



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 57 OF 2017

FRANCIS OSORO SOIRE.....APPELLANT

VERSUS

JOSEPH MOCHERE

WYCLIFF SOIRE.....RESPONDENTS

(Being an appeal from the Ruling of Hon Makila RM delivered on the 12th July 2017 in Kisii Civil Case No. 288 of 2017)

JUDGMENT

1. The appellant in this appeal sued the respondents in Civil Case no. 288 of 2017 in the subordinate court. He sought a permanent injunction to restrain the defendants by themselves, their agents, servant, family members and or any person acting on their behalf from interring and or burying the remains of Beatrice Kemunto deceased at the plaintiff's (appellant's) home or family land No. Wanjare/ Bomariba/474.

2. This being the first appeal and required to consider the evidence adduced evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified (see **Selle and another vs. . Associated Motor Boat Company Ltd & Others [1968] EA 123**).

3. From the proceeding before the trial court Ms Sagwa for the respondents raised a preliminary objection that the appellant had no locus standi to file the suit as the suit land was in the name of Okwoyo Maiso and not the appellant, as stated in paragraph 10 of the respondents defence. That there was a restriction that there should be dealings in the land until succession was done. That the court was being called to determine beneficiaries to the estate and yet the court has not been moved under the succession law. That the appellant had not taken out any letters of administration that the case goes to the jurisdiction of the case. Mr. Soire in response submitted that the issues raised in the pleadings regards burial of the remains of the deceased at the home of the appellant contrary to Kisii customary law. That the appellant had alluded to the parcel number where his home is situated (suit land). That the ownership of the appellant was a non-issue. That the issue as to burial does not require taking out letters of administration for him to ventilate his rights and grievance. That the matter is under the Magistrate's Court Act which has jurisdiction to hear and determine customary rights. In a Ruling dated the 12th July 2017 the trial court upheld a preliminary objection raised by the respondent and struck out the plaint with costs for reasons that the plaintiff had no locus standi to institute the said suit. The trial magistrate stated as follows;

“To my understanding the subject matter of the suit as filed herein and even the application is not the burial of the deceased but the land which is sought to be protected from legal injury if the burial was to take place thereon. There is nothing customary about the suit herein or the remedy sought in the nature of customary law remedy.

Under the provisions of sections 29 (a) of the law of Succession Act the plaintiff has the legal right to file succession proceedings in order to give life to any legal rights that he may have on the land issue”.

4. Aggrieved by the said ruling the appellant filed this appeal. his grounds of appeal are as follows;

- i. That the learned trial magistrate erred and misdirected herself in law in misapprehending the issues raised in the plaint in that they did not concern the rights of land or probate.
- ii. The learned magistrate erred and misdirected herself in striking out the appellant's suit without according him a right to be heard.
- iii. That the learned trial magistrate decided the case without giving full consideration to the submissions by the appellant's counsel.

5. The appeal was canvassed by way of written submissions. I have considered them. According the appellant's his contention at paragraphs 4 through to 7 of the plaint was that Beatrice Kemunto (deceased) whose remains were intended and arranged to be interred by the

respondents at the appellant's homestead situate on L.R No. Wanjare/Bomariba/474 was contrary to Gusii customary law and was without the consent of the appellant. That the claim as set out shows it was not neither a claim to land and had nothing to do with a probate or succession cause where there was need to determine who were heirs or beneficiaries in law to the estate of the deceased Okwoyo Maiso. That the suit was struck and the appellant was not given a chance to ventilate his claim by being given a chance to adduce evidence and lastly that the appellant's submissions were not considered, that the trial court addressed herself to the issues raised by the respondents counsel. That the orders striking out the plaint should be set aside and the suit set down for hearing.

6. The respondent submitted that the respondents denied the claim in paragraph 10 of their defence and the trial magistrate made orders that the preliminary objection be heard first before the suit is heard. That in support of the preliminary objection the respondents relied on the certificate of official search over parcel number Wanjare/ Bomariba/474 which indicated that the parcel number was registered in the name of Okwoyo Maiso. According to the respondents there is only issue for determination, whether or not the appellant has the locus to institute the proceedings in the trial court. It was submitted that it is trite law that the estate of the deceased person can only be represented in any legal proceedings by a person who is duly authorised to so on behalf of the estate and the powers of the legal representative are set out in Section 82 of the Law of Succession Act Cap.160. That the appellant had no letters of administration to the estate of Okwoyo Maiso before filing suit. That the appellant in his plaint alleged that Beatrice the deceased was not the legal wife of his brother and therefore he had invited the trial court to determine the beneficiaries to the estate of Okwoyo Maiso. The respondents sought to have the appeal dismissed with costs.

7. The issue for determination in this appeal is whether the trial court erred in law in dismissing the appellant's suit on the preliminary objection. At paragraphs 4 to 7 the plaint set out the basis of his suit as follows;

“4. That shortly before the said Peter Nyamweya died on the said 11.11.2014 he had cohabited with one Beatrice Kemunto, without any formal marriage under Gusii Customary Law or any other law.

5. That the said Beatrice Kemunto reaching sometimes on 15.6.2017 died and her remains are now lying at Nyangena awaiting interment and/or burial.

6. That both the defendants herein by themselves and /or their agents , servants and /or persons acting on their behalf have without the consent and /or permission of the plaintiff herein or his family and contrary to Kisi Customary Law to inter the remains of the said Beatrice Kemunto at Bomariba plaintiff's home in Bomariba within Kisii County.

7. That despite several demands made upon the said defendants to desist from their decision as to the place of interment or burial of the deceased Beatrice Kemunto making the filing of the suit necessary”.

8. The respondents at paragraph 10 of the defence raised the issue of the appellant's locus. The appellant argues that the issue that was for determination was the interment of the deceased Beatrice Kemunto at the Appellant's homestead on Land Parcel No. Wanjare/ Bomariba/474 contrary to Gusii Customary law. The appellant in his plaint claims that the deceased was going to be buried in his home or his family land. My view after reading his plaint is that he was raising an issue of burying the deceased in the land he claimed was his or family. The objection raised was in order the appellant raised the issue that the interment was to take place in his home or family. I agree with the observation of the learned trial magistrate that the issue was not one of customary law but the land which the appellant sought to be protected from legal injury if the burial was to take place thereon. There was no remedy sought in the nature of customary law. Further from the proceedings it is evident that the deceased was buried in the said suit land. The orders being sought have been overtaken by events. The record shows that the appellant was given a chance to be heard, he responded to the objection raised and after he failed to demonstrate that he has no locus his suit was struck out. I find no merit in the appeal and it is dismissed. Since this is a family matter each party to bear its own costs.

Dated signed and delivered at Kisii this 2nd day of May 2019.

R.E.OUGO

JUDGE

In the presence of;

Mr. Ochwangi h/b Mr. Soire for the Appellant

Ms. Sagwa for the Respondent

Rael Court clerk