REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CIVIL CASE 152 OF 2007

PHILIP TOROITICH AND ANNA KANGOGO…........PLAINTIFFS

=VERSUS=

ELIAS TOROITICH CHEMOBO……..………..……DEFENDANT

JUDGMENT

The Plaintiffs are brother and sister and have instituted this suit against their own father seeking an order that he be compelled to bury their deceased mother on his land where the matrimonial home had been situated.

The Plaintiffs in their plaint dated 5th September, 2007 averred that:-

Ø They are the biological children of the Defendant

Ø The Defendant is the husband of the late Taplilei Teriki Toroitich who died on the 9th June, 2007 having initially cohabited as such from 1963 and having subsequently formalized the marriage in accordance with Keiyo Customs in 1983.

Ø Upon commencement of the marriage and during the entire life time of the deceased, the couple set up their matrimonial home within Uasin Gishu District on Land Parcel No. Karono/Sosiani/Block 6 (Kaplolo) 114.

Ø The marriage was blessed with four children namely:

- Annah Kangogo - born 1964

- Teresia Kemboi - born 1966

- Philip Toroitich - born 1970

- Barnaba Toroitich - born 1972

Ø The Plaintiffs and Defendant and the deceased are all Keiyo’s and are subject of and are bound by Keiyo Customs.

Ø In blatant disregard of the mandatory requirement of Keiyo customs the Defendant has resisted the burial of the deceased at the matrimonial home which is situated at Land Parcel NO. Karoni/sosiani/Block 6 (Kaplolo) 114.

Ø Owing to this the deceased's body is lying at the Iten District Hospital mortuary

Ø The Defendant's action has caused the children and the family of the deceased psychological and emotional distress.

Ø Attempts at resolving the matter have been frustrated by the Defendant.

The Plaintiffs prays for the following orders:-

a)   A Declaration that under Keiyo Customs the Defendant is bound to bury the deceased on Land Parcel No. Karoro/Sosiani/Block 6 (Kaplolo) 114.

b) Pursuant to (a) above, the OCS Moiben Police Station be directed to provide adequate security to enable the Plaintiffs bury the deceased.

c) Costs of the suit.

The Defendant upon service of Summons filed a Defence to the claim. He pleaded as follows:-

ü The Defendant admits that the deceased died on 9th June, 2007 and that they had bee married in accordance with Keiyo customs in 1983. They have lived together from 63.

ü He denied that the deceased was still his lawful wife for she had been sent away to their parents' home and dissolution of marriage therein was automatic pursuant to Keiyo customs.

ü That the deceased jointly with her two sons killed his step son John, drunk his blood. As a result, his two sons and their children ceased being his children.

ü The action of the deceased and her two sons, Philip and Barnaba who is facing a murder charge is a great abomination dawned on the family and such a curse ought to be reversed which act the Keiyo customary laws take great exception to.

ü The Defendant has resisted the burial of the deceased in any of his parcel of lands because he does not condone such a heinous murder, drinking of blood and washing the children with the same, an act which according to Keiyo customary law allowed a visitation of the perpetrators being sent back to their uncles where they are now and the deceased ceased being his wife and ought to be buried by her uncles.

ü There is no more anguish than the killing of a child by family members for purpose of disinheriting one another.

ü The Defendant is more stressed psychologically to note that his children could kill one another to get more shares of his property in disregard to the sanctity of life.

ü The Defendant avers that the 1st Plaintiff indeed participated in the killing of the deceased step son a fact that the police seem to have been compromised by his son Barnabas who purposely decided to carry the cross on behalf of his brother and on behalf of their deceased mother.

ü None of the Plaintiffs or their uncles have ever called the elders with a view of resolving the dispute.

Due to the nature and urgency of the case, this Court gave the trial priority and was fully heard. The 1st Plaintiff and two others testified on behalf of the Plaintiffs. P.W.3, an elder from the Keiyo Community was called as a person conversant with Keiyo Customs. The Defendant testified. He called 2 other witnesses. D.W.3 was called as a Keiyo elder conversant with Keiyo Culture, Customs and traditions.

After the trial, the Court directed that the parties advocates, Mrs. Nyaundi for the Plaintiff and Mr.

Chemwok for the Defendant file written submissions. This was duly done together with supporting authorities.

I have carefully considered the pleadings, the testimonials, the written submissions and authorities.

The first issue that this Court is obliged to deal with at the outset is the question of the locus standi of the 1st Plaintiff. In paragraph 4 of the Plaintiff, the 1st and 2nd Defendants expressly pleaded that they were the biological children of the Defendant. The Defendant in paragraph 1 stated:-

"**1. The Defendant admits the contents of paragraph 1,2,3 and 4**

………………………………………………**.**

In paragraph 4, he states:

" **4. The contents of paragraph 7 and 8 are partially admitted and the Defendant avers that since the deceased jointly with her two sons killed his step son John, drunk his blood with his grandchildren, they ceased being the Defendant's children though biologically he his their father"**

There are clear, unambiguous and unequivocal admission by the Defendant that both the 1st and 2nd Plaintiffs are his biological children. It is trite law that the Defendant like any other party in a suit is bound by his pleadings. He cannot depart from it. Of even greater significance, the Defendant in an affidavit sworn on 26th October 2007 depones as follows:

" **That the deceased herein indeed participated and / or jointly with her two sons killed his step son, John, drunk his blood and with his grandchildren and therefore ceased to be my children <u>though biologically</u> I am their father."**

From the evidence on record, the Court finds that the two sons he referred to were Philip Toroitich, the First Plaintiff and Barnabas Toroitich, who is now facing the murder charge. This affidavit is on oath.

I therefore hold that the First Plaintiff is a biological son of the Defendant. I do reject any attempt in the Defendant's evidence and written submissions from departing from this fact. The issue of locus standi was not even pleaded by the Defendant.

Secondly, I am obliged to deal with the question as the alleged murder of John by the First Plaintiff, his brother Barnabas, the deceased and an employee. From the evidence on record, I find that indeed the 4 were arrested by the Police but subsequently all were released after investigations and only Barnabas Toroitich was charged with the murder of John, a nephew of the Defendant. The case is still pending in the High Court and has yet to be heard.

Section 77 (2) (a) of the constitution of Kenya

des that:-

(2)   " Every person who is charged with a criminal offence : -

(a)   shall be presumed innocent until proved guilty; ……….."

This is a Constitutional provision to secure protection of the Law. The Constitution is the Supreme Laws of the Land. On this basis, this Court ruled that the criminal case of murder against Barnabas Toritich and matters touching thereon would not form the testimony of any of the witnesses. The court invites the Sub-judicial Rule and throughout the trial, had a difficult time in restricting the Defendant, his Counsel and witnesses to the admissible and proper issues before the Court and preventing the "trial" for the murder case within these proceedings.

The Court continually pointed out and reminded Counsel for the Defendant against violating the Constitutional provision. The Defence ………. Pleaded was already offensive and breached this law. The Defendant and his Counsel were warned of this. This Court refused any reference of any part of the Defence that stated or suggested that the First Plaintiff, the deceased, Barnabas Toroitich or any other person killed John, the Defendant's nephew.

Sadly, the entire Defence was based on the ground that the Defendant was entitled to refuse the burial of the deceased on his land because she had been involved in the murder of John together with her sons. The deceased was never charged in a Court of law with any Criminal offence in connection with the said late John, neither is there any conviction. Having never been charged, the application of the presumption of innocence does not arise in the first place. It therefore makes it even more serious for one to plead in a defence that an innocent person who has not been charged under any law is guilty of murder and other serious crimes.

Before this Court is a civil suit relating to the burial of the deceased. It is not a Criminal case relating to the alleged killing of John. That matter was investigated by the Police and Barnabas Toroitich, a son of the Defendant charged. That will be the end of the matter.

On the said grounds, this Court would have been entitled to strike out paragraph 4,5,7,9,10 and 11 of the Defence. The Court did not do so but allowed the hearing to proceed without such a step which would have really made the suit seriously undefended. The Court decided to hear any issue of merit fairly and with a view of an expeditious hearing so that6 the fate of the body which has been lying in the mortuary since 9th June,2007 could be decided.

Be that as it may, in view of section 77 (2) (a) of the Constitution, I shall ignore wholly and without any apology any evidence tendering to support any allegations, contained in the said paragraphs.

As a result, I do find and hold that the only issues before me is whether under Keiyo Customary Law, the Defendant and the deceased were still husband and wife at the time of death / and if so whether the Defendant is obligated to bury her on the suit property where the matrimonial home had been. The Defendant testified that the home on the land had been torched and burnt down due to the killing of John and to prevent a curse befalling the family.

D.W.1 testified that after the deceased had been arrested by the Police, she did not return home. On cross-examination, he testified that had she not carried out the illegal acts (the murder), he would have buried her. He refuses to bury her because she was involved in the murder / killing of John, his nephew. If he did so his family would be befallen by a curse and they would be finished. They would not live on the land unless a certain cleansing process and rite was carried out over the years. He admitted that the deceased had been his wife. That a married woman is usually buried at her husband's home and on his land. This is under Keiyo Customs.

P.W.3 – the elder on the Plaintiff's side testified that under Keiyo Customs, a husband must bury his wife when she dies and vice versa. That it is a duty. He said that a woman with children can never be sent away or divorced.

D.W.3 – The elder on the Defendant's side was a Marakwet and not a Keiyo. He was also one of the elders involved in the decision to banish the deceased and accused her of involvement in the death of John. In the pecuniary, I found he is not an expert on Keiyo Customs and also not an independent witness on the subject of Keiyo Customs. He however, conceded that under Keiyo Customs, a woman is buried at her matrimonial home upon death.

During the hearing, the Defendant alleged that he had transferred the suit property to his brother in compensation for the death of John. There was no evidence to support this. I reject the attempt by the Defendant to undermine the fair hearing of this suit.

On the basis of the foregoing, I do hereby find that:-

1. The Plaintiffs are the biological children of the Defendant and therefore have the locus to present the suit.

2. The deceased and the Defendant were married under Keiyo Customs.

3. At the time of the death of the deceased, the marriage between the deceased and the defendant had not been dissolved.

4. That the Defendant is the registered proprietor of land Parcel Number Karono/Sosiani/ Block 6 (Kaplolo) 114.

5. That the deceased's matrimonial home up to the time of her death was on land parcel No. Karono / Sosiani / Block 6 (Kaplolo) 114.

6. The Defendant has refused to allow the burial of the deceased on Land Parcel No. Karono (Sosiani /Block 6 (Kaplolo) 114.

7. That under Keiyo Customs, the Defendant is obliged to bury or allow the burial of the deceased on the said parcel of land.

In terms with the decision of the Court of Appeal in **OTIENO -V- ONGO (1987) KLR – 407** and his own admission, I find that the defendant was born and bred a Keiyo. He has remained a member of the Keiyo Community and is subject to the Customary Law and practices of the Keiyo people. If there is a Keiyo Customary practice of "**trying and convicting**" suspects of murder and banishing them from the Community without the due process as enshrined in the Constitution of Kenya would not only be unconstitutional but also repugnant to justice and morality.

I do therefore enter and record judgment in favour of the Plaintiffs as against the Defendant as follows:

(a) A Declaration do issue that under Keiyo Custom the Defendant is bound to bury the deceased.

(b) The Defendant is hereby compelled to bury the deceased on Land Parcel NO. Karono/Sosiani/Block 6 (Kaplolo) 114.

In default of this, the Plaintiffs are hereby given the right and liberty to remove the deceased's body from Iten Hospital Mortuary and without any hindrance, interference from the Defendant, his agents and/or servants do bury the deceased on Land Parcel No. Karono / Sosiani/Block 6 (Kaplolo) 114.

(c) Pursuant to (a) and (b) above, the Officer in Charge, Moiben Police Station is directed to provide all necessary Security to enable the Plaintiffs bury the deceased and compliance to these orders.

(d) Each party to bear hi/her costs.

DATE AND DELIVERED AT ELDORET THIS 7TH DAY OF DECEMBER 2007.

M.K.IBRAHIM,

JUDGE.