



IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL NO. 110 OF 2010

(Being an appeal from the judgment of Hon. B. Kituyi, Resident Magistrate on 3/5/2010 in Nakuru CMCC No. 335 of 2010)

OLIVER BONARERI OMOL.....1ST APPELLANT
YACABETH KWAMBOKA.....2ND APPELLANT
SUSAN NYABOKE.....3RD APPELLANT
SABINA NYABONYI.....4TH APPELLANT
WILTA KERUBO.....5TH APPELLANT
MONICA MOSIARA.....6TH APPELLANT

VERSUS
JOSEPH BASWETI OROGO.....RESPONDENT

JUDGMENT

This is an appeal against the judgment of the Resident Magistrate delivered on 3rd May 2010 in Nakuru CMCC No. 335 of 2010 in which she allowed the respondent's claim and directed that he has the right to bury the body of Mary Kemunto Basweti (the deceased) at his ancestral home in Kisii.

In that case the respondent claimed he paid to his in-laws 15 cows and 8 goats as dowry and married the deceased in 1960s under Kisii Customary Law. His brothers, Jonathan Nyachiro Orogo, PW2, and Francis Mokoye Orogo, PW3, corroborated his evidence on the payment of that dowry. Thereafter he established their matrimonial home in Nyaribari, Kisii District. The couple has 8 children.

In cross examination he admitted that for over 20 years the deceased had been living at what he calls his second home at Bagaria in Njoro Division of Nakuru District. On learning of her death he came to Nakuru to arrange for the transportation of her body to Kisii for burial only to find that his daughter Mochobe Basweti was already making arrangements to bury her in Njoro. He filed the said suit and obtained a temporary injunction restraining the burial until the suit was heard and determined.

The appellants on learning of the suit applied and were joined as defendants. They denied that Mochobe Basweti is their sister. The 5th appellant, Wilta Kerubo testified on behalf of the others and claimed that though the respondent is their father, he was not married to their mother, the deceased. In the circumstances he has no right to take her body for burial. Instead she counter-claimed for an order to be given the body for burial in Njoro as per the deceased's wishes.

The appellants called David Ruguri, a village elder in Njoro, who corroborated Wilta's evidence that the deceased expressed a wish to be buried in Njoro. He said that on 1st April 2010 at about 9.00 a.m., at the invitation of the deceased, he went to her home and she told him that she should be buried in Njoro when she died. She also told him that her piece of land in Njoro should be inherited by her three daughters in equal shares.

After hearing the evidence the learned trial magistrate found that the deceased was indeed married to the respondent

under Kisii Customary Law. Consequent upon that finding she held that the respondent was entitled to bury her at his ancestral home in Kisii. As I have said this appeal is against that decision.

Presenting the appeal Mrs Kireri for the appellants cited the High Court decision in **Korir Vs Mutai [2008]1 KLR (G & F) 980** and submitted that both the lower court proceedings and judgment were a nullity for lack of jurisdiction. She also submitted that judgment was a nullity for flouting **Order 20 Rule 4** of the **Civil Procedure Rules**. She faulted the trial court for striking out the appellant's defence for no good reason. On the merits of the decision she submitted that the respondents failed to discharge the burden of proving that he was married to the deceased under Kisii Customary Law and/or that he had the right to bury her body. With that she urged me to allow this appeal and direct that it is the appellants who have a right to bury the deceased at her home in Njoro in accordance with her wishes.

Mr. Cheche for the respondent submitted that this appeal has no merit and should be dismissed with costs. On jurisdiction he submitted that the appellant having married the deceased under Kisii Customary Law, the trial court had jurisdiction to adjudicate on the dispute. He defended the learned trial magistrate's right to strike out the appellants' defence as the same was filed after viva voce evidence had been taken.

Wondering how the respondent could have sired 9 children with the deceased without being married to her, counsel dismissed the appellants' claim in that regard as totally untenable. He referred me to the evidence of the respondent and that of his two brothers on the payment of dowry and urged me to find that he is entitled to bury his wife.

In her rejoinder, Mrs Kireri invited me to consider the fact that the nature of the dispute required the expeditious disposal of the suit hence the reason for filing the defence after the evidence had been tendered.

I have considered these rival submissions and the evidence on record in this matter. Having not heard witnesses testify and watch their demeanour, an appellate court should be slow to reverse the trial court's decision. But it should at the same time bear in mind the legal position that an appeal is by way of a retrial. With that in mind it must then reconsider the evidence, evaluate it itself and draw its own conclusions--**Selle & Another - Vs- Associated Motor Boat Co. Ltd & Others [1968] EA 123**. At p.126 of that report, the Court of Appeal added this with regard to the appellate court's role:-

“In particular this court is not bound to follow the trial judge's findings of fact if it appears that either he clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally. (Abdul Hameed Saif -Vs- Ali Mohamed Sholani (1955) 22 EACA 270).”

With these principles in mind, I now wish to consider the issues raised in this appeal starting with the one of jurisdiction.

As I have pointed out, following the High Court decision in the said case of **Korir Vs Mutai (supra)**, the learned trial magistrate, while admitting that by virtue of **Section 2** of the **Magistrates Jurisdiction Act** as read with **Section 3(2)** of the **Judicature Act**, she had no jurisdiction to deal with matter, nonetheless went ahead and dismissed the issue for having been raised too late in the day. Mrs. Kireri for the appellants submitted that the learned trial magistrate erred. In her view she had no jurisdiction at all to try the matter.

I hold a different view from the one expressed by my brother Justice Kimaru in **Korir Vs Mutai (supra)**. Whereas I concur with him that the word “means” in **Section 2** of the **Magistrates Jurisdiction Act** should be interpreted as confining the jurisdiction of the Magistrates Court to matters therein stated, I am of the view that burial disputes fall under paragraph (f) of that section. Let's read the whole section to get the import of that paragraph.

“In this Act, unless the context otherwise requires – ‘claim under customary law’ means a claim concerning any of the following matters under African Customary Law –

- (a) Land held under customary tenure;**
- (b) Marriage, divorce, maintenance or dowry;**
- (c) Seduction or pregnancy of an unmarried woman or girl;**
- (d) Enticement of or adultery with a married woman;**
- (e) Matters affecting status, and in particular the status of women, widows and children, including guardianship, custody, adoption and legitimacy;**
- (f) Intestate Succession and administration of intestate estates so far as not governed by any**

written law.”

In testate succession, as observed by the Court of Appeal in **Apeli Vs Buluku, [2008] 1 KLR 873**, after death the custody and possession of the body of a deceased person belongs to his executors until it is buried. It follows that in intestate succession the custody and possession of the body belong to the person or persons entitled to administer such deceased person's estate.

As **Paragraph (f) of Section 2 of the Magistrates Jurisdiction Act**, authorizes the magistrates' courts to deal customary law claims relating to “Intestate Succession and administration of intestate estates so far as not governed by any written law”, I hold that burial disputes based on customary law like this one fall under intestate succession and administration of the intestate's estate and the magistrates court has therefore jurisdiction to determine the issue. It follows that in this case, contrary to its finding, the trial court had jurisdiction to determine the dispute.

Having disposed of the issue of jurisdiction, I now wish to deal with the appeal on its merits.

As I have pointed out, the learned trial magistrate having found that the deceased was married to the respondent under Kisii Customary Law, she held that he is entitled to bury her body at his ancestral home in Kisii. Mrs. Kireri faulted that decision and contended that the respondent was not married to the deceased and has therefore no right of burying her body.

That contention is not entirely correct. The appellants did not counter the evidence adduced by the respondent that he paid dowry for the deceased. That evidence therefore stands uncontroverted and I consequently find that the respondent indeed paid dowry for the deceased and married to her under Kisii Customary Law.

Dowry is the most important element of Kisii Customary Law. The ceremonies mentioned in Cotran's book are not mandatory. At any rate the respondent having indisputably sired 8 or 9 children with the deceased, I find the appellants' contention that he was not married to their late mother, the deceased, incredible. As I have said I find that the respondent was duly married to the deceased under Kisii Customary Law.

Having found that the respondent and the deceased were indeed married under Kisii Customary Law, **Section 3(2) of the Judicature Act** comes into play. It enacts that:-

“The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice and without undue regard to technicalities of procedure and without undue delay.”

Does Kisii Customary Law provide for burial disputes like the one in this case? Yes it does.

Under Kisii Customary Law, the widow or widower has a right to bury his or her deceased spouse. It follows that the respondent in this case has a right to bury the deceased. That right, is, however, not absolute. The deceased's views as to where and who should bury his or her body as well as other circumstances do in most cases override that right.

Although I concur with the Court of Appeal decision in the said case of **Apeli Vs Buluku, [2008] 1 KLR 873** that under English law, there is no property in a dead body, it is, however, common knowledge that Africans treat their dead relative differently. Africans highly respect their deceased relatives and reverently handle their burials. That is why they go into great expense and take a lot of time to arrange for their decent burials. With regard to where and/or who should bury the deceased, they invariably honour the deceased's wishes. See **Charles Onyango Oduke & Another Vs Samuel Onindo Wambi, [2010] eKLR (Kisumu HCCC No. 143 of 2009)**.

It is common knowledge and I take judicial notice of the fact that a reasonable fraction of Kisiiis have moved out of Gusiiland and settled in other parts of the country. Except in cases of ownership disputes, nearly all of them are buried in their new acquired homes when they die.

In this case it is not in dispute that in early 1980s the deceased migrated from her husband's home in Nyaribari to Bagaria in Njoro where she established her home. I reject the respondent's claim that he assisted her in acquiring the new home. He produced no evidence to support that claim. On the contrary, on the evidence

of David Ruguri, a village elder in Bagaria, Njoro, and that of DW1, I find that the deceased solely acquired that home and expressed her wish to be buried there.

For over 30 years the deceased was separated from the respondent. For over 30 years the respondent did not know where or how the deceased lived. He was not concerned with the deceased's sickness. How, in the circumstances, can such a man be allowed to take the deceased's body to Kisii for burial against her wishes just because he wants to avoid condemnation by his community? It would be immoral to allow such estranged husband to purport to love his wife in death. I have no hesitation in finding that, in the circumstances of this case, the deceased's wishes override the respondent's customary law right to bury her body in his ancestral home in Kisii.

Consequently, I allow this appeal and direct that the appellants be given the body of their late mother for burial at Bagaria in Njoro in accordance with her wishes. The respondent shall pay the mortuary charges to date but if he does not, the appellants should pay them and take the body for burial. This being a family matter, each party shall bear its own costs of this appeal and those of the lower court.

DATED and DELIVERED at Nakuru this 22nd day of July, 2010.

D. K. MARAGA

JUDGE.