any knowledge of his alleged daughter.

Yunuke Bitutu gave evidence in support of the appellant. She was a step-mother to the appellant. She testified that she saw the respondent long time ago when she was then married to the appellant. Later she was sent away after she declined to accompany the appellant to Monire. When emissaries were sent to persuade her to return, she hit the appellant's brother with a jembe. Later the cows that the appellant had paid as dowry were returned from the respondent's home and given back to the appellant. She denied that she had been married anywhere else prior to getting married in the home of the appellant. She reiterated that the respondent never left with any child. She added that if the cows paid as dowry were returned or retrieved, then under Gusii Customary Law, the respondent could not continue to be a wife. She denied that the appellant used to visit the respondent in the scheme.

The learned magistrate having carefully evaluated the evidence tendered by both sides, the respective written submissions filed and the law reached the verdict thus:-

"Under customary law and as espoused by some of the witnesses, marriage is symbolized by the payment of dowry (sic) the man's family to the girls family. This DW1 did. It is not clear from the evidence how much dowry DW1 paid.

Was that dowry returned to symbolize the determination of that marriage? The defence contends that the dowry which had in turn been used in regard to PW2's marriage was retrieved and returned to DW1. The question is, is that possible? I find it quiet (sic) strange that that could be possible. As DW2 testified once dowry is returned, then the lady would cease to be a wife under customary law. No witnesses have been called to show that dowry was returned. It would have been necessary for witnesses to be called to show that the dowry DW2 paid was returned and especially that it was retrieved from the parents of PW2 where it had been taken to pay for her dowry. Though I take note that it is a long time about 50 years ago as alleged there must be witnesses to show or provide evidence on the occurrence. During the trial, PW2's marriage was not challenged. Though her husband is now dead it was not shown that she ceased to be a wife in that home. What do I say so? Because if the dowry was retrieved and returned to DW1 then she would also have ceased to be a wife in that home. She got married into and asked to go back to her parent's home. The import of the above is that it's not been conclusively shown that PW1 ceased, customarily or otherwise to be the wife of DW1. No formal divorce proceedings were also been (sic) initiated to dissolve her marriage. It is also not lost on me that with the marriage dissolved any children that PW1 gave birth to were considered those of DW1, irrespective of whether he was the biological parent/father or not. That said therefore it would in the absence of any contrary evidence be concluded that the deceased is the son of DW1. Customarily, the child belongs to the father or father's clan. A child and especially a son does not take up the mother's linage. (sic) It thus becomes the duty of the father to take responsibility for an occasion such as the present one – burial of deceased. On a balance of probability therefore, I would find that the plaintiff has proved her case as required. I have no doubt in my mind that the defendant is obligated to permit the burial of the deceased on the matrimonial land, the opposition from the deceased's step-brothers notwithstanding.

In (sic) would thus make the following orders:

1) That the plaintiff be allowed to bury their deceased son Joseph Ocharo Nyaribo at the matrimonial land at Nyamakoroto.

2) That the defendant to bear the accumulated mortuary costs.

3) The O.C.S – Keroka police station to assist the plaintiff in ensuring compliance with the present order.

4) That the defendants sons and step-brothers to the deceased to ensure peace and tranquility during the burial of Joseph Ocharo Nyaribo.

5) Each party to bear its costs of the suit as this is essentially a family dispute. Orders accordingly."

The appellant was aggrieved by the judgment and decree aforesaid. He instantly lodged this appeal. In support thereof he advanced nine grounds to wit:

"1) The learned trial magistrate erred in law and misdirected himself in making findings not supported by any evidence on record or law and hence arrived at the wrong decision.

2) The learned trial magistrate erred in fact and on the material on record that the marriage between the appellant and respondent was still subsisting and when the evidence on the record to the contrary is overwhelming and weighty.

3) The learned trial magistrate erred in law and even Kisii custom (sic) when the evidence on record to the contrary is overwhelming and weighty.

4) The learned trial magistrate decided the case against the evidence tendered by the appellant.

5) The learned trial magistrate in (sic) making orders that were adverse to persons who were not parties to the suit.

6) The learned trial magistrate erred and misdirected himself in law in deciding that the deceased was the son to the appellant on no evidence at all, or rather on insufficient evidence.

7) The learned trial magistrate erred in law in ordering the appellant be buried in a matrimonial property at Nyamakoroto which is not a clearly defined place.

8) The learned trial magistrate failed to appreciate that marriage between the appellant and respondents got dissolved way before 1961 when the appellant contracted a new marriage with one Salome Kwamboka at Ichuni Catholic Church a Christian and without any objection by respondent or do whatsoever.

9) The learned trial magistrate erred in law by deciding the case in favour of the respondent on insufficient evidence or without proof of her case on a balance of probability."

When the appeal came up for directions it was agreed amongst other directions that the appeal can be canvassed by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them alongside cited authorities.

An appellate court has a duty to reconsider the evidence adduced before the trial magistrate's court, evaluate it and draw its own conclusion. Such court is however expected to always bear in mind the fact that it neither saw nor heard the witnesses and therefore not in a position to pass judgment on the demeanour of the witnesses. As was stated by the court of appeal in **Selle Vs Associated Motor Boat Company Ltd (1968) E.A 126** ***"….. In particular this court is not bound necessarily to follow the trial's court findings if it appears either that it has clearly failed on some points to take account of***

particular circumstances of probabilities materially to estimate the evidence or the impression based on the demeanour of a witness is inconsistent with evidence in the case generally.”.

The case before the learned magistrate was fairly simple and straight forward. It was whether the deceased was the appellant’s son and if so whether he was duty bound to bury him under Gusii customary law. Much as the learned magistrate appreciated the twin issues aforesaid, however as he crafted the judgment he drifted into determining whether or not a marriage between the appellant and the respondent still subsisted. In so doing, the learned magistrate fell in the trap set by the respondent. To the respondent, this was not so much a burial dispute but whether or not she was still married to the appellant. In other words the respondent was merely using the death of her son in order to assert her claim as the wife of the respondent and the consequential benefits arising therefrom that included the matrimonial property in particular, land. The entire testimony of the respondent and her witnesses has it is centre piece, the marriage of the respondent to the appellant and whether it was dissolved. Yet that was secondary or peripheral issue to my mind.

Being a customary claim one could have expected that the respondent would bring forth expert witnesses on Gusii customary as regards burials. One would likely expect that the respondent would line up expert witnesses to say whether a father is obligated to bury his son whether or not such son is born in or outside wedlock, or where the parents are divorced or even where the parents have been living apart for a long time as in this case or even in a situation like this where the alleged son had married and had his own family but had never stayed in the home of the appellant. According to the evidence on record, the deceased was aged 40years. He was married with six children, 4 sons and 2 daughters. Despite lack of expert witnesses the learned magistrate reached a conclusion ***“…. Customarily, the child belongs to the father or father’s clan. A child and especially a son does nto take up the mother’s linage (sic). It thus becomes the duty of the father to take responsibility for an occasion such as the present one burial of the deceased...”.*** With tremendous respect to the learned magistrate there was no factual or legal basis for that finding and or conclusion. No evidence, expert or otherwise was led by any of the parties in that regard. Courts of law act on hard and cogent evidence on record and not suppositions, speculations and or inferences. Courts have always been restrained or cautioned from advancing and or introducing theories in judgments that are unbacked by evidence. The learned magistrate herein did not even suggest that he was taking judicial notice of Gusii customary law. Nor had any authority in the form of discourses on Gusii customary law or any reported case law on the subject cited to him. It appears that the learned magistrate also made erroneous presumption that customarily, every child belongs to the father. Not every tribe in this country is patrilineal. There are those in which the son or indeed the children belongs to the mother. In other words there are matrilineal communities as well. Gusii community may as well be matrilineal contrary to the holding and or conclusion reached by the learned magistrate.

Time and again it has been stated that cases resting purely on customary law, it’s absolutely necessary that experts versed in the customs be summoned to testify so as to assist the court reach a fair verdict since the court itself is not well versed in those customs and traditions. In the absence of such expert testimony, there can only be one conclusion, such claim remains unproved. In this case even if I was to disgress a bit just like the learned magistrate and consider the issue as to whether there was a valid marriage between the appellant and the respondent, I will still come to the same conclusion that in the absence of expert evidence tendered during the trial, one cannot confidently say as the learned magistrate did that there was a valid marriage which had not been dissolved. The court needed to be told what amounts to a valid Gusii customary law marriage and how such marriage can validly be dissolved under Gusii customary law. As it is therefore there is no evidence on record either way that would have assisted the court to say that (a) There was a valid Gusii customary law marriage much as it was admitted by the parties and (b) whether it had been dissolved or not in accordance with Gusii customary law. Thus the learned magistrate erred in making a finding that he did not believe that the marriage between the appellant and the respondent had been dissolved as no formal divorce proceedings had been initiated. He had no basis for such conclusion for no evidence had been led before him as to how the Gusii customary marriage is formally dissolved. It is also instructive that both sides called close relatives as witnesses. The case of an expert on Gusii customary law cannot therefore be gainsaid.

Besides, the deceased claimed to be a son of the appellant on the basis that his mother was a wife of the appellant. Was there any other evidence to show that the deceased was indeed the son of the appellant? I cannot see any. Evidence as to parenthood can be adduced through various documents e.g birth certificates, Identity cards and or even death certificates. It is instructive that the respondent never had any such evidence. I do not think that the respondent was not in possession of such evidence. She must

have had them or any one of those documents. She could not claim not to have had at least a death certificate and or an identity card of the deceased. It is trite law that he who asserts must prove. These documents could easily have proved the paternity of the deceased. That she failed to adduce them in evidence can only be interpreted to mean that they would have been adverse to her case.

It is also instructive that though the deceased was aged 40 years, married and with his own children, he did not as much in his lifetime assert his claim of paternity to the appellant. There is no evidence that the appellant ever participated as a father during the deceased marriage to his wife. Nor is there evidence that the deceased ever visited the appellant at his home in his lifetime.

Coming back to the prayers in the plaint, they are clearly ambiguous and incapable of enforcement. Court orders when issued should be clear, concise, definite and capable of execution. It is trite law that a party to a litigation if successful can only get what he has asked for. In the circumstances of this case, the issue was whether the deceased was a son of the appellant and whether the appellant must bury him in his ancestral land in accordance with Gusii customary law. One would therefor have expected a prayer in the nature of a declaration in that regard. Without such prayer, I do not see then how a permanent injunction can issue against the appellant to restrain him from denying the respondent her portion and or share of her matrimonial property. This is not the issue that brought the respondent to court. In any event supposing the land in question was in the appellant's name, can he be restrained from stopping other people from claiming a portion of his suit premises. Secondly, this was not a case for determination and division of matrimonial property.

Again how would such an order be executed. In the same breath, the respondent prayed that the appellant be restrained from denying her land where the remains of the deceased will be interred. The piece of land is not identified. Supposing the appellant had no land at all. The other prayer was ***"… The staggering mortuary charges be born by the defendant who is the head of the plaintiff's family …".*** What is to be made of such an order. How will the decree be extracted and or executed. I will have been forgiving for this kind of pleading if the suit had been filed by the respondent in person. However, this is not the case here. The suit was initiated by **Messrs B. Rogito Isaboke & Co. Advocates** who should have known better how to plead**.** Then there was the prayer that the appellant's sons be restrained from disrupting or disturbing the respondent's peaceful lifestyle at her matrimonial home at Nyamakoroto. This prayer if granted will affect persons who are not even parties to the suit. The respondent knew the sons of the wife of the appellant. Why could she enjoin then in the suit. It is trite law that as much as parties are bound by pleadings the court should not issue orders adverse to persons who are parties to the suit. What was the respondent's peaceful lifestyle that these sons would have disrupted or disturbed?

The respondent mentions her home as Nyamakoroto. However the evidence on record points to the fact that she had no such home. In any event Nyamakoroto is a village. The case could have perhaps been different had she given the details of the land parcel.

For all the foregoing reasons, I find the appeal merited. It is allowed with costs. The judgment and decree of the learned magistrate is set aside. In substitution I order that the respondent's suit be dismissed with costs to the appellant as well.

Judgment dated, signed and **delivered** at Kisii this 30th July 2010.

ASIKE-MAKHANDIA

JUDGE