



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 11 OF 2018

1. S M O.....1<sup>ST</sup> APPELLANT

2. S O O.....2<sup>ND</sup> APPELLANT

3. J M B.....3<sup>RD</sup> APPELLANT

-VRS-

J O O.....RESPONDENT

[Being an Appeal from the Judgement and Decree of Hon. A. C. Towett – RM dated and delivered on the 7<sup>th</sup> day of May 2018 in the original Nyamira Chief Magistrate’s Court Civil Suit No. 102 of 2017]

JUDGEMENT

By a plaint dated 12<sup>th</sup> June, 2017 the respondent sued the appellants and sought orders as follows: -

“(a) A declaration that the remains of the late M N N is to be interred/buried at her matrimonial home in LR NO. WEST MUGIRANGO/BONYAMATUTA/[Particulars Withheld].

(b) An injunction restraining the defendants, their family members, relatives, friends, servants, agents, assignees or any other persons acting under their direct or indirect instructions from in any way or manner whatever interfering with the burial of the late M N N in LR. NO. WEST MUGIRANGO/BONYAMATUTA/[Particulars Withheld].

(c) Cost of this suit be borne by the defendants.

(d) Any other relief(s) this court may deem fit and just to grant in the circumstances of this suit.”

The respondent averred that the late M N N who died on 9<sup>th</sup> May 2017 was the 2<sup>nd</sup> wife of the late E O O, the proprietor of the land and that was therefore her matrimonial home and the Abagusii Customary Law dictated she should be buried on that land.

The appellants filed a defence in which at paragraph 5 they denied that M N N was the wife of the late E O O as alleged and in paragraph 6 averred that *“whereas the said late M N N and E O O , had a relationship, ..... The same was to the level of concubine, which terminated before being solemnized into marriage and no children were begotten of the subject relationship and the same did not thus translate into marriage as the plaintiff would wish the court to believe.”*

The defendants also denied that the late M N N had a matrimonial home on their land. They also averred that they had no obligation to bury her as she was not their kin.

The trial magistrate after hearing and considering the evidence from both sides found in favour of the respondent and granted him the prayers sought and in addition made an order that the appellants pay the mortuary fees.

The appellants were not satisfied with the judgement and decree of the lower court and so they preferred this appeal. The same is premised on the following grounds: -

“1. That the Learned Trial Magistrate misdirected herself in law by allowing the plaintiff suit with costs against the defendant thus occasioning a miscarriage of justice.

**2. The Learned Trial Magistrate erred in fact and in law in holding and/or finding that the respondent herein had proved his case on preponderance of probability, in the absence of any tangible and/or credible evidence at all to that effect.**

**3. The Learned Trial Magistrate misdirected herself in fact and law, when she failed to properly or at all evaluate and/or analyse the evidence adduced by the defendant witnesses, thus the Learned Trial Magistrate reached an erroneous conclusion insupportable by the evidence on record.**

**4. The Learned Trial Magistrate erred in law when she failed to properly evaluate evidence on record thus reaching erroneous decision.**

**5. The Learned Trial Magistrate erred in law and in fact by taking into consideration extraneous matters thereby arriving at erroneous decision to the prejudice of the appellant.**

**6. In a nutshell, the judgement of the Learned Trial Magistrate is contrary to weight of submissions, law and material on record.”**

By the appeal, the appellant seeks orders that the judgement and/or decree of the Learned Trial Magistrate dated and delivered on 7<sup>th</sup> May 2018 be set aside and be substituted with an order dismissing the respondent’s suit and further that the costs of this appeal and in the lower court be borne by the respondent.

The appeal was canvassed by way of written submissions.

In his submissions, Counsel for the appellants faulted the trial magistrate for ordering the appellants to pay mortuary fees an issue which according to him had not been pleaded. He also faulted the trial magistrate for relying on photographs which in his view were inadmissible. He accused the trial magistrate of descending into the arena of litigation and taking a witness stand and contended that the trial magistrate is not an expert on photography and faulted her for reaching too much into the photographs. Counsel submitted that the trial magistrate ought to have dealt with the evidence of the respondent’s witnesses with circumspection. Counsel submitted that the witnesses were liars and that the respondent’s suit was a claim for land rather than a burial dispute. Counsel contended that the respondent and his witnesses concocted evidence that their relative was married to the late O and once **“they have forced burial of their relative on the O’s land, they shall seek to be given a share.”** Counsel stated that it emerged from the evidence that the respondent is not even a child of the late O, a fact which he had concealed from the court but which was revealed by the evidence of his own witnesses. Counsel accused the respondent’s witnesses of concealing facts and stated that their evidence was full of contradictions and it ought not to have been believed by the trial magistrate. He contended that the land herein being trust land it would be very unjust to compel the living relatives of the late E O O, to contend with the burial of a stranger in their homes as the ghost of the stranger would haunt them forever. Counsel submitted that the burial of a stranger in the trust land will fetter the constitutional rights of the beneficiaries of the trust. He urged this court to allow the appeal.

On his part, Counsel for the respondent submitted that there was sufficient evidence that the late M N was legally married to the late E O O under the Abagusii Customary Law, that the late E O O had paid dowry for her and even publicly acknowledged that she was his wife. Counsel submitted that the appellants have no lawful grounds to deny this fact. He submitted that customary law is what is used in deciding burial disputes and urged this court to do the same.

On the issue of mortuary fees, Counsel submitted that the lower court exercised its discretion properly. Counsel urged this court to dismiss this appeal and uphold the judgement of the trial court.

I have considered this appeal, the grounds thereof, the rival submissions and the authorities cited. My primary duty as the first appellate court however is to reconsider and evaluate the evidence in the court below so as to arrive at my own conclusion. I must do so bearing in mind that I neither saw nor heard the witnesses give evidence and make provision for that – See **Selle V. Associated Motor Boat Co. Ltd [1968] EA 123.**

Before I proceed, let me start by stating that this appeal is not the place to determine the proprietary rights of the parties to LR NO. WEST MUGIRANGO/BONYAMATUTA/[Particulars Withheld]. In so saying I associate myself with the observation by my brother Mutungi J of the Environment and Land Court in **Jerusa Basweti Ogeisia V. Jenifer Nyamoita Achoki & Another [2018] eKLR** where he stated: -

**“39. This suit involves one family. Indeed, the mother and her children. The suit no doubt was brought in an attempt to settle what otherwise is a lingering succession/ownership dispute where the mother sought to settle the ownership and/or distribution of land through a burial dispute. Ownership of land and/or distribution of land cannot be done in the guise of a burial dispute. The considerations are totally different in determining ownership of land and determining a burial site. In this case, I have determined the burial site for the deceased which necessarily does not confer any ownership rights over the subject parcel of land.”**

Likewise, in this appeal I shall determine the burial dispute which will necessarily not confer any ownership rights over the subject parcel of land. That certainly should put to rest the appellants’ fear that the respondent is after the land. The issue of ownership shall be left to be determined at the right time and in the right forum.

It is now settled that the law applicable in determining burial disputes is African Customary Law. In **Martha Wanjiru Kimata & Another V. Dorcas Wanjiru & Another [2015] eKLR** the court stated: -

**“13. What law is applicable to burial disputes? It is now settled law that where the issue of place of burial is to be decided by a court of law, the court relies on customary law to establish the place of burial....”**

In *Jerusa Basweti Ogeisia V. Jenifer Nyamoita Achoki & Another (supra)* the court held: -

**“31. The defendants have submitted and I am in agreement with them that the applicable law in determining the issue of the burial site before the court is the Abagusii Customary Law relating to burial of deceased persons.....”**

As the deceased herein belonged to the Abagusii community as do the parties the customary law applicable to this dispute shall be Gusii Customary Law.

From the record of the lower court and the submissions of Counsels in this appeal, the real issue in controversy is whether the deceased was married to E O O, also deceased. The parties did not call experts in Abagusii Customary Law on Marriage. However, Counsel for the respondent referred to **Eugene Cotrans: Restatement of African Law of Kenya Vol. 1. The Law of Marriage and Divorce in Chapter 6 page 63** the writer gives the definition of marriage consideration (Chiombe cho oboko) as follows: -

**“Chiombe cho oboko is a payment or payments of cattle, other livestock or other property rendered by or on behalf of the bridegroom to the father (or other guardian) of the bride, which is necessary for the validity of the marriage and to establish the affiliation or legal control of the issue of the union and which may be repayable in whole or in part on the dissolution of the marriage. Chiombe cho oboko must be distinguished from collateral payments and other gifts of marriage (.....) which are not returnable on dissolution of the union.”**

The write continues to state that Chiombe cho oboko consists of cattle, sheep and goats or their equivalents in money. The states that there is no fixed amount of chiombe cho oboko payable as the same is subject to negotiation between the families and varies according to the agreement reached.

In this case the appellants' contention is that the late E O O never married M N as he did not pay dowry for her. I have weighted their evidence and that of the respondent and I am persuaded that the deceased was in fact a wife of E O O. The respondent's witnesses Pw2, Pw3 and Pw4 testified that they were present when M's father collected 4 cows and 4 goats from E's home. Pw3 (J O O) told the court that they partook traditional brew and sang traditional songs in celebration. The witnesses for the appellants vehemently denied that there was a relationship between M and E. This despite the averment in paragraph 6 of the defence that the two cohabited. In the said paragraph the appellants aver that M was just a concubine and that the marriage terminated before being solemnized into marriage. They also claim that the union was never blessed with children and as such it did not amount to a marriage. It is clear therefore that these witnesses were not truthful. If the deceased lived with E it was not as a concubine but as a wife as he had paid dowry for her and whether or not their union was blessed with children is immaterial. There is evidence that at some point in the marriage E O chased M away. This is conceded by both sides. What the appellants did not admit however is that the two were later reconciled and continued living together. Peter Onyancha (Pw5) a retired Senior Chief was present during the reconciliation. He told the court that the meeting had been convened by one Chief David Masaki, Chief Onyari and Assistant Chief Zablon. The court heard that after that meeting M returned to her home and lived there until E died in 1998. There is no evidence that the deceased had any other problem with M after that. The meeting adverted to by Pw5 is in accord with what Cotran writes at page 69 where he states: -

## **“VII DIVORCE**

### **1. Machinery for divorce**

**A divorce can be granted either by the family and clan elders under Kisii Customary procedure or by a court.**

**(a) DIVORCE BY ELDERS. If a man wishes to divorce his wife, he sends her back to her father.....the family elders (abamate) of both parties then discuss the matter and try to reconcile the parties. If they fail to do so, a bigger meeting of clan elders (etureti) of both sides is then called. The elders again try to reconcile the parties and only if they fail do they then consider whether the grounds advanced by the party seeking dissolution are sufficient to justify a divorce. The elders may then agree to or refuse the dissolution of the marriage. The return of the Chiombe cho oboko and the custody of the children are also discussed and settled at this meeting.....”**

In this case we have evidence that the parties were reconciled and there was therefore no divorce; dowry paid to M's father was not returned and for all intents and purposes she was still his wife. The relatives of E had no business therefore to chase her from his home when she died and cannot benefit from their wrongdoing. The upshot is that there is no merit in their appeal.

On the issue of payment of mortuary fees, whereas the same was not pleaded, the same goes to the costs of the suit and as costs follow the event the trial magistrate cannot be faulted for ordering the losing party to pay the same.

This appeal is dismissed with an order that the appellants shall bear the costs of the appeal, the costs in the lower court as well as the mortuary fees that have accumulated or will have accumulated up to the time the remains of the deceased are interred. The judgement of the trial magistrate is upheld as are the orders.

It is so ordered.

Signed, dated and delivered in Nyamira this 8<sup>th</sup> day of November 2018.

E. N. MAINA

**JUDGE**