



King'ari ((Suing as the personal representative of the Estate of Michael Nyangena Nyariki (Deceased)) v Anyona & 4 others (Appeal 25 of 2021) [2023] KEELC 644 (KLR) (8 February 2023) (Judgment)

Neutral citation: [2023] KEELC 644 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
APPEAL 25 OF 2021
M SILA, J
FEBRUARY 8, 2023**

BETWEEN

**MATHRITA MORAA KING'ARI APPELLANT
(SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF
MICHAEL NYANGENA NYARIKI (DECEASED))**

AND

**JANIFER MORAA ANYONA 1ST RESPONDENT
ABEL MOCHUMBE ONSONGO 2ND RESPONDENT
ESTHER NDUNKU ONSONGO 3RD RESPONDENT
REUBEN MAROKO OMORI 4TH RESPONDENT
FRANCIS OKEYO BINYANYA 5TH RESPONDENT**

(Being an appeal against the judgment of Hon. S.N. Makila, Senior Resident Magistrate delivered on in the suit Kisii CMCC No. 163 of 2018)

JUDGMENT

(Being an appeal against the judgment of Hon S.N Makila, Senior Resident Magistrate delivered on in the suit Kisii CMCC No 163 of 2018) (appellant claiming that she got married to the deceased after his death pursuant to Gusii customary law; appellant suing the respondents claiming that they have wrongfully evicted her from her matrimonial home; appellant adducing evidence that one can be married after death where he had no wife or children and that such marriage is proved inter alia by payment of dowry; if indeed such marriage exists, appellant not leading sufficient evidence regarding payment of dowry to demonstrate marriage to the deceased; appeal dismissed)



1. The appellant filed suit against the respondents through a plaint filed on July 9, 2018 before the Chief Magistrate's Court at Kisii. In the plaint, the appellant pleaded to be the legal representative of the estate of Michael Nyangena Nyariki (deceased) and averred that she has filed suit on behalf of the estate of the deceased and on her own behalf. She pleaded that the deceased was the registered owner of the land parcel West Kitutu/Bogeka/3348 (the suit land) and that this was ancestral land having been inherited from the father of the deceased. The deceased died on September 4, 2016 and she claimed that she got married to the deceased thereafter on September 12, 2016 in accordance with Kisii customary law and that dowry was paid to her family. She pleaded that at the time of his death, the deceased had her as his wife, and he had four children whom she named in the plaint, and whom she contended to be beneficiaries of the estate of the deceased. She pleaded that on November 10, 2017, the respondents, the 1st, 2nd and 3rd, being siblings of the deceased, the 4th a cousin to the deceased, and the 5th, a local pastor, in an effort to intermeddle with the estate of the deceased, entered into the appellant's homestead in the suit land, and attempted to evict the appellant and her children. It is also alleged that they destroyed some properties, including the house, and also took away a motor vehicle belonging to the deceased. She subsequently registered a caution in the register of the suit land. She pleaded that again on May 31, 2018, the respondents trespassed into the suit land and cut trees, which they went and sold, and threatened to destroy the only house remaining in the homestead. She feared that the respondents would evict her. In the suit, she sought orders to permanently restrain the respondents from trespassing into the suit land and evicting her, or taking possession of the suit land, costs and interest.
2. The respondents filed defence on January 25, 2019. They pleaded that the deceased was dead at the time that the appellant alleges to have married him and he was thus incapable of entering into a contract of marriage. They denied that the appellant was wife of the deceased or that the children named by the appellant were his children. They denied that the plaintiff and her children were living on the suit property and averred that they were chased away by community members. They denied trespassing into the suit land as they were born there.
3. On April 19, 2019, the appellant filed an application to amend plaint which was allowed. In the amended, plaint, she added that on December 4, 2018, while the suit was pending, the respondents in company of about 50 youth in an attempt to intermeddle with the estate of the deceased, forcefully entered the suit land and cut down all remaining trees, burned down the only remaining house, and forcefully evicted the plaintiff and her children. She pleaded that she now lives in a rented house in deplorable conditions. She amended the prayers in the original plaint to include an order of a mandatory injunction to have her reinstated into the suit property, special damages of Kshs 81,722/- being the value of the cut trees, and general damages for eviction and loss of use of the suit land.
4. The appellant gave evidence twice, first before she amended her plaint, and subsequently after amendment of the plaint. In the first instance, the appellant stated that she was taken to be married in that home by the 1st respondent and that she lived in the home for one year. She was however chased away. She denied being in a meeting held on November 15, 2017 despite her being noted to be in attendance. In that meeting, the 1st respondent had complained that her husband, one Anyona, had placed the appellant in the house of the deceased, ostensibly to take care of it, yet in reality he had placed her there as his second wife. She therefore wanted her out. Cross-examined, she testified that she does not know the husband of the 1st respondent and she only came to know the 1st respondent together with the 4th and 5th respondents, when they brought her to be married to the deceased. She denied that she and the husband of the 1st respondent are lovers. She did not know the deceased during his lifetime and only came to the deceased during his burial. She married the deceased after his death. This she claimed was in accordance with Kisii customary law. The deceased was aged 24 years at the time of death while she was 34 years with four children. She denied fraudulently obtaining the certificate



- of death of the deceased, or using fraud to secure the letters of administration *ad litem*. She denied colluding with the chief to claim that she was married to the deceased. Re-examined, she stated that the clan of the deceased married her notwithstanding her age and the children that she had. She stated that the 1st respondent was involved in her customary marriage to the deceased but that she is now bitter because she believes that she is her husband's lover.
5. Upon her recall, she stated that she had been evicted from the suit land by the respondents. She produced the assessment report to prove the special damages. She also produced as exhibits various letters written by the chief of the area and a burial program alleged to be of the deceased which names her as wife.
 6. The appellant called one John Onyiego Kingoina, who introduced himself as a retired teacher, accredited mediator, and chairman of Gusii mediators association. He stated that he was well versed with the traditions of the Abagusii. He produced a report which he claimed to be a product of research and which he stated guides traditional marriages of the Abagusii. He testified that if a man dies without marrying, the mother of the deceased, or close family members, would identify a lady to be the wife of the deceased man. The said lady would be brought immediately before or after the burial of the man and she would be recognized as the wife of the deceased. The marriage would be confirmed by payment of dowry. In case of conflict between the lady and the family of the deceased, the dowry would be refunded to signify dissolution of that marriage. If dowry is not refunded the said lady would remain to be wife. Cross-examined, he stated that he has not got any formal training in traditions. He did not know who brought the appellant to the home.
 7. With the above evidence, the appellant closed her case.
 8. In her evidence, the 1st respondent testified that she is married to one Anyona who lives with the appellant in Kisii town and therefore the appellant is her co-wife. She testified that after her brother was buried, she and her husband decided to find someone to look after the house of her brother and that is how the appellant ended up living in the house of the deceased. She claimed that thereafter, her husband started cohabiting with the appellant at the home of her late brother. She called the appellant who confirmed this position. This, she averred, was contrary to Abagusii custom and a meeting of clan elders was called to discuss the issue. It was resolved that the house be destroyed and the appellant was chased away from the house by the clan members. She stated that she is the next of kin of the deceased and she is the one who took the certificate of death. She produced the documents showing return of the original ID card of the deceased before collecting the certificate of death. She thus averred that the certificate of death displayed by the appellant was fraudulently obtained. She denied that the burial program produced by the plaintiff was genuine. She admitted cutting down the trees in the homestead though she denied that they were valued at Kshs 81,000/=. She denied that the appellant married her late brother.
 9. DW-2 was the 3rd respondent, a cousin to the deceased. His evidence was that he was informed after the burial of the deceased, that a lady (the appellant) has been brought to the home to cater for the homestead. She lived there briefly. One night, they heard noise from the homestead, and on going there, found Anyona quarreling another man who was in the house. It dawned on them that Anyona was having an affair with the appellant and they called a village meeting where the appellant was ordered to leave the house which was later destroyed by village mates. He stated that it was wrong for the husband of the 1st respondent to host the appellant in the house of the deceased.
 10. With the above evidence, the respondents closed their case.
 11. Counsel were invited to file submissions which they did. The trial magistrate narrowed down the following issue for consideration :-



- a. Whether the appellant was married to the deceased under Kisii customary law.
 - b. Whether the eviction of the appellant from the deceased's land was lawful.
 - c. Whether the appellant is entitled to the reliefs sought.
 - d. Who should bear the costs of the suit.
12. On the first issue, the trial magistrate referred to the evidence of PW-2, that a marriage after a person was dead would be confirmed by payment of dowry. She found that the appellant did not testify on dowry payment and only produced letters from the chief that referred to movement of animals as dowry on September 12, 2016. She was of opinion that there was need to call the chief who wrote the letters. She also was of opinion that there was need to have the appellant give elaborate testimony on the payment of dowry and call witnesses to support the allegation that dowry was paid to the family of the deceased. She found that there was insufficient evidence that the family of the deceased paid dowry to the family of the appellant. On eviction of the appellant, she found that it was arrived at upon the villagers being concerned that the appellant was breaching the acceptable societal norms. She did not find her eviction to be illegal and was of the view that it served to preserve the social fabric in the village. She concluded that the appellant was merely a caretaker. She thus found that the grant of letters of administration ad litem to have been irregularly obtained. She added that the plaintiff is at liberty to prove her interest, if any, though the normal succession process, though she held that in her view, the appellant had not proved any marriage to the deceased. She dismissed the appellant's case with costs.
13. Aggrieved, the appellant has preferred this appeal. There are 15 grounds listed. They contend *inter alia* that the trial magistrate erred in finding that the appellant had failed to produce sufficient evidence to support her marriage to the deceased; that the magistrate erred in finding that the appellant had not proved payment of dowry; that the magistrate erred in omitting the appellant's testimony on payment of dowry from the proceedings then blamed the appellant for failing to testify on dowry; that the magistrate erred in finding that the appellant lived in the home of the deceased as caretaker and not as wife; that the magistrate erred in finding that the appellant was evicted by villagers; that the magistrate erred in finding that the appellant breached the acceptable societal norms; that the magistrate erred in not finding that there was no evidence of involvement of villagers in the illegal eviction; that the magistrate erred in finding that the appellant had no proprietary interest in the land; that the magistrate erred in finding that the grant of letter of administration ad litem was obtained irregularly; that the magistrate erred in giving unsolicited advice to the appellant to prove her interest in a normal succession case; that the magistrate erred in applying section 107 of the [Evidence Act](#) to the disadvantage of the appellant and failing to call upon the respondents to prove their allegations; that the magistrate failed to issue a reasoned judgment.
14. Both Mr Mageto for the appellant, and Mr Moracha for the respondents, filed written submissions which I have taken into account before arriving at my decision.
15. In a nutshell, the case of the appellant was that she got married to the deceased after his death and that this was in accordance with Gusii customary law. She called PW-2 to affirm the existence of this custom. She contended that since she is wife of the deceased, it was therefore illegal for the respondents to evict her from what she considered to be her matrimonial home. She also allegedly filed the suit to protect the estate of the deceased. The reply of the respondents is that the appellant was never married to the deceased and that she was only brought into the homestead of the deceased to act as a caretaker. They allege that she developed a love affair with the husband of the 1st respondent within this homestead which irked the villagers and they resolved to have her removed.



16. Although the suit was said to be in respect of the estate of the deceased, for all intents and purposes, the suit was very much for the sole benefit of the appellant, whose wish is to retain possession of the suit land, which she considers to be her matrimonial home. If there was anything filed in respect of the estate of the deceased, it was peripheral at best.
17. There was evidence led that under Gusii customary law, one can be married to a deceased person. PW-2 stated that in such custom, dowry is paid to the family of the woman by the family of the deceased. The woman will then be considered the wife of the deceased and the children that she has will be considered the children of the deceased. The allegation that the appellant was married under this custom was strongly denied and since this was an issue alleged by the appellant, then the onus was on her to prove the same. The trial magistrate indeed found so and referred to the provisions of section 107 of the Evidence Act, cap 80, Laws of Kenya, which provides as follows :-

107. Burden of proof.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

To section 107 above, I would add section 109, which provides as follows :-

109. Proof of particular fact.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

18. In our case, it was the appellant who wished to have the court believe that the fact of marriage to the deceased existed. The burden was therefore upon her to prove that such marriage indeed existed. In this instance, she brought an alleged expert who stated that such kind of marriage is permissible and one important ingredient is that dowry is paid. If that is the case, then the appellant needed to demonstrate that the two families met, that they agreed that the appellant could be married to the deceased, and that they negotiated the dowry to be paid, and that the said dowry was indeed paid. In this case, there was no mention of any meeting where the two families met and agreed that the appellant could be married to the deceased. There was no evidence led as to what kind of dowry was negotiated. There was also no evidence that such dowry was paid. You would expect that the appellant would call somebody from her family to demonstrate the amount of dowry negotiated and also state the amount of dowry received. It will be recalled that apart from herself, the only other witness that the appellant called was the alleged expert, and nobody else. There was reliance placed in some letters that the chief had written and a burial programme. I have gone through these letters but they do not prove any marriage between the deceased and the appellant. First, marriage is a family affair, not a chief's affair. It is the two families which agree on what sort of dowry is to be paid and the evidence of such marriage thus needed to come from the family. In any event, the only letter from the chief that one would say alludes to dowry is that dated September 12, 2016. I have read that letter. It is actually some sort of permit to transport an animal. It says that one Enock Bichanga has been authorized to transport a cow, red in colour, from the home of Abel Mogumbe Nyariki as part of dowry payment to Encok Omogain Ogembo. That letter doesn't say who the person being married is. It certainly doesn't mention the appellant as the lady being married. The respondents had filed notice that they wished to cross-examine the chief. He was never called to shed light on this letter. One could not in the circumstances of this case say that the fact of marriage was proved by the sole testimony of the appellant and this letter written by the chief.



19. The burial programme produced by the appellant alleges that the appellant is married to the deceased. That burial programme was disputed, but in any event, one cannot say that he/she has proved marriage through a burial programme alone.
20. I am in full agreement with the trial court that the appellant hopelessly failed to prove that she got married to the deceased. Having failed to prove the fact of marriage, the rest of her case actually collapses. She and her children cannot claim to have any proprietary interest in the estate of the deceased as she had absolutely no relationship with the deceased. It is common ground that the children were not of the deceased. Neither can she have any locus to sue on behalf of the estate of the deceased or represent the estate of the deceased.
21. It is argued by the appellant that the respondents needed to prove that she was a caretaker. That is not so. It was the appellant to prove that she was a spouse of the respondent. Without such proof, then no other conclusion could be reached, other than to agree with the respondents' position that the appellant was a mere caretaker.
22. There is evidence of a meeting of the village elders having been called to discuss the conduct of the appellant while she was residing in the home of the deceased. It was of course alleged that she was having an affair with the husband of the 1st respondent. I am persuaded that such meeting was held and resolutions reached that the continued stay of the appellant in the home of the deceased was scandalous and threatened the moral fibre of the society. The finding of the magistrate on this score cannot be faulted. As I have mentioned earlier, the appellant failed to prove marriage to the deceased and with that, she cannot claim any proprietary interest in the property of the deceased. Her removal from the suit property violated none of her rights. She was in occupation as a licensee from the immediate family of the deceased and her licence ended when they no longer wished to have her continue living in the house of the deceased. She cannot in those circumstances claim that she has a right to continue residing in the home of the deceased.
23. The appellant faulted the advice of the magistrate where she was informed that she could try her luck in a succession matter. I see nothing wrong with that advice. In any event, it is just advice, she can either take it or leave it.
24. From the above, it will be seen that I am not persuaded that the trial magistrate fell into any error. In fact, I find the judgment of the trial magistrate to be very well reasoned.
25. There is no merit in this appeal and it is hereby dismissed with costs.
26. Judgment accordingly.

DATED AND DELIVERED AT KISII THIS 8 DAY OF FEBRUARY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

