



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA**

Civil Appeal 31 of 2001

GABRIEL K. MURAKHO.....APPELLANT

VS

JUSTINE NAFULA MASINDE

ANTHONY OKWABA.....RESPONDENTS

JUDGMENT

This is an appeal against the decision of J. S. Wanjala, District Magistrate sitting at Sirisia delivered on

7th May 2001, dismissing the entire suit.

The facts leading to this appeal appear to be short and straight forward. By an amended petition for matrimonial property dated 13th September 2000, Gabriel K. Murakho, the appellant herein sued Justine Nafula Masinde and Anthony Okwoba, the 1st and 2nd Respondents in which he claimed for the return of the following matrimonial properties:

- I. Pillar known in Bukusu language as ‘Enjeko’**
- II. Small hut known in the same language as ‘Namwima’**
- III. Sweeping grass known as ‘Buyefwe’**
- IV. Natural tree known as ‘Milaa’**
- V. Traditional stool known as ‘Namwima’**
- VI. 48 bags of maize or its value**
- VII. 10 pairs of long trousers**
- VIII. 10 pairs of shirts**
- IX. 4 goats**
- X. 2 jackets**

XI. 2 bed sheets

XII. A text book

XIII. Inner wears

XIV. Radio permit

XV. Important receipts and documents in a box.

XVI. Cash

When served, the 1st Respondent filed a defence denying the appellant's claim. The 1st Respondent claimed that whatever property she had belonged to her late husband Priton Wakwoba. She also counter-claimed against the appellant for payment of Ksh.141,000/= and for the release of her Identity Card, bank plate and a voter's card.

At the hearing, the appellant presented the evidence of three witnesses whereas the Respondents testified without calling for the evidence of independent witnesses. The trial magistrate considered the evidence tendered by both sides and proceeded to dismiss the suit. He however made no finding on the counter – claim. Being aggrieved, the appellant preferred this appeal.

On appeal the appellant listed seven grounds. Mr. Areba Advocate for the appellant argued all the grounds of appeal together. It was argued that the trial district Magistrate failed to consider the appellant's evidence and those of his witnesses. Mr Areba was of the view that there was evidence showing that there was a marriage contracted between the appellant and the 1st Respondent. He also argued that there was evidence that the 1st Respondent deserted the matrimonial home with the matrimonial property.

Mrs Roselyne Aburili Advocate for the Respondents opposed this ground by stating that there was no reliable evidence to establish the appellant's claim. she urged this court to dismiss the appeal.

I have considered the rivaling submissions over this ground. I have also considered the pleadings and the evidence tendered before the trial District Magistrate. It is the evidence of the appellant that on the 1st day of January 1993 he got married to the 1st Respondent according to the Nyala Customs and Rites. He said he paid two heads of cattle, one goat and one coat. He told the trial court that the couple lived in the matrimonial home at Khamunialo Village. The appellant claimed that the 1st Respondent deserted the matrimonial home on the 12th April 2000 taking with her the matrimonial property with the assistance of the 2nd Defendant. The appellant told the trial magistrate that he reported for duty at about 7.30 a.m on 12.4.2000 but when he came back he found the Respondents having removed everything in the house leaving his property in his bed room. He said he attempted to restrain her but she was adamant on leaving the matrimonial home. The Appellant said he saw the 2nd Respondent drive a motor vehicle to collect the goods. The appellant told the trial court that he followed the 1st Respondent to her parents' home in Nangeni on 13.4.2000 where she flatly rejected his overtures to have her return to his residence. The appellant summoned the evidence of P.W2, Joseph Wanjala Murakho. P.W2 said he found the 1st Respondent having packed her luggage and having heard her saying she was going for good. P.W2 said he saw the 2nd Respondent loading the luggage. He said he saw a radio and a rain coat left behind.

P.W3, Samwel Nayombe Chenonoi, the Chief Luguse Location said he received a complaint from the appellant against the 1st Respondent. He said after hearing the complaint he directed the 1st Respondent to return the matrimonial property and go back to her husband who is the Appellant.

The trial District Magistrate took time to analyse the evidence tendered before him and came to the conclusion that the appellant had failed to prove his case. Being the first appellate court, I have reconsidered and reassessed the evidence tendered for and against the suit. It is abundantly clear that the Trial District Magistrate considered the evidence of the appellant and his witnesses. The Appellant had prayed for a return of the Matrimonial property. It was incumbent upon the Appellant to establish proof of the existence of the alleged property and to establish that they were taken by the Respondents. It is obvious from his evidence that whatever property were owned by the appellant were separated and left in his bed room. There was no evidence showing that the property were loaded on the aforesaid motor vehicle said to have been used to transport the matrimonial property. The Appellant did not present evidence to prove that he saw the goods he now claims to be returned being loaded on the motor vehicle. P.W2's evidence was the same as that of the Appellant. The duo both claimed they saw goods on top of a motor vehicle. There was no specific identity of the items *vis a vis* those now being sought to be returned. I agree with the trial District Magistrate that the appellant failed to establish his claim. There was no evidence showing that the Respondents specifically took away the goods complained of.

It is the submission of Mr. Areba that there was evidence showing that there was a marriage between the appellant and the 1st Respondent. In this regard the appellant claimed that he got married to the 1st Respondent on 1st January 1993 according to Nyala Customary Law and rites by meeting all the conditions required by that custom. On the other hand the 1st respondent disputed the appellant's claim and averred that her relationship with the appellant was that of a boyfriend and girlfriend. The court of appeal for East Africa Stated the legal position in respect of these issues in the case of *Hortensiah Wanjiku Yawe vs= The Public Trustee C. A no.13 of 1976*. In this case the court of Appeal for East Africa held *inter alia* :

- I. The onus of proving customary law Marriage is generally on the party who claims it.
- II. The Standard of proof is the usual one of a civil action namely '*on the balance of probabilities*'
- III. Evidence as to the formalities required for a customary law marriage must be proved to that standard.
- IV. Long cohabitation as man and wife gives rise to a presumption of marriage in favour of the party asserting it.
- V. Only cogent evidence to the contrary can rebut the presumption.
- VI. If specific ceremonies and rituals are not fully accomplished, this does not invalidate such a marriage.

In this matter, it is the word of the Appellant against the word of the 1st Respondent. The trial court was not urged to decided on whether or not a marriage existed. But it is one of the essential elements which must be proved in order for a court to handle a dispute over matrimonial property. The Appellant's evidence was heavily based on the fact that there was a marriage according to the Nyala Customary law. I have carefully re-assessed and reconsidered the evidence tendered before the trial court. I am not convinced that the Appellant proved that there was a valid Nyala Customary Marriage. The Appellant should have presented independent evidence of persons who attended the ceremony and of course people versed with Nyala Customary Marriages. If indeed the appellant felt aggrieved, then he should have claimed for a return of the dowry. Again, I am not convinced that the appellant proved that there existed a customary marriage between him and the 1st Respondent. Though the trial district magistrate did not consider this issue nevertheless he came to the correct conclusion in dismissing the action for want of proof.

The other ground which was argued is as to whether the district Magistrate's court had

jurisdiction to determine a dispute over matrimonial property. It is the submission of Mrs Aburili Advocate for the Respondents that the trial court did not have jurisdiction to hear and determine the dispute. Mr. Areba Advocate did not address me over this ground. I think it is an issue which should have been raised before the trial court but unfortunately that did not happen. What emerged from the evidence and the pleading is that the dispute revolved around matrimonial property. It is the evidence of the appellant that the Respondents took away the matrimonial property. On her part, the 1st Respondent is of the view that the property she took were the property she inherited from her first husband. The question now being raised is whether or not the district magistrate's court had jurisdiction to entertain such a dispute? I have carefully considered the issue and I am of the view that, when it comes to Matrimonial Property the applicable law is the Married Women's Property Act of 1882 (England) as a statute of general application. Section 17 of that Act provides that "*in any question between husband and wife as to the title to or possession of Property' either of them may apply to the High court or a County Court and the Judge "may make such order with respect to the property in dispute as he thinks fit."* I agree with the submissions of Mrs aburili that the District Magistrate had no jurisdiction to hear and determine the dispute. The dispute is a matter specifically left for the High Court to decide. The Trial Magistrate should have proceeded to strike out the entire suit because it was incompetently before it. I have already said that issue touching on jurisdiction was not argued before the trial court. A cardinal Principle in law is that the court is presumed to know the law hence a court can decide a matter touching on jurisdiction *suo moto* and without any prompting.

The final point argued on appeal is that the trial district magistrate did not comply with the provisions of Order XX rule 4 of the Civil Procedure Rules. This ground flies on the face of record. It is abundantly clear that the trial magistrate drew up the points for determination and actually determined the same with reasons. The fact that he did not cover all the issues raised did not mean that he did not comply with the law. Consequently, I see not merit on this ground.

The record shows that the trial magistrate did not make a finding on the counter-claim. I think the trial District Magistrate was carried away by the main action until he forgot to consider the matter. Being the first appellate, I shall consider the matter. In the counter-claim, the 1st Respondent prayed for payment of Ksh.141,000/= release of K.C.B bank plate, identity card and a voter's card. When the 1st Respondent was called upon to testify she said;

"It is true, I heard what he told this Court. I deny the fact, he is the one with my property i.e 1.1 acres of land, houses with 60 Iron sheets, 4 heads of cattle i.e 3 cows, a bull and a goat. He has my brick-making machine. I want him to return to me these items. That is all."

It is clear from the above quotation that the 1st Respondent failed to present credible and cogent evidence to prove her counter-claim. Besides this fact, it is also obvious that the District Magistrate did not have jurisdiction to hear and determine the counter-claim. The pecuniary jurisdiction of the court was also way below the amount claimed. In the end, the counter-claim should be struck out.

For the above reasons the appeal is ordered dismissed for lacking in merit with costs to the Respondents.

I have already pointed out that the matter was incompetently before the district Magistrate's court. In view of that, I propose to set aside the judgment and substitute it with an order striking out the entire suit including the counter-claim. Each party to meet his or her own costs.

Dated and delivered this 7th day of July 2006.

J. K. SERGON

JUDGE