CMI v GKI (Civil Appeal E015 of 2020) [2023] KEHC 21001 (KLR) (1 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21001 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL E015 OF 2020

WM MUSYOKA, J

AUGUST 1, 2023

BETWEEN

CMI ..... APPELLANT

AND

GKI ..... RESPONDENT

(Being an appeal from the ruling and order of Hon. E Malesi, Senior Resident Magistrate, SRM, delivered on 4th November 2020, in Kakamega CMCCC No. E028 of 2020)

JUDGMENT

1. The suit before the trial court was by the respondent against the appellant and others, for an order to access the matrimonial home to set up a house for the purpose of giving, SIM, her alleged deceased husband, a decent sendoff in accordance with the relevant customs. The appellant resisted the suit by a defence, in which she denied that the respondent was married to the deceased. A trial was conducted, and the court found and held the respondent to be the first wife, who had priority to bury the deceased, and also gave directions on where the body was to be interred, and directed that the same be released to the respondent.

2. The appellant was aggrieved, hence the appeal. The appellant avers that the place that the court directed the body to be interred was not registered in the name of the deceased nor that of the respondent; the respondent did not have a compound where the appellant had established a home; the Abashimuli clan customs were not considered in determining where to construct a house; elevating the respondent to a customary law wife when dowry had not been paid for her; extraneous considerations were made, and the court did not consider other parcels of land where the respondent had a home.

3. Directions were given for filing of written submissions. The appellant complied, for there are written submissions in place, which I have read and noted the contents thereof. The central argument is that the respondent was not married to the deceased, and the sub-arguments are that the court erred in directing the respondent set up a house in a compound belonging to the appellant, not acknowledging

the Abashimuli customs on when, where and how to put up a house for a wife, and that the land associated with the respondent was elsewhere.

4. There are 3 issues for me to consider, whether there was a marriage between the respondent and the deceased; who owns the land where the respondent was directed to put up a house, and whether Abashimuli customs were ignored.

5. On the first issue, the respondent testified on how she and the deceased married in 1991, and lived at the house of a relative at Lusui, before moving to his father's land at Matioli, where they put up a matrimonial home, and that house was still standing as at the date of her testimony. They later moved to Nairobi. The deceased later bought land in Lusui and put up a home there. She said that the land was still in the name of the seller as at the date when the deceased died. The said land was allegedly bought in 2004, and a house built on it in 2007. She said that she was party to the establishment of a matrimonial home there. She fell out with the deceased at some point, whereupon he began to relate with the appellant. He saw them together for the first time in 2016/2017. The deceased called her in March 2020, and she visited him at the home at Lusui, where the appellant was, and she spent a day there, where she slept in the kitchen. She stated that the deceased married a Topistar, PW3, in 2002, and had a child with her. They separated in 2011, and she married someone else. She said that a house had not been constructed for PW3. She stated that as at the time the deceased died, he was living with her son, PW2. The children were returned to her before the deceased died.

6. PW2, GMI, stated that he lived at Lusui with the appellant. He said that at the time of his birth in 1996, the respondent and the deceased were living at Matioli. The respondent and the deceased then left him at Matioli, and went to live in Nairobi. He joined them at Nairobi, and even schooled there, for a while, before he moved to Lusui Primary School. He described PW3 as the mother of his sibling, ZS, saying that she had lived with them as a house-help. He described the appellant as his stepmother, saying that she was introduced as such to him by the deceased in 2017. He said that he and his elder sibling, Mercy, DW2, from another mother, lived together with the deceased and the appellant at Lusui, while the respondent lived in Nairobi. He said that prior to his death, the deceased had not been in good terms with the respondent for about 1½ years. He said that he did not know any other land of the deceased except the Lusui land. He said that he was present when the house at Lusui was constructed, PW1, the respondent, was not around when the construction started and when it ended, and that after its completion, the deceased brought the appellant home. He said that the deceased came back to Lusui in 2017/2018 after its development ended. He stated that the deceased used to visit the respondent in Nairobi. He said that he began staying on the Lusui land in 2011, and that the deceased had intended that the respondent settled on the said land, something which the appellant was not happy about. He said PW3 used to visit the Lusui home, and would sleep in the semi-permanent house within the compound. He said that the deceased never told him of any land that he owned, apart from the Lusui property.

7. PW3 was TMS. She described the deceased as having been her husband. She met him in 2000, and stayed with him till 2011, and had 1 child between them, ZSI. She lived in Nairobi with the deceased. They separated in 2011 and she remarried. She described the respondent as a wife of the deceased, with whom she and the deceased stayed with in Nairobi. She said that she was not a house-help, but had been called to Nairobi by the deceased. She said that the respondent had no house at Lusui, and that the appellant occupied the main house there. She could not tell when the houses were put up, as she was not present then. She said that the land was purchased after she was married, and that she visited the land in 2007, and that she spent a night in a semi-permanent house on the land. She first met the appellant in 2016, and heard that she was a wife of the deceased, but the deceased introduced the appellant as such in 2017. She said that the deceased had told her that her son would build on the land

at Lusui. She said that the deceased never paid dowry for her. She said that when she and the deceased separated, the deceased had not yet married the appellant. She said that she was not taken to any other home, apart from the Lusui home. She further said that the deceased had visited her parents.

8. PW4, Noordin A. Miheso, was called as an expert in Abashimuli customary law. At age 55 years, he was the oldest in the Abashimuli clan. He described himself as a staunch Muslim, although his father was Christian. He said that the respondent was married in 1991, and that the deceased had no home at Matioli. He said that the land for the deceased was at Lusui, although he was not involved in the purchase of the land, nor its development. He said that he also knew Topistar, PW3, in 2007/2008, and the appellant 3 or so years before the deceased died. He said that the clan would have to construct a house for the respondent before the burial. He said that a home could be established without apportioning the land.

9. Geoffrey Masheti Wendo testified as a witness summoned by the court. He said that he was at teacher at Lusui Primary School, where he taught a child of the deceased, PW2, and that was when he met the deceased. He stated that the appellant called him on 3rd October 2020, and informed him that the deceased was not well. He took him to hospital, but was not accompanied by the appellant. He then called PW2, who came to hospital to nurse the deceased.

10. The appellant testified as DW1, and produced a dowry payment agreement and a sale agreement for the land allegedly bought for her by the deceased. She stated that PW4 was never close to the deceased, and was not a clan elder. She described the respondent as a co-wife, who was separated from the deceased, but she had not been married when the dispute which led to the separation erupted. She said that the Iguhu land had been acquired before she was married, and that it was being used for farming, and was often leased out. She stated that when the respondent came to the home at Lusui in March 2020, she slept at the kitchen, but added that she did not try to force herself into the main house. She said that she lived with PW2 on and off. She said that when she was taken to her current matrimonial home, she found a semi-permanent store there, but she could not tell when the same was put up. She said that that the respondent was not claiming her house, but for a house to be built for her at the land. She said that the respondent should not have a house put up for her on her land, and the best that could be done would be to have a tent pitched for her. She said that she was aware of the custom, which required that a widow ought to stay confined in her house, without going out, for 3 days, after the burial of her husband. She said that one widow cannot stay in the house of her co-widow during the 3 days. She said that the respondent was married to the deceased customarily, and the 2 were separated customarily.

11. DW2, MMI, described herself as the first-born biological child of the deceased. She identified the appellant and the respondent as her step-mothers, saying that the appellant was married after the respondent. She said that her own mother remarried. She said that she knew of only one home of the deceased, where he lived with the appellant. She said that she had heard that the deceased had put up a home for the respondent at Matioli. She said that she was present when the foundation was done, for the house for the appellant, which was done in the presence of the appellant and the father of the deceased. She said that the respondent did not visit the property within that period, and that she never slept in the house put up on that land. She said that the appellant was introduced as a fiancé when the foundation was being dug. When the construction was completed, she, the deceased, PW2 and the appellant entered the new house. She understood that the said house was meant for the appellant. She said that the deceased had 3 parcels of land, at Muraka, Lusui and Kasavai. She alleged that the respondent sold the Muraka property. She also claimed that the deceased had told her that he had built a house for the respondent at Kasavai. She said that the deceased had intended that his 3 children, that is herself, PW2 and the son of PW3, to occupy the land on which the appellant lived. She said that the deceased did not have a cordial relationship with the respondent, and whenever the 2 met there would

be insults. She said that there used to be a semi-permanent house on the land, but she could not tell who built the house. She could not tell whether PW2 used to live on the land, before she was brought to the land. She said that she was aware of a dispute between the appellant and the respondent over the ownership of the house. She said that she had no problem with a house being built on the land for the purpose of the respondent mourning her husband.

12. DW3, EMN, was an uncle of the deceased. she acknowledged the appellant and the respondent as widows of the deceased. He said that the deceased used to live with the appellant, in a house that they had constructed. He said that he was present when the house was being constructed. He stated that the home belonged to the deceased and the appellant. He said that his home was next to that of the deceased, and he knew pretty much what used to happen at the home of the deceased. He said that the deceased did not inherit the land, but bought it. He said that he never saw the respondent on the land. He explained that a polygamous man settles his wives on different parcels of land. He stated that a house for the respondent, to mourn her husband, could not be put up at the home of her co-wife, and instead a tent could be put up to accommodate her and her children and other relatives. He said that the elders had asked the respondent to put up a house at Iguhu, where the deceased had land, but she did not. She said that the lands at Lusui and Iguhu were more or less of the same acreage. He said that the respondent lived in Nairobi, and only travelled upcountry for funerals. He said that he did not know PW3, and that whereas he was introduced to the appellant, the deceased never introduced him to the respondent. He said that Lusui land was bought in 2009, and that at Iguhu in 2011, and that the deceased established his home at Lusui, where he lived with the respondent, and had intended to set up a home for the respondent and her children at Iguhu.

13. Edwin Palapala testified as DW4. He was a mason. He described the deceased as his friend, and the appellant as his widow. He said he knew the deceased since 2007, and he had told him that the respondent was his first wife, and the appellant his second. He said that he used to visit his homes at Nairobi and where he lived upcountry. He said that he did not visit when the house at Lusui was being put up, but he saw PW2 and DW2 there.

14. LN testified as DW5. She knew the respondent since 1992.. She used to live with her and the deceased at Lusui in Kasavai. She said that the deceased and the respondent first lived at Matioli, before they moved into Lusui, and then Nairobi. She met the appellant for the first time in 2016, at a funeral of a relative. She said that whenever the respondent visited the deceased, after he married the appellant, she would stay at the house of their grandmother. She said that her own husband die before he had put up a house for her, and he was buried in front of the house of his parents, and she was secluded in her mother-in-law's kitchen after the funeral. She said that the respondent wanted a house constructed for a similar purpose. She said that the house at Lusui had been constructed for the appellant, for the deceased was living with her then, and the deceased had not constructed one for the respondent.

15. Christopher Mutsalali Muchanja testified as DW6. He said he was the pastor who prayed over the Lusui land after it was purchased. He said that the deceased told him that he was a polygamist, although he did not tell him the names of his wives. PW7 was Pius Ayoyi Witia. He said that the deceased had told him of his multiple marriages. DW8 was Gabriel Okonji. He constructed the semi-permanent structure on the Lusui land in 2010. He said that he met the appellant when she came looking for him, to be her witness in the case. DW9 was Charles Michael Madubuyi. He said that he knew the respondent as a widow of the deceased, but he did not know the appellant. He said that there was a house at Matioli, belonging to the deceased. He said that the deceased had not been allocated land at Matioli, but he had heard that he bought land elsewhere, and had constructed on it. DW10 was Joel Lumumba Ikala. He said that the deceased lived at Matioli for 5 years, before he moved to Nairobi. He put up a house at Matioli, where he lived with his wife. He later heard that he had separated from

her. He said that the house at Matioli was a simba, and he had been shown where to build the simba by his father. DW11 was Chimaka Fredrick Musoli, a friend and a nephew of the deceased. He knew the appellant as the widow of the deceased, and that he met the respondent after the deceased died. He said a piece of land was bought for the respondent at Iguhu.

16. From my review of the testimonies of the witnesses presented by the appellant and the respondent at the trial, the matter of the matrimony of the respondent was not in dispute. It was agreed by all that the respondent was the first wife of the deceased. The appellant, in her testimony, recognized her as such. The issue as to whether dowry had been paid for her was not raised by the appellant, nor any of the other witnesses, and that was not an issue the trial court had to determine, and it is not a matter that should now arise on appeal.

17. The second issue, that the appellant raises on appeal, is on the ownership of the land where the proposed house is to be put up. The evidence presented by both sides did not point to who owned the land in question. It was not identified in the pleadings, both the plaint and the defence, by reference number. At the oral hearings, it was said to be at Lusui. No title deed was produced as evidence of the person who owned it. The record of appeal and the original records are disorderly, and I cannot pick out from them the documents that were placed on record as the exhibits that were produced in the matter. The only sale agreement, that I see in the trial record, appears to be dated 4th February 2012, and it does not appear to relate to the Lusui land, but that at Iguhu. So, there is absolutely no evidence on who the registered proprietor of the land in question is. There is concurrence, though, that the deceased bought the land, and put up a house or houses on it, and that the appellant resided in the main house. The appellant does not claim to be the owner of the land, for she never bought it, nor was it registered in her name. I do not quite understand why the appellant should make the ownership of the land an issue on appeal, when at the trial she did not claim to own it or to have bought it or to have had it registered in her name. The deceased bought the land, that is what I get from the record.

18. The dispute was not so much on the land, and it was not even on the house that the appellant lived in. Indeed, the reason the respondent was asking for an order to be allowed to build a house on the land was because she had no house on the land. It is curious that the parties spent so much time on the matter of when and how the house that the appellant resided on was built, by who and who resided there. All that was unnecessary, given that the respondent was not claiming the house, but seeking an order that she be allowed to put up a house on the land, from where she could comply with the mourning custom.

19. What emerged is that although the deceased was said to have married more than once, twice according to the appellant and thrice according to the respondent, he had only set up a matrimonial home, shianyi, for 1 wife, the appellant, and not for the other wife or wives, including the respondent. The respondent herself acknowledged as much, and that is why she initiated the suit at the trial court to be allowed to put up a house, which she could use for seclusion and mourning, otherwise, the compound upon which the permanent home stands was set up for the appellant. My understanding of the evidence is that the deceased was living with the appellant up to his final days, and not with the respondent. It was the appellant who was nurturing him, comforting him and caring for him to the very end. The matrimonial home, where he lived with the appellant, is the place where he had put up a permanent house, and he had no other home or permanent house elsewhere.

20. According to the Bashimuli customs, as I understood them, a man can only be buried in front of his permanent home, unless he has no home, when a temporary home is then made for him, what is called a litili. In this case, the deceased had put up a permanent home, which was the shianyi for the appellant. That being the case, there would be no need for putting up a litili, as there is already a shianyi. I have noted from the proceedings that the appellant's shianyi is where the children of other mothers have

been residing, including PW2, a son of the respondent, and DW2, a daughter by another mother. It appears to have been the deceased's centre of operation. It would only be right that he be buried at the place that he called home. The other custom that emerged was that the shianyi is never shared, and another wife or widow of the deceased cannot go into seclusion in the shianyi of another wife or widow, because the shianyi is never shared. It also emerged that shianyi can be in the same compound, but far apart from the other shianyi.

21. It was submitted that the respondent could have put up her house at the land meant for her at Iguhu. There was no evidence that the deceased was the proprietor of the Iguhu land, said to be Kakamega/I/xxx, as no title or registration document was produced. The only document on record is a sale transaction done in 2012. There was no evidence whether transfer was ever done to the name of the deceased. Indeed, evidence was that the deceased never took possession. Given that circumstance, the trial court did not have any evidence that Kakamega/I/xxx belonged to the deceased, upon which it could order that a house be erected there. At least for the Lusui property, the deceased had already erected several houses there, without anyone raising issue, and that was where his only matrimonial home was situated, and that matrimonial home was established for the appellant, for she lived there in a permanent house with the deceased, up till the point of his death.

22. What was before the trial court was a case for the purpose of erecting a structure at Lusui for the purpose of the burial. The case has nothing to do with determination of matrimonial rights. The putting up of the house by the respondent should not be construed to mean that the matrimonial rights of the parties have been pronounced, for such orders cannot be made in a suit over burial rights, neither does the magistrate's court have jurisdiction to make determinations on such issues.

23. It was submitted that the customs of the Abashimuli clan were not ascertained. I am not persuaded that such customs were not ascertained. Both sides presented witnesses, who purported to expound on those customs. What emerged was that a widow is expected to go into seclusion for 3 days after the burial. It also emerged that a widow could not go into seclusion of the house of a co-widow, hence the prayers that the respondent sought in order to put up a structure for that purpose.

24. In view everything that I have stated above, the trial court erred in ordering that the deceased be buried in front of the house of the respondent, when the respondent has no house. As she has no house, the deceased ought to be interred in front of the home that he had established for himself, and where he lived prior to his death, rather than before or in front of a structure constructed hurriedly after his death, as if he had no permanent home, and which structure he never occupied in his lifetime. In the circumstances, I do find merit in the appeal herein, and I allow the same. I shall set aside the order made in Kakamega CMCCC No. E028 of 2020, on 4th November 2020, and substitute it with an order that the remains of the deceased be interred outside or in front of the permanent matrimonial home or house that he had set up and lived in with the appellant on the Lusui land. The respondent shall be at liberty to put a temporary structure on the Lusui land, some distance from the permanent house of the appellant, for the purpose of seclusion and mourning, which temporary structure shall be removed 30 days after the burial of the deceased. The remains of the deceased shall be released to both the appellant and the respondent, for burial purposes, but in event that that shall not be practical, and being mindful of the fact that the deceased lived with the appellant until he died, the body shall be released to the appellant. The Officer Commanding the nearest police station shall ensure compliance with these orders, and shall maintain law and order at the burial. The mortuary charges, incurred so far, shall be shared or borne equally between the appellant and the respondent. Each party to bear their own costs of this appeal.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 1ST DAY OF AUGUST 2023

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Mr. Ondieki, instructed by Gichaba Ondieki & Company, Advocates for the appellant.

Grace Khatunyi Imbayi, the respondent, in person.