REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA

Civil Appeal 35 of 2007
(Appeal arising from original record of BGM CM CC.171 OF 2005)

JOSEPH FRANCIS MAKOKHA……APPELLANT

~VRS~

RAPHAEL SIMIYU WEKESA
IGNATIUS WEKESA NDUMBA……RESPONDENTS

JUDGMENT

The Appellant Joseph Francis Makokha appeals against the Judgment of Bungoma Resident Magistrate G. Sogomo delivered on 7/5/2007. The Appellant's case was dismissed with costs on ground that his evidence was not in conformity with his pleadings.

The Appellant who was the Plaintiff in the lower court relies on seven grounds of appeal. Precisely, the Appellant contends that the magistrate fundamentally erred in law and fact by basing the whole judgment on one paragraph of the plaint, specifically number 4. He failed to appreciate that the words ***"father"*** appearing twice on the plaint was a typing error. Oral and documentary evidence adduced by the Plaintiff was not taken into account which evidence was neither analysed or even considered.

Mr. Situma argued the appeal for the Appellant submitted that the Applicant had produced a limited grant to show that he was stepping into the shoes of his deceased father in filing the suit for payment of dowry by the Defendants. The 1st Defendant admitted he married PW2 and did not pay dowry. The defence was filed without leave and it was therefore defective. The defence did not file submissions after the case closed.

Mr. Waswa for the Respondents submitted that the Plaint was defective and even if the court was to analyze the evidence it would have reached the same finding. The Plaintiff's evidence differed on the schools attended by PW2. The Plaintiff being a brother to PW2 could not claim ***"fathers"*** allowance. The prayer for general damages was misplaced in a customary claim. The Defendants denied that there was any subsisting marriage. The grant was for purposes of filing a single civil suit and does not entitle the Appellant to go on appeal. The beneficiaries of the estate were not named.

The lower court proceedings show that the Defendant failed to enter appearance leading to interlocutory judgment being entered. The Plaintiff (PW1) testified that he is a brother to one Anna Nelima Makokha (PW2). The 1st Respondent Raphael Simiyu wekesa married PW1 in 1996 under Bukusu Customary Law. The couple sired three children. The 1st Respondent failed to pay any dowry to the parents of PW2. The parents were deceased at the time the suit was filed. PW1 obtained a limited

grant and filed the suit on behalf of the estate of the deceased. The 2nd Respondent was sued in his capacity as the father of the 1st Respondent. His claim was for 13 heads of cattle, father's allowance of ksh.15,000/=, mother's allowance of Ksh.10,000/=, a hat and general damages.

PW2 testified that she married the 1st Respondent under Bukusu Customary Law and both were blessed with three children. Dowry was payable under customary law but the 1st Respondent failed to pay it to her parents.

At the time the two witnesses gave evidence on 29/8/2005, the Defendant was not in court. He had not filed appearance. On the 14/11/2005 the counsel for the Defendant appeared in court and was allowed time to file an application to set aside interlocutory judgment within 21 days. The application was filed belatedly about 30 days later. The court struck it out and ordered that no further application of the same nature should be filed.

The Respondents' counsel was allowed the opportunity to cross-examine PW1 who was recalled on the same day.

For a reason not explained in the proceedings, PW2 testified again on 5/3/2007. The counsel for the Defendant was absent. PW1 was therefore not cross-examined. Both parties filed submissions.

The magistrate in his half page typed judgment only dealt with one issue. He said that the plaintiff's evidence contradicted his pleadings. In the plaint he said he was the father of PW2 while in his testimony he said he was the brother of the Plaintiff. The judgment stated in part:

> ***"In stating that he was the brother of Nelima and not the father as depicted in the plaint, the Plaintiff has shot himself in the foot and without determining any other aspect of this suit, I find that as a result of that gross aberration the Plaintiff's claim has failed. This suit is dismissed with costs on the lower scale to the Defendants."***

This is a suit where interlocutory judgment had been entered and it was formally proved since the Defendant did not file defence. Every party is bound by its pleadings. The pleadings in issue here is paragraph 4 of the plaint.

> ***"4. The Plaintiff states that in or about the year 1999, the 1st Defendant married the Plaintiff's daughter known by the name ANN NELIMA MAKOKHA who was at that time in form three at Kimukungi Secondary School. As a result of the said the 1st Defendant's actions, the Plaintiff's daughter's education was disrupted and the Plaintiff has consequently suffered loss and claims damages."***

The error in the plaint is the word ***"daughter"*** which appears twice in the said paragraph. The rest of the plaint is in order and consistent with the evidence.

The issue for determination here is whether the magistrate erred in finding that the error was fatal to the Plaintiff's case.

The evidence of both PW1 and PW2 is that the Plaintiff is the elder brother of the girl in respect of whose marriage the dowry claim was based. PW1 produced a limited grant as authority for him to file the suit on behalf of the estate of the deceased. He told the court that upon the death of his parents, he was the one in authority to pursue the claim. The evidence of the Plaintiff was not challenged as to his capacity in cross-examination. The Defendant's counsel who had the opportunity to cross-examine PW1 did not do so since he was absent from court. It seems none of the parties or their counsels noticed this error and the judgment of the court must have taken the Plaintiff by surprise. If the plaint was to be amended, it would mean amending only paragraph 4 to delete the word ***"daughter"*** and substitute it with the word ***"sister"*** in both line 2 and 5. I agree with the defence that it was not the duty of the court to correct the defect during judgment.

The trial court found the defect to be so material that it dismissed the case for this only reason. I do not agree with the trial

magistrate in his finding. The defect is not beyond redemption even at this stage. It is explained by the evidence of the Plaintiffs that PW1 stepped in after his father's death. There is great probability that the plaint had been drafted before the father died. When he died and the limited grant was obtained, the drafter omitted to make the necessary corrections.

Section 100 of the Civil Procedure Act empowers the court to amend any pleading to rectify a minor defect or error in any proceeding in a suit for purposes of determining any question or issue raised therein.

It is my finding that the error is curable under section 100 of the Civil Procedure Act. The error did not occasion any failure of justice. Each of the parties proceeded with the case with a clear mind that PW1 was the brother and not the father of PW2. The magistrate was wrong in dismissing the suit due to the said negligible error. For this reason, I set aside the judgment of the lower court.

This is a very unique kind of appeal. The evidence of the lower court on the proof of the claim was not evaluated by the court. This court has a duty to deal with it and make its finding on the issues in the suit.

I start on the premise that interlocutory judgment was on record. The Defendant did not adduce any evidence to controvert that of the Plaintiff. The Plaintiff's evidence was corroborated by that of PW2 that there was a subsisting marriage between the parties conducted under Bukusu Customary Law. The couple had three (3) children. No dowry was paid to the parents of PW2 during their lifetime as required by the custom. The father of the girl has a right under that customary law to claim dowry. In death, a personal representative to the estate of the father can pursue the claim. PW1 obtained the necessary authority to sue. The 1st Respondent's is liable to pay dowry and his father the 2nd Respondent is vicariously liable.

It is my finding that the Appellant has proved his case against the Respondents to the standards required. I enter judgment in his favour against the Defendants jointly and severally.

The amount of dowry claimed was 13 heads of cattle whose value was not computed. I hereby place the value per head at Ksh.5000/= making a total of Ksh.65000/=. The parents allowance was separate from the dowry and is meant to be enjoyed by the parents of the girl only. Now that the parents are deceased, I decline to allow this claim. The same case applies to the father's rain coat and hat.

For the two goats, I give the value for each at Ksh.2500/= making a total of Ksh.5000/=. The prayer of general damages is not a customary claim and is therefore rejected.

I therefore enter judgment for the Appellant for Ksh.70,000/= plus costs of the suit and this appeal.

F. N. MUCHEMI
JUDGE

Dated, Delivered and Signed at Bungoma
This 9th day of December, 2009 in the presence of *Mr. Waswa for the Respondents.*