



**Nyagesiba & another v Arika & another (Civil Appeal
105 of 2022) [2024] KEHC 7012 (KLR) (3 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7012 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 105 OF 2022**

**TA ODERA, J
JUNE 3, 2024**

BETWEEN

ANN KERUBO NYAGESIBA 1ST APPELLANT

EDDINAH HULDAH N. OGEMBO 2ND APPELLANT

AND

MELLEN KWAMBOKA ARIKA 1ST RESPONDENT

PATRICK NYABUTO NYAGESIBA 2ND RESPONDENT

*(Being an Appeal from the judgment and decree of the Senior Resident Magistrate Honourable
P.K. MUTAI delivered on 14.12.2022 in Kisii Chief Magistrate's Case NO.842 OF 2022)*

JUDGMENT

1. The appellants herein Ann Kerubo Nyagesiba And Eddinah Huldah N. Ogembo being dissatisfied with the judgment/decree of Hon. P.K. Mutai –Senior Resident Magistrate in Kisii appealed against the whole judgment delivered on 14th day of December, 2022 following grounds: -
 - A. The learned trial magistrate erred in law and fact in holding that the 2nd appellant was not legally married to the deceased and no dowry was paid.
 - B. That the learned trial magistrate erred in law and in fact in holding that the deceased was married to two wives under the Gusii Customary Law even when the 1st respondent had confessed that dowry was not paid to her family.
 - C. That the learned trial magistrate erred in law and in fact in holding that consent entered between the 1st appellant and 1st respondent was binding upon the 2nd appellant who was not a party at the time of recording the same.



- D. That the learned trial magistrate erred in law and fact when he did not take due regard to the counter-claim which remained unchallenged and no judgment given on the same.
 - E. That the learned trial magistrate erred in law and in fact in holding that the 1st respondent was the legal wife to the deceased when there was no any proof of marriage under the Gusii Customary law.
 - F. That the learned trial magistrate erred in law and fact in ordering that the remains of the deceased be interred at Nyaguta without considering that the deceased had established a matrimonial home at Nyamataro (Embassy) and not Nyaguta.
 - G. That the learned trial magistrate erred in law and fact in giving judgment in favour of the plaintiffs without sufficient evidence on record.
 - H. That the learned trial magistrate erred in law and fact relying on authorities which touched on other customs without minding the Gusii Customary law.
 - I. That the learned trial magistrate erred in law in holding that a party is bound by their pleadings without considering the appellant's pleadings and documents on record.
2. The appellants prayed that this Honourable Court be pleased to allow the appeal and set aside the judgment of the lower court dated 14.12.2022 and substitute with the orders that: -
- a. That the judgment and decree of the trial court be set aside/ quashed.
 - b. That the appeal be allowed.
 - c. Costs of this appeal be provided for.
3. This is an appellate court whose duty is to re-evaluate the evidence on record and come to its own conclusion bearing in mind that it had no opportunity of seeing the witnesses during their testimony.
4. The facts of this case as per pleadings and evidence are that the Elijah Nyangesiba the deceased herein passed on 18.10.22 at Nyangena Hospital Kisii where he was undergoing treatment. The body was moved to Hema Hospital Mortuary for preservation. 1st respondent got into a relationship with deceased in the year 1993 and they were blessed with a child namely Patrick Nyabuto Nyangesiba (2nd respondent) on 22.9.1993 as per his birth certificate (Pexh 1). She later on started cohabiting with deceased as husband and wife built their matrimonial home in his ancestral home in Nyanguta Kisii county but did not pay her dowry. It is the case of respondents deceased was polygamous as the later started cohabiting with Edinah Ogembo Huldah (2nd appellant). 2nd appellant's position is that she started staying with deceased in the year 2004 and built their matrimonial home in Nyamataro in Kisii county. They were also blessed with Owen Nyangesiba (as per his birth certificate Pexh 2). Who died before deceased and was buried at Nyamataro in their matrimonial home. 2nd appellant's case is that 1st respondent was married to deceased for a short time in the year 2004 and left and that her relationship with deceased was formalized by a church wedding in the year 2007 and paid her dowry thus she is the only widow of deceased. It is not disputed that deceased passed on in the hands of 1st respondent who was taking care of him in hospital while the 2nd appellant was working in America.
- 2nd appellant came back from America and started making funeral arrangements with the 1st appellant who is her mother in law to the exclusion of the respondents and hence this suit.
- The 2nd respondent's case is that the deceased should be interred in her matrimonial home since she is the first widow and their son the (2nd respondent who is the first son of the deceased). The 2nd appellant also wants to burry deceased insisting she is the only widow to the deceased.



5. I have carefully re-evaluated the entire evidence on record and the submissions by both parties and the issues for determination are as follows:
 - a. Whether the deceased was monogamous or polygamous under Gusii customary law or whether he was in a monogamous marriage.
 - b. Whether the Trial court erred in failing to consider the appellant's pleadings and counterclaim and not giving judgment on the counter claim.
 - c. Whether the trial court erred in holding that parties are bound by their pleadings.
 - d. Whether the trial magistrate erred in ordering that deceased's remains be interred at Nyaguta as opposed to Nyamataro.
6. On whether deceased was monogamous or polygamous, under the Gusii customary law, it was the case of 1st respondent in both pleadings and evidence that She was the 1st wife to the deceased who had set up a home at Nyaguta since 2004. She produced photographs which she took with deceased and her father in law (Pexh 1) On cross-examination she admitted that deceased did not pay her dowry and that the 2nd appellant is her co -wife. PW2 David O. Onung'a an uncle to deceased supported the evidence of 1st respondent and said that under the Gusii Customary law a man is buried in the home of his first wife. PW3 Meshack Omari Getenga also an uncle to deceased said that 1st respondent and 2nd appellant were the 1st and 2nd wives of deceased. He said deceased should be buried in the home of the 1st wife. He said deceased had homes in Nyaguta and Nyamataro and that as per Gusii customary law he should be buried in Nyaguta.

The 1st appellant told this court that she is the mother to deceased and she recognizes 2nd appellant as a wife to deceased and that she paid her dowry of 200,000/= and 2 goats for her. On Cross-examination, she denied knowing 1st respondent. On the photographs being put to her (Pexh 1) she said she could see herself her husband and a strange boy and others whom he did not know in them. She said 2nd respondent is a stranger to her. She recognized PW2 as her brother-in-law but said that PW3 was not known to her. Dw2 who is the 2nd appellant testified that she the only widow of deceased having been married by deceased in the year 2004 and legally in 2007 in a church wedding, as per photographs (pexh 4). She denied knowing the 1st respondent and that she saw her during her son's funeral. She said she saw photograph in the year of her husband and 1st respondent. She said that her dowry was paid to her parents. I have looked at the lower court record and noted that on 28.11.22 when 2nd appellant testified she attempted to produce a marriage certificate but the same was objected to by the counsel for respondent on the ground that it was not and attached to their list of documents. The objection was sustained by the trial court who found that the document offended order 11 of the *civil procedure Rules* which provides for disclosure of documents that a party seeks to rely on to avoid trial by ambush. I agree that the rationale behind order 11 was to avoid fishing of evidence. Nothing would have stopped the 2nd appellant from listing the marriage certificate in the list of documents if indeed she had it. The "marriage certificate" was thus rightly rejected by the trial court. Article 159 of the *Constitution* would have applied if she had at least listed the marriage certificate. Though the appellants testified that dowry was paid to the parents of the 2nd appellant no witness was called to support the same as it is usually witnessed by elders and family members. The appellants also adduced careful and selective their evidence when photographs where deceased and respondents were put to them as they said they only recognized deceased in those photographs and not 1st respondent and her son. He said photographs clearly show that they were taken in family gatherings including the funeral of the son of 2nd appellant which 1st respondent attended. 1st appellant denied knowing 1st respondent but 2nd appellant said she



was a former wife of deceased. I find that the appellants were economical with the truth on the issue of dowry and whether the 2nd appellant was cohabiting with deceased.

7. In Kenya, dowry is a token of appreciation paid by a man to the parents of a woman whom he intends to marry. It is one of the essentials of the customary marriages in Kenya. It is clear that deceased paid no dowry for 2nd appellant and 1st respondent as required by Gusii customary law just as in other Kenyan customary marriages. From the evidence on record that deceased did not enter into any formal or customary marriage with either of the two ladies herein. Though the [marriage Act 2014](#) provides for registration of marriages the deceased did not comply with the same in to formalize his relationships with the said 2 women.

Can it be presumed that there was marriage between the deceased and 1st respondent and 2nd appellant respectively?

8. In the case [Hortensia Wanjiku Yawe v The Public Trustee Nairobi](#) [1976] eKLR the court held that long cohabitation and general repute will give rise to a rebuttable presumption that marriage exists between a man and a woman. However, the law has since developed in the area of presumption of marriage and the current position is that long cohabitation does not necessarily create the presumption of a marriage as was held by the Supreme Court of Kenya in the case of [Mary Nyambura Kangara v Paul Ogari Mayaka](#) (2023) eKLR. In the said case the Supreme Court in the [Kangara v Mayaka \(Supra\)](#) set out conditions that must be met to presume existence of a marriage relationship as follows:

1. The parties must have lived together for a long period of time.
2. The parties must have the legal capacity to marry.
3. The parties must have intended to marry.
4. There must be consent by both parties.
5. The parties must have held themselves out to the outside world as being a married couple.
6. The onus of proving the presumption is on the party who alleges it.
7. The evidence to rebut the presumption has to be strong, distinct, satisfactory and conclusive.
8. The standard of proof is on a balance of probability.

9. In this case, it has emerged that deceased set up homes for both the 1st respondent and 2nd appellant in Nyaguta and Nyamataro respectively and they cohabited for a long time, the parties were all consenting adults, neighbours including PW2, PW3 and DW3 knew them as couples and they said that deceased had planned to pay dowry for them before his death. There is overwhelming evidence that deceased intended to marry the said two good ladies. They both cohabited with him and neighbours and relatives knew them as husband and wives. It can thus be safely presumed that deceased was a husband to the two good ladies herein and having taken the 1st respondent first she is presumed to be the first wife and 2nd appellant the 2nd wife. The deceased was not monogamous but polygamous. The trial magistrate thus did not err in finding that dowry was not paid for 1st respondent and 2nd appellant and that deceased was polygamous.

10. On whether the trial court failed to consider the counterclaim of the 2nd appellant, I have seen the counterclaim of the 2nd appellant which raises the issues of her marriage to deceased, that 1st respondent was married to deceased shortly before 2004 when she got married and that she is the widow of deceased and that they set up a matrimonial home in Nyamataro and reserved the right hand side for the man of the house as per the Gusii customary law, that deceased expressed his wish to be buried next to his son



Owen (also deceased). I have perused the trial Court's judgment on Page 4 where the issues of marriage, will and where deceased was to be buried were listed for determination, the trial court pronounced itself on the said issue on plain and clear language in that the deceased was married to both women, that the alleged wishes of deceased to be buried next to his Son Owen (deceased) did not meet the threshold for an oral will under Section 9 of the law of succession Act and that in paragraph 10 and 11 of the plaint the 2nd appellant conceded that deceased be buried in Nyaguta. It is thus clear that the counterclaim was considered by the trial magistrate.

11. On whether the trial court erred in holding that parties are bound by their pleadings, in paragraph 7 of the defence the 2nd appellant indicated that paragraphs 10 and 11 of the plaint are admitted. Paragraph 10 of the plaint seeks restraining orders against the defendant and her sons and agents from interring the body of deceased in any other place than his ancestral home in Nyaguta sub -location and denying the plaintiff the unfettered rights to determine the burial site of their husband and father. Paragraph 11 of the plaint pleads that the plaintiffs claim is for declaration that they are supposed to burry remains of the late Elijah Nyagesiba in his ancestral home in Nyaguta kiogoro location in Kisii county. It is trite law that parties are bound by their pleadings and it is clear that the 2nd appellant admitted in her defence that the deceased should be buried in his ancestral home. Though in her evidence she stated that she wished to bury the deceased being the only widow. She cannot run away from that admission in her pleadings. The trial Magistrate did not err in law or fact when he found that 2nd appellant is bound by her said pleadings.
12. On whether the trial Court erred in ordering that the body of deceased be interred at Nyaguta, the trial magistrate found that the deceased's body be interred at Nyaguta where he established a matrimonial home of the first wife (1st respondent). It is trite law that ascertainable wishes of a deceased must be considered in determining his place of interment. Thus PW1, Pw2 and PW3 who told the court that under the Kisii customary law a polygamous man is buried in the home of his first wife and the first grandson becomes the first one to lift jembe during digging of the grave. The 2nd appellant said she should be the one to burry the deceased as per his oral "will" Trial court hell the "will" did not meet the threshold set under Section 9 of the law of succession Act. Dw3 a brother to deceased said that deceased told him that he wished to be buried in Nyamataro as the 1st respondent was unfaithful to him. I have carefully considered the issue of the will and I find that neither Dw2 nor Dw3 indicated the date when the said will was made and so one cannot tell whether deceased died within 3 months of making it and the witnesses to it are not mentioned save for Dw3. I agree with the trial magistrate that the will did not meet the threshold for admission of oral wills.

It is not disputed that the deceased was a Kenyan man and a Gusii by tribe and thus subscribed to Gusii customary law during his life time. Article 2 (4) of the constitution of Kenya enjoins the courts to apply customary law unless the same is inconsistent with the Constitution. In the absence of the will then Gusii customary law on burials prevails as rightly held by the Trial court. Section 3 (2) of the Judicature Act that provides that:-

“The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”



In the case of *Nyariba Nyankomba v Mary Bonareri Munge* [2010] eKLR where the High Court said that:

“Time and again, it has been stated that in cases resting purely on customary law it is absolutely necessary that experts versed in the customs be summoned to testify so as to assist the court reach a fair verdict since the court itself is not well versed in those customs and traditions”.

13. The appellants called PW2 and PW3 a brother and cousin to deceased who also subscribe to Kisii customary law as witnesses and they told this court that as per Kisii customary law a Polygamous Kisii man is buried in his first wife’s home. This was not controverted.
14. The trial court based it’s finding on the place of interment of deceased on Kisii customary law. It is thus not true that Gusii customary law was ignored as alleged by the appellants.
15. The respondents proved their case in the lower court on a balance of probability based on the weight of evidence. I do agree with the trial court that the place for interment of the remains of the deceased is at the home in Nyaguta where he was staying with Mellen Kwamboka Arika the first wife as per the Gusii Customary Law and Edinah Huldah Ogembo the 2nd wife should be included in the burial arrangements.
16. I uphold the Judgment of the learned trial Magistrate.
17. The appeal is dismissed.
18. This being a family matter each party shall bear its own costs of the appeal.
19. It is so ordered.

T.A ODERA

JUDGE

3. 6.24

Nyaenya: I hold brief for Ochwangi for respondents

Aboki begi is for Appellant

Court Assistant - Oigo

1st appellant - present

2nd appellant – absent

1st respondent – absent

2nd respondent – absent

