



REPUBLIC OF KENYA



KENYA LAW
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**Ombachi v Samwel & 5 others (Civil Appeal E043 of 2023)
[2025] KEHC 1592 (KLR) (6 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1592 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E043 OF 2023
WA OKWANY, J
FEBRUARY 6, 2025**

BETWEEN

ROSEMARY OMBACHI APPELLANT

AND

ANNAH NYANCHAMA SAMWEL 1ST RESPONDENT

NANCY KORIR 2ND RESPONDENT

LYDIAH GESARE ORENGE 3RD RESPONDENT

JAMES NYABERI ONDIEKI 4TH RESPONDENT

MARY KWAMBOKA NYAKUNDI 5TH RESPONDENT

STELLAH ONGATI 6TH RESPONDENT

(Being and Appeal from the Judgment in the Chief Magistrate's Court at Keroka in Civil Suit No CMCC E102 of 2023 delivered by Hon. C. Ombija, Senior Resident Magistrate on 26th July 2023)

JUDGMENT

1. The Respondents herein were the Plaintiffs before the trial court where they sued the Appellant, in a burial dispute, seeking the following orders: -
 1. An Order directing the Defendant to allow and recognize the 1st Plaintiff as the 1st wife of the deceased and the 2nd, 3rd, 4th, 5th and 6th Plaintiffs as children of the deceased Robert Ombachi Ongubo.
 2. A Declaration that the 1st Plaintiff, being the 1st wife to the deceased Robert Ombachi Ongubo has a right to bury the remains of the deceased outside her house as per the Abagusii customary laws and rites.



3. An Order directing a specimen sample be taken from the deceased Robert Ombachi Ongubo for the Purposes of conducting a DNA test with the 2nd, 3rd, 4th, 5th and 6th Plaintiffs before burial.
 4. Costs of the suit.
 5. Any other relief the Honourable court may deem just and fit to grant.
2. The Appellant defended the suit through her Statement of Defence dated 29th May 2023 in which she denied the allegation made in the Plaint.

Background

3. The Plaintiffs'/Respondents' case was that the 1st Plaintiff got married to the deceased (Robert Ombachi Ongubo) under the Abagusii customary law in February 1964 and that the said marriage was blessed with six (6) children. The Respondents averred that sometime in the year 1979, the 1st Respondent left her matrimonial home following a disagreement after which the deceased married the Appellant herein as a second wife. The Respondents stated that the deceased however reached out to the 1st Respondent, with a view to seeking a reconciliation, sometime in the year 2019 after which they engaged in amicable interactions until his demise on 2nd May 2023.
4. She contended that following the death of the deceased, the Appellant herein, barred her from participating in the deceased's burial arrangements and did not recognize her as the wife of the deceased thereby triggering the filing of the suit for the orders highlighted at the beginning of this judgment.
5. At the hearing of the case before the trial court, the Respondents presented the evidence of 3 witnesses while the Appellant called 4 witnesses.
6. A summary of the Respondents' case was as follows: -
7. The 1st Respondent, Annah Nyanchama Samwel (PW1), confirmed that she got married to the deceased in the 1960s but that they separated in 1979 following a disagreement. She added that they however resumed communication with the deceased around November/December 2022 when she visited the deceased together with her children and even sent him money for treatment. She stated that dowry that the deceased paid to her parents was never returned/refunded and that she was therefore still the 1st wife of the deceased.
8. Peter Nyambane (PW2), the 1st Respondent's brother, testified that the deceased married the 1st Respondent under Abagusii customary law and that dowry was paid to his father which dowry was never returned. He added that the couple was blessed with six children before they parted ways in 1979.
9. Johnson Nyamwange (PW3) testified that the deceased was his neighbour and friend. He confirmed that the deceased married the 1st Respondent in 1964 under Abagusii customs and paid six cows as dowry.
10. The Appellant's case was as follows: -
11. Rosemary Ombachi (DW1), the Appellant herein testified that she got married to the deceased in 1972 under the Abagusii customary law which marriage was later solemnized in church. She testified that she did not recognize the 1st Respondent as her husband's 1st wife because she only interacted with her after her husband's demise. She stated that she was not aware if the two ever lived together as husband and wife and urged the court to dismiss the 1st Respondent's case. She produced her National Identity Card and her Marriage Certificate (D.Exh 1-3)



12. Geoffrey Osiri (DW2), the deceased's cousin, testified that the 1st Respondent was the deceased's wife but that they separated in 1972 and that they did not reconcile. He added that the deceased thereafter married the Appellant who was therefore the rightful wife to the deceased for 52 years.
13. Partas Nyanchama Ogechi (DW3), the deceased's niece, testified that she knew the 1st Respondent as the deceased's wife in 1970s but that the 1st Respondent left her matrimonial home in the early 70s only to resurface in 2023 when the deceased died.
14. Elkanah Nyangani (DW4), the deceased's cousin, testified that he participated in the Mediation process between the parties herein. He added that it was during the mediation process that he learnt that the deceased had married the 1st Respondent.
15. At the conclusion of the case, the trial court found that the marriage between the deceased and Respondent still subsisted and that she was, under the Abagusii customary law, the 1st wife of the deceased. The trial court then directed that both wives be allowed to participate in the burial arrangements.
16. Aggrieved by the trial court's decision, the Appellant filed the present Appeal through a Memorandum of Appeal dated 24th August 2023 wherein she listed the following grounds of appeal: -
 1. That the Learned Trial Magistrate erred in law and in fact in reaching a finding that the 1st Respondent herein is a wife to the late Robert Ombachi Ongubo by virtue of Abagusii customary law.
 2. That the Learned Trial Magistrate erred in law and in fact in reaching a finding that the 1st Respondent was never divorced from Robert Ombachi Ongubo when it was clear from the evidence on record that the 1st Respondent had never stayed with the deceased as husband and wife for a period exceeding fifty (50) years.
 3. That the Learned Trial Magistrate erred in law and in fact in not considering the Appellant's submissions.
17. The Appeal was canvassed through written submissions which I have considered.
18. The duty of a first appellate court was restated in the case of *Selle v. Associated Motor Boat Company* (1968) EA 123 where it was held thus: -

“This court must consider the evidence, evaluate itself and draw its own conclusions. Though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had 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 demeanor of a witness is inconsistent with the evidence in the case generally”

(see also *Abdul Hamond Sarif v. Ali Mohamed Solan* [1955] 22 EACA 270).

Analysis and Determination

19. I have carefully considered the record of appeal and the parties rival submissions. I find that the main issue for determination is whether the Appeal is merited.



20. The Appellant submitted that the 1st Respondent did not establish any connection with the deceased after being separated from him for over 50 years so as to justify the trial courts finding that she was still married to the deceased. Reference was made to the case of *San v. GW* (2020) eKLR, *Morris Odawa v. Samuel Ochieng Auma* (2019) eKLR and *Olive Bonareri Omoi & 5 Others v. Joseph Basweti Orog* (2010) eKLR where the courts held that in determining such cases, the circumstance of a case must be considered such as the conduct of the person during the lifetime of the deceased and the deceased's own wishes which could override customary laws.
21. It was the Appellant's case that the 1st Respondent deserted the deceased and her matrimonial after which the deceased married her as his new wife. The Appellant argued that if indeed the deceased had intended to take back the 1st Respondent as his wife, he could have taken the necessary steps to realise the same during his lifetime. She contended that the 1st Respondent's claim that she was the deceased's 1st wife, after being separated from him for more than 40 years, was malicious and an afterthought.
22. The Respondents, on their part, submitted that Section 43 of the *Marriage Act* No. 4 of 2014 recognizes customary marriages and that even though the 1st Respondent and the deceased had been separated for many years, it was not in dispute that she was still the wife as the dowry paid to her parents had not been returned. The Respondents argued that the deceased and the 1st Respondent were on the path to reconciliation during the last years before his death.
23. It was submitted that having paid dowry for the Appellant and 1st Respondent, as required under the Abagusii customary law, the deceased was fully aware of the said customary laws relating to marriage and divorce and could have initiated steps towards realizing a divorce during the period of separation. The Respondents urged this court to infer the deceased's true intentions from his conduct since the deceased did not divorce the 1st Respondent before his demise.
24. The trial court referred to Articles 2 (4) and 11 (1) of the *Constitution* and Section 3 (2) of the *Judicature Act* which empowers courts to apply African Customary Law in civil matters, as long as they are not repugnant to justice and morality and do not contravene any written law. It is on this basis that the trial court held that that the 1st Respondent was a wife to the deceased and allowed her to participate in the burial preparations and ceremony.
25. It is clear that the determination of this appeal revolves around the issue of whether the Respondents proved, to the required standard, that the marriage between the deceased and the 1st Respondent was still subsisting as at the time that the deceased died. I find that it was not disputed that the 1st Respondent got married to the deceased, under the Abagusii customary law, in 1964 and that they lived together until their separation in 1979. This piece of evidence was confirmed by the Respondents' witnesses and the testimonies of the Appellant's witnesses, DW2 and DW3. The said witnessed confirmed that the deceased paid dowry to signify and seal his marriage to the 1st Respondent which dowry was never returned upon their separation in 1979.
26. The Appellant, on the other hand, contended that the trial magistrate erred in finding that the deceased was still married to the 1st Respondent despite their long separation. According to the Appellant, there was no marriage between the deceased and the 1st Respondent as they had not lived together for a period of 50 years. I note that no material was presented before the trial court to show that the customary law marriage between the deceased and the 1st Respondent ended or was dissolved as a result of their long separation. The Respondents maintained that the customary law marriage could only be dissolved through the return/refund of the dowry. The Appellant did not tender evidence to counter the Respondents' position on customary law divorce. In *Wambugi W/O Gatimu v. Stephen Nyaga*



Kimani [1988-92] 2 KAR 292 while citing with approval the decision in *Ernest Kinyanjui Kimani v. Muiru Gikanga and Another* [1965] EA 735 the Court of Appeal in held that: -

“Where African customary law is neither notorious nor documented it must be established for the court’s guidance by the party intending to rely on it and as a matter of practice and convenience in civil cases the relevant customary law, if incapable of being judicially noticed, should be proved by evidence or expert opinions adduced by the parties.”

27. In the said *Ernest Kinyanjui Kimani case (supra)* the court held that: -

“Customary law is a part of the law in Kenya. The parties in this case are Africans and therefore the court will take judicial notice of such African Customary laws as may be applicable but subject to the provision of the law. In some cases the court will be able to take judicial notice of these customs without further proof as for instance in cases where the particular customary law is set out in a book or document of reference, but usually in the High Court or in a Magistrate’s Court, the relevant customary law will, as a matter of practice and of convenience, have to be provided by witnesses, called by the party relying on that particular law in support of his case. The court’s power to call in the aid of assessors is a discretionary power of the court and whilst it may be of great value and assistance to the court in cases dealing with customary law, yet this does not cast the burden of proof in establishing the customary law on the court and not on the litigant himself. Custom as referred to in sections 13 and 51 of the *Evidence Act* would include African customary laws and the onus of proof to establish a particular customary law rests on the party who relies on it in support of his case. Where a party relies on a local custom then that local custom must be proved by witnesses called by that party, and it would be incorrect for the Judge to act only on the opinions of the assessors. While witnesses as to the local custom could have their evidence tested by cross-examination and the other party would also have the opportunity of calling evidence to controvert their opinion, opinions of assessors would, in normal be given at the end of the case when the parties would have no opportunity to test their opinions by cross-examination, or be able to call evidence to contradict these opinions... This is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity the customary law must be accurately and definitely established. The court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward the customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially, of the apparent lack in Kenya of authoritative text books on the subject, or any other relevant case law, this would in practice, usually mean that the party propounding the customary law would have to call evidence to prove the customary law, as he would prove the relevant facts of his case.”

28. I find that in the absence of evidence to show that a long period of separation amounted to the termination of a customary law marriage, the trial court arrived at the correct finding when it held that the 1st Respondent and the deceased were still married as at the time the deceased died. My findings are fortified by the decision in *Mary Njoki v. John Kinyanjui Mutheru & 3 Others, (Mary Njoki)* [1985] eKLR where Kneller JA made reference to the decision in *Hortensia Wanjiku Yawe v. The Public Trustee Nairobi* [1976] eKLR and set out the relevant principles as follows: -

- 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 for 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; (*Mwagiru v Mumbi*, [1967] EA 639, 642)
 - iv. Long cohabitation as a man and a 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 (*Toplin Watson v Tate* [1937] 3 All ER 105)
 - vi. If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage. (*Sastry Veliader Aronegary v Sembecutty Vaigalie* (1880-1) 6 AC 364; *Shepherd George v Thye*, [1904] 1 Ch 456)
29. It is noteworthy that the dispute before the trial court was a burial dispute, and the claim that the Appellant had barred the 1st Respondent from participating in the said burial. I find that the trial court correctly analysed the evidence that was presented before it and applied the law in arriving at the determination that the 1st Respondent was entitled to participate in the deceased’s burial in her capacity as his 1st wife. As I have already stated in this judgement, no evidence was led to show that the deceased formally divorced the 1st Respondent. The evidence before the trial court was that the two parties separated following a disagreement and were working on their reconciliation as at the time of the deceased’s demise. To my mind, the said separation cannot be construed to mean that the parties had divorced.
30. The question that this court has to grapple with is the effect of overturning the trial court’s verdict considering that the 1st Respondent had already participated in the deceased’s burial as his 1st wife. Will such an outcome undo the 1st Respondent’s participation in the burial ceremony, which was the gist of her case before the trial court? I find that the burial in question having already been conducted, the instant appeal is over an issue that is now spent/moot. My take is that any issue over the 1st Respondent’s status or relationship with the deceased is a matter that may best be canvassed at an appropriate forum, particularly with respect to the succession case over the deceased’s Estate.
31. For the reasons that I have stated in this judgment, I find that the instant appeal is not merited and I therefore dismiss it with no orders as to costs.
32. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 6TH DAY OF FEBRUARY 2025.

W.A. OKWANY
JUDGE

