



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Lili v Mueni & 2 others (Civil Appeal 19 of 2021)  
[2023] KEHC 17369 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17369 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CIVIL APPEAL 19 OF 2021**

**GMA DULU, J  
MAY 11, 2023**

**BETWEEN**

**THOMAS MUINDU LILI ..... APPELLANT**

**AND**

**FAITH MUENI ..... 1<sup>ST</sup> RESPONDENT**

**GEORGE MAINGI ..... 2<sup>ND</sup> RESPONDENT**

**PETER NZIOKA ..... 3<sup>RD</sup> RESPONDENT**

*(From the judgment of E. M. Muiru – PM at Kilungu Law  
Court delivered on 1st April, 2021 on Civil Case No. 34 of 2019)*

**JUDGMENT**

1. In a judgment delivered on April 1, 2021 the trial Magistrate found no merits in the suit and dismissed the same, with costs to the defendants. Dissatisfied with the decision of the trial court in dismissing the suit, the appellant who was the Plaintiff in the trial court, has come to this court on appeal through Counsel DM Mutinda & Company Advocates on the following grounds:-
  1. The learned trial Magistrate erred in law and fact in failing to appreciate that the Plaintiff had satisfied the basic requirements for granting a permanent injunction.
  2. The trial Magistrate erred in law and fact by misdirecting herself to irrelevant facts which were not in issue in the case.
  3. The learned trial Magistrate erred in law and fact by treating the orders as if it was on land while it was basically on dowry ceremony and Kamba customs and beliefs.



4. The learned trial Magistrate erred in law and in fact by totally disregarding the Plaintiff's explanation of the culture and its impact, including Kamba taboos and viewing them as superstition.
  5. The trial Magistrate erred in law and in fact by disregarding the evidence filed in court including documentary one like a marriage certificate.
  6. The learned trial Magistrate erred in law and fact by dwelling on the issue of whether dowry and been paid in the first marriage yet a marriage certificate which is a conclusive proof of marriage was on record.
  7. The learned trial Magistrate erred in in law and in fact by holding that a prima facie case had not been proved.
  8. The learned trial Magistrate erred by failing to capture the witness testimony on record which would have helped her arrive at fair judgment.
  9. The learned trial Magistrate erred in law and in fact by accepting as the truth unproved or supported oral lies by the Defendants and basing her judgment on evidence that had nothing to support its validity.
  10. The learned trial Magistrate erred in law and in fact by failing to appreciate that both the 1<sup>st</sup> and 3<sup>rd</sup> Defendants did not have a home and whatever they were talking about belonged to an estate of a deceased person whose administrator was the Plaintiff.
  11. The learned trial Magistrate erred in law and in fact by failing to take notice that the first husband of the 1<sup>st</sup> Defendant died while attempting to be enjoined in the suit and his papers were on record.
  12. The learned trial Magistrate erred in law and in fact by taking to be gospel truth all what the Defendants were saying even without any proof while at the same time disregarding almost every testimony by the Plaintiff.
2. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by DM Mutinda & Company Advocates for the Appellant and those filed by Wachenje & Mariga LLP Advocates for the Respondent.
  3. In their submissions, the Appellants Counsel has emphasized the applicability of Kamba traditions and beliefs and maintained that Benson Kavyu was married to the 1<sup>st</sup> Respondent in Mombasa in 1999 and that because the 1<sup>st</sup> Respondent now wants to secretly celebrate a marriage with another man through payment of dowry as bride price at her maternal grandparents home, this act would bring calamities which would wipe out an entire family or clan.
  4. Counsel for the Respondent on the other hand, maintained in submissions that the appellant had not satisfied the requirements for grant of permanent injunctive orders.
  5. I note that none of the Counsel cited any decided court cases but Counsel for the Respondent relied on Article 24 and 36(1) on the Constitution on freedom of association which is a constitutional right.
  6. I note that in the judgment, the trial Magistrate relied on the principles enunciated in the case of *Giella v Cassman Brown Ltd* (1973) EA as applied by the Court of Appeal in the case of *Hassan Nuri & Another v Japhet Mwakala* – Mombasa Civil Appeal Number 8 of 2015 with the conclusion that as the appellant had failed to establish a prima facie case, the claim be dismissed.



7. In my view, the principles stated in the case of *Giella v Cassman Brown Ltd* (supra), relate to the grant of interlocutory or temporary injunctive orders, pending determination of the main suit. That said however, permanent injunction orders as sought herein by the appellant are equitable reliefs. Thus a person who asks the court to grant such injunctive orders has to show that he or she has legal interest in the subject matter.
8. Secondly, he or she has to show that the injunctive relief sought is the most efficacious relief that can be granted by the court in the circumstances of the case, as against all other reliefs if any.
9. In evidence before the trial court, the appellant testified as PW1. He was the only witness and alleged that the 1<sup>st</sup> Respondent was already married and that she now wanted to celebrate another marriage in the homestead in question which would bring calamities to him and the entire family or clan under Kamba customary beliefs.
10. The 1<sup>st</sup> Respondent testified as DW1. She called two witnesses DW2 Peter Nzioka, and DW3 George Maingi. They maintained that DW1 Faith Mueni Tom merely lived with a man but had not married. That she now wanted to get married under Kamba traditions and that the subject house in which she wanted the Kamba marriage ceremony to take place did not belong to the Appellant but to a deceased grandmother of DW1. They also maintained that there is no truth in the allegation of a curse befalling the family.
11. I will start by stating that the burden was on the Appellant to prove all his allegations. This is the intendment of Section 107 and 108 of the *Evidence Act* (Cap 80) that he who alleges has the burden to prove his allegations. This being a civil case the Appellant was required to prove his allegation on the balance of probabilities.
12. Though the appellant stated in evidence that the 1<sup>st</sup> Respondent [DW1] was married to another man in 1999 under Kamba Customary Law, he has not brought in court any witness to support his allegation of such a marriage. The ground of appeal talk about a marriage certificate, but I see none. In my view, therefore, the appellant failed to prove on the balance of probabilities that a Kamba marriage ceremony or other form of marriage occurred in 1999 between DW1 and another man, as such traditional ceremonies ordinarily involve a number of people and it would have been known by many others in the family and clan, even those who did not attend the said traditional marriage ceremony. The fact that two people lived together for sometime and got children, on its own cannot in my view prove that their relationship is a marriage, especially where none of the two has claimed herein to have been married to the other.
13. With regard to the appellant's complaint about the house where the Kamba marriage ceremony is to be held, it is clear from the evidence on record from both sides, that the said house does not belong to the appellant. The fact that he is the administrator of the estate of the late owner of the house, even if true does not confer ownership rights to him. He is merely required to protect the property for the use and benefit of the beneficiaries, including the 1<sup>st</sup> Respondent. Being an administrator does not give the appellant a superior right of use as against the other beneficiaries.
14. Thus since the house does not belong to the appellant nor does he live there, in my view he cannot prevent a marriage ceremony being conducted in that house. Legal interest in the subject house to justify injunctive reliefs was not demonstrated by the appellant.
15. With regard to the allegation of the 'kithitu' curse, firstly the person who is said to have threatened to employ the 'kithitu' oath is now dead. Secondly, such allegation on the effects of 'kithitu' would have to be proved by experts in Kamba traditions and customs. There being no evidence on record from



any expert in Kamba traditions and beliefs, I find that the Appellant has not proved this allegation of traditional curse on the balance of probabilities.

16. From the above findings, the appellant has not proved his legal interest in the intended marriage ceremony nor ownership of the house where the ceremony is to be conducted, nor the allegation of a curse on the balance of probabilities. Like the trial Magistrate therefore, I do not need to go into considering whether the injunctive relief sought is the most efficacious, as the appellant has not established his complaints or allegations through evidence. The appeal is for dismissal.

17. Consequently and for the above reasons, I dismiss the appeal herein with costs to the Respondents.

**DATED, SIGNED AND DELIVERED THIS 11<sup>TH</sup> DAY OF MAY, 2023 VIRTUALLY FROM VOI.**

**GEORGE DULU**

**JUDGE**

**In the presence of:-**

Mr. Mwendwa for appellant

No appearance for respondent

**Mr. Otolo court assistant**

