



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NUMBER 205 OF 2015**

**R L A. .... PLAINTIFF**

**VERSUS**

**F O. .... 1<sup>ST</sup> DEFENDANT**

**D O. .... 2<sup>ND</sup> DEFENDANT**

**J U D G M E N T**

1. R L A, the Plaintiff filed this suit on 8<sup>th</sup> June, 2015 claiming that his wife one P C O (hereafter “the Deceased”) died on 31<sup>st</sup> May, 2015 after a short illness. That after the deceased’s demise, her family, led by the Defendants started to make burial arrangements and excluded him from the same. That although he had been married to the deceased for five (5) years out of which a son was born to them, the Defendants had made arrangements to bury the deceased on 13<sup>th</sup> June, 2015 at Kisumu and deny him the chance of interring the remains of his wife. He also alleged that the Defendants had gone to his house and taken away certain items including his son with the deceased, “LL”. He therefore, sought a declaration that the deceased was his wife; an order that he be allowed to bury the remains of the deceased at his rural home and for the return of the items removed from his house together with the child “LL”.
2. Together with the Plaint, the Plaintiff filed a Motion of Notice seeking several orders including an interlocutory injunction to restrain the Defendants from removing the remains of the deceased from the mortuary or burying the same. The court gave an interim injunctive order and gave the return date as 15<sup>th</sup> June, 2015. On being served with the order, the Defendants rushed to court on 10<sup>th</sup> June, 2015 with an application seeking to restrain the Plaintiff from accessing the house in which the deceased used to live and to be allowed to inter the remains of the deceased at Obambo village in Kisumu. Faced with the contradictory Affidavit evidence as regards the status of the deceased and with the experience of burial disputes in the country dragging for ages in our courts thereby denying the bereaved a proper chance to mourn; on 15<sup>th</sup> June, 2015 the court ordered for an expedited trial of this suit. The defence, witness statements and all documents were ordered to be filed forthwith and the trial commenced on 24<sup>th</sup> June on a day to day basis and concluded on 30<sup>th</sup> June, 2015. A total of 10 witnesses testified. This is now the Judgment.
3. It was the Plaintiff’s case that he met the deceased in 2010 which was followed by a relationship that culminated in the deceased moving into his house at Umoja from Buruburu. That the deceased’s family came to know of their staying together and they had no objection to it; that the Plaintiff took the deceased to his rural home in 2011 and introduced her to his family whereby they carried themselves as man and wife. When “LL” was born, the deceased family came to visit them at this home; that the 1<sup>st</sup> Defendant attended the pre-wedding and the wedding of the Plaintiff’s sister at Bungoma. The Plaintiff told the court that in 2012, he made an introductory

- visit to the deceased's home accompanied with his father PW 2 and another relative.
4. It was the Plaintiff's testimony, that when the deceased was unemployed, he employed her in his Chemist until he found a job for her at Pfizer Laboratories; that the deceased had put his name in her medical card as the beneficiary of her employer's medical scheme. That when she fell ill, he visited her while in hospital and that the Defendants had removed the child "LL" from Home From [Particulars Withheld] Academy Buruburu and enrolled him in Kinoo without the Plaintiff's consent. He denied that he was liable to pay the amount counterclaimed by the Defendants. He admitted that, the deceased was subject to the Luo Customs. He narrated how he had been excluded from the burial arrangements of the deceased and the Defendant's intentions to benefit from the deceased's property.
  5. J A (PW 3) is the Plaintiff's Father. He told the court how the Plaintiff went with the deceased to his home in Khwisero in December, 2011; and how he and one of his brothers accompanied the Plaintiff to Obambo Village for an introductory visit in 2011. That on the said visit, they found PW 1 and another lady. That the 1<sup>st</sup> Defendant had visited his home twice during a pre-wedding and the wedding of his daughter. He indicated that after the deceased passed on, he sent his sons to ask the 1<sup>st</sup> Defendant about the possibility of his family paying dowry and being allowed to bury the deceased but she declined.
  6. PW 1 Nicholas Ashono Alesa, has known the Plaintiff since 2010. He later came to know that the Plaintiff and the deceased were in a relationship. He knew that the two lived together as man and wife. On his part, Richard Tsalwa (P W 4) told the court that he has known the Plaintiff since 1990 when they were in school. That he knew the Plaintiff and the deceased as man and wife as he used to visit them in their home at Umoja. To conclude his case, the Plaintiff called Wilfred Okoti (PW 5) who was presented as an expert in Luhya Customs. Aged 53 and having lived in Nairobi for 20 years, PW 5 told the court that under Luhya Customary Law, dowry can be paid even after a woman has passed on; that he had been asked by PW 2 to meet with the family of the deceased which he did on 1<sup>st</sup> June, 2015 and discuss on the payment of dowry which however, the 1<sup>st</sup> Defendant flatly declined any proposal made by his team.
  7. In their defence, the Defendants denied the Plaintiff's claim and alleged that there was no marriage between the Plaintiff and the deceased. They admitted that the Plaintiff and the deceased had a child LL but since the Plaintiff had not married the deceased, he had no right to inter her remains. They counter claimed a sum of Ksh.361,760/- being the costs they had allegedly suffered as a result of the disruption of the burial arrangements they had made because of the order that the Plaintiff had obtained.
  8. F O (DW 1) is the deceased's mother. She told the court that the deceased though having a child with the Plaintiff she died single. That when she wanted to leave Nairobi for Kisumu, she decided to rent out the family house at Buruburu. She, therefore in this regard, she rented a one roomed house for the deceased at Umoja to which the deceased moved to in 2012. That it is her and the 2<sup>nd</sup> Defendant (DW 2) who were maintaining the deceased and paying for rent until she got employed in January, 2015. She denied the Plaintiffs contention that he and his father DW 3 ever paid her any introductory visit. She admitted however that she remembers the two, accompanied by the deceased visiting her rural home but nothing about the relationship between the Plaintiff and deceased was discussed thereat. She denied any dowry discussion taking place on 1<sup>st</sup> June, 2015 at the deceased's house. She produced receipts for the expenses she had incurred in preparation for the burial of the deceased which however, went to waste as a result of this case.
  9. Further, DW 1 admitted attending the pre-wedding party of the Plaintiff's sister in Chwele Bungoma but insisted that it was at the invitation of her friend Irene and not the deceased. She denied having any financial motive in fighting for the burial of her daughter. She told the court that after obtaining the order, on 8<sup>th</sup> June, 2015, the Plaintiff locked the deceased's house and threw everyone out. She however did not report to the police as this case was on-going.
  10. DW 2 D O, the brother to the deceased told the court that the deceased was never married to the Plaintiff; that the deceased lived alone and did not cohabit with the Plaintiff. That it is him who paid most of the bills for the deceased. That when the deceased was hospitalized at Metropolitan Hospital, the Plaintiff offered no assistance. He insisted that as Christians, the deceased family had declined to discuss dowry for the deceased because she had already passed on. DW 3, I A told the court how she took care of the deceased since the latter's admission at Metropolitan Hospital on

20<sup>th</sup> April, 2015 until her demise. During that time, she was living in the deceased's house with the house help and the child "LL" only. The Plaintiff visited that house only once.

11. J O DW 4 and P O DW 5, an uncle and auntie of the deceased respectively, testified that the deceased was not married at the time of her demise. They indicated that dowry can only be paid after a lady had died under Luo custom only if "**Ayie**" and part of the dowry has been paid.
12. After the parties closed their respective cases, counsels submitted which submissions this court has considered. The issues that fall for determination are: -

- a. **Was there a marriage between the Plaintiff and the deceased or can one be presumed in the circumstances of this case?**
- b. **To who should the body of the late P C O, the deceased, be released to for burial?**
- c. **Is the Plaintiff liable to pay the amount claimed in the counter claim?**
- d. **What orders as to costs?**

13. Under Section 3(1) of the Marriage Act, 2014, marriage is defined as: -

***"..... A voluntary union of a man and woman whether in a monogamous or polygamous union and registered in Accordance with this Act."***

Section 6 of that Act specifies five (5) kinds of marriages and one of them is a marriage celebrated in accordance with customary rites relating to any of the communities in Kenya. The Plaintiff in this case is from the Luhya Community while the deceased was from the Luo Community. Despite that fact, the parties in this case were in agreement that the Customary Law applicable in this dispute is the Luo Customary law. This is the reason why the Plaintiff's witnesses testified on Luhya Customary Law and insisted that it was the same as Luo Customary Law as relates payment of dowry after a lady has passed on.

14. From the evidence on record, it is clear that either in 2011 or 2012, the Plaintiff accompanied his father PW 3 to Obambo village where they met the deceased's mother, the 1<sup>st</sup> Defendant and another lady. It is not clear whether the Plaintiff and the father (PW 3) were accompanied with another relative as was contended by the Plaintiff and PW 3. The said relative was neither called as a witness nor was his name disclosed. Whether he exists or not the court cannot tell. On the other hand, DW 2 told the court that on the said visit, the Plaintiff was accompanied by his father together with the deceased who was carrying the child LL. That at the time, she was with her house help one Benta. That the visit was unannounced and after lunch the Plaintiff and his father left. Nothing was discussed during that visit.
15. Was this an introductory visit? Was it sufficient enough to be considered a marriage step under Luo or even Luhya Customary Law? I am inclined to believe the evidence of DW 1 that this was an unannounced visit. Both the witnesses for the Plaintiff, especially PW 3 and PW 5 were agreed that under both Luhya and Luo custom, before the man's family visits the girl's family, notice of the visit is given to the latter. That it is expected that the man's party will include his father and some elders. It is also expected that the girl's party will have elders waiting to receive the visitors. The meeting is some sort of a celebration. It is at this meeting that the girl identifies her man and is expected to give her acceptance of the proposal by the man's family. Some token, ordinarily money, called "**Ayie**" is then given to the mother of the girl. In the instance case, I am satisfied that the Plaintiff visited the deceased's home with his father alone. I do not accept the Plaintiff's testimony that a notice of the visit had been given. If there was any such notice, it will be most surprising that his party was not received by the elders of the deceased's family. How would one explain that they only found the 1<sup>st</sup> Defendant and another lady, who now transpires to have been the 1<sup>st</sup> Defendant's house help? There were no other relatives of the deceased, her brothers, uncles and Aunties who would be expected to be in attendance.
16. From the evidence on record, under Luo Customary Marriages, at the introductory visit, the agreement money known and "**Ayie**" meaning "**I have accepted her**" is paid by the man's

family. This is then followed by dowry negotiations and subsequent payment thereof. It is only then that a marriage under Luo Customary Law can be said to have been concluded. In the instance case, none of the foregoing ever took place. There was no “Ayie” paid nor any dowry paid to signify any marriage between the Plaintiff and the deceased. Accordingly, I hold that there was no marriage under Luo Custom or any other Custom at all.

17. Mr. Wanyaga, learned counsel for the Plaintiff submitted that a marriage could be presumed between the Plaintiff and the deceased by virtue of their long cohabitation and the closeness of the Plaintiff to the deceased. This was evidenced by the Plaintiff being put as the beneficiary of the deceased in the Medical Scheme of her employer. Counsel further submitted that the existence of the child LL as a result of the relationship between the two should not be ignored. Mr. Wandeto for Defendants submitted otherwise.

18. Under Section 6 of the Marriage Act, 2014 there are only five types of Marriages that are recognized in Kenya. That Section provides: -

**“6 (1) A marriage may be registered under this Act if it is celebrated:-**

- a. ***In accordance with the rites of a Christian denomination;***
- b. ***As a civil marriage;***
- c. ***In accordance with the customary rites relating to any of the communities in Kenya***
- d. ***In accordance with the Hindu rites and ceremonies; and***
- e. ***In accordance with the Islamic Law”***

It would seem that marriage by long cohabitation is not recognized under that Act. Does this however, do away with those relationships where couples have lived together as man and wife for years even whose relationships have ended up with children? I do not think so.

19. **In Hortensia Wanjiku Yahweh Vs Public Trustee C.A No. 13 of 1976** Mustafa J stated: -

***“I agree with the trial judge that the onus of proving that she was married to the deceased was on the appellant. But in assessing the evidence on this issue, the trial judge omitted to take into consideration a very important factor long cohabitation as man and wife gives rise to a presumption of a marriage in favour of the Appellant. Only cogent evidence to the contrary can rebut such a presumption, See Re: Iaplin-Watse Vs Tate (1973) 3 ALL ER 105. .....***

***However, in considering whether there was a marriage the trial judge ought to have taken account of the presumption of marriage in the Appellants favour. Such presumption carries considerable weight in the assessment of evidence. Once the factor is put into the balance in the Appellants favour, the scale tilt in favour of her direction.”***

He continued: -

***“I can find nothing in the “Restatement of Africa law” to suggest that Kikuyu Customary Law is opposed to the concept of presumption of marriage arising from long cohabitation..... It is a concept which is beneficial to the institution of marriage, to the status of the parties involved and to issue of their union, and in my view is applicable to all marriages and howsoever celebrated.”***

Wambuzi P stated therein: -

***“The presumption is nothing more than an assumption rising out of long cohabitation and general repute that the parties must be married irrespective of the nature of the***

***marriage actually contracted.”***

20. This principle has been applied by our Kenyan courts notwithstanding the existence of marriage statutes. Accordingly, even with the repeal of the previous seven (7) Marriage Statutes and enactment of the Marriage Act, 2014, the principle is still good law as was in 1976. See the Court of Appeal decision in **VRM Vs MRM & another (2006) eKLR** and **Rosemary Aoko Munjal Vs Noel Namenya Munja (2015) Eklr.**
21. The evidence of the Plaintiff is that he met the deceased in 2010 and in 2011, the deceased moved to live with him in Umoja. That he offered her employment at his business Sportchem Chemists until she found employment at Pfizer Laboratories early this year. That their relationship bore them a son LL; that his friends PW 1 and PW 4 regarded them as man and wife as did his family. PW 1, PW 3 and PW 4 supported the Plaintiff's contention. On the other hand, the defence case was that the deceased was single; that she lived alone in Umoja and the Plaintiff was just a friend with whom she got a child. DW 1 testified that when she decided to relocate to Kisumu from Nairobi, she decided to rent out the family house at Buruburu and it is then that the deceased decided to move out and live on her own. That is her who purchased all the household items for the deceased when she moved to her own house at Umoja in March, 2012. DW 1 produced D Exhibit 1 pages 52 to 54 being receipts for the items she said she purchased for the deceased to facilitate the latter's movement to her new home. DW 1 and DW 2 testified that they took care of the deceased necessities between 2012 and 2015. According to them, she was living alone with no husband. They however recognized the Plaintiff as the father of the LL.
22. With such contradictory evidence, the court is called upon to determine whether or not there was a marriage by reputation, i.e. long cohabitation popularly known as Common Law Marriage. For a marriage to be presumed between a couple, the two must have cohabited; the cohabitation must be long and uninterrupted and the couple must have carried themselves as man and wife not only to their close friends but also relatives and other acquaintances. Their actions and lifestyle should leave no doubt in the minds of those who know them and even strangers that the couple must be in a marriage relationship and not necessarily a relationship of convenience. In our African set up, I take judicial notice that such couples will occasionally visit their rural homes (both the man's and the woman's) and they will in such occasions carry themselves as such. In a marriage relationship, the couple is expected to take care of and be responsible for and protect each other. They are expected to be not only the closet but to be there for each other at all times.
23. The Plaintiff made a total of four statements, that were admitted as his evidence in chief. These were made on 8<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup> and 23<sup>rd</sup> June, 2015, respectively. He stated that he had lived with the deceased at Umoja as man and wife. In the statement of 17<sup>th</sup> June, 2015, he stated: -

**“That I (sic) the father of three children namely: -**

1. J L – 19 years.
2. B C C 17 years
3. LL 3 years

***“I have not carried on any relationship with the mothers of the first two boys. The deceased was aware of the two boys and took them as her children. I do support the two boys and when they close school they come to stay with me. They are both in boarding.”***

24. There is the evidence of DW 3, I A who stayed with the deceased from 20<sup>th</sup> April, 2015 until she passed on 31<sup>st</sup> May, 2015. She told the court that during that time, she was living with the deceased and the latter's house help Matilda alone in the deceased's house. That she only saw the Plaintiff three (3) times during that period. She stated in her statement of 22<sup>nd</sup> June, 2015.

***“16. STAYED WITH P TILL HER DEATH. During my stay at her place, I was the one who took care of her. This involved cleaning her, feeding her and taking her to hospital. (I used to carry her on my back) During all this time, I have never seen any assistance of any sort offered by the Plaintiff.***

**17. THE PLAINTIFF.** *I however recalled that the Plaintiff briefly came to the metropolitan Hospital but he never stayed, he left immediately. The second time I saw the Plaintiff was when he came to P's house, again he never stayed. The third time I saw the Plaintiff was when I was in Umoja, I had gone to the shop and I saw him talking on phone he was saying "I have sold four (4) tuskers and drunk two (2) Konyagis". The fourth time I saw the Plaintiff was when he came home with his friends after the death of P asking to bury her. I do not know him as P's husband."*

25. This piece of evidence was never challenged. The Plaintiff admitted that he visited the deceased while she was admitted at Metropolitan Hospital once with PW 1. There was also the evidence of DW 2 to the effect that, when the deceased visited Coptic Hospital as an outpatient, she was unable to go home. She called him and he collected her from under a tree where she had collapsed. That when she was admitted at Metropolitan Hospital, he took her on two occasions at night to Afya Centre to see a Consultant specialist and he settled the deceased's bills for those visits as her medical card did not cover outpatient costs. The question that lingers in the mind of the court then is. If the Plaintiff was the husband of the deceased, where was he when she collapsed and remained under a tree after visiting the Coptic Hospital until DW 2 collected her and dropped her at her house? Why did she not call the Plaintiff as her husband to come for her? Did she call him and he ignored for her to have called her brother? Why is it that for 6 days when the deceased was admitted at Metropolitan between 22<sup>nd</sup> April, 2015 and 27<sup>th</sup> April, 2015 the Plaintiff only visited her once? Where was he staying between 20<sup>th</sup> April, 2015 and 31<sup>st</sup> May, 2015 when DW 3 was nursing the deceased at the house she was living in? Why would the Plaintiff's other two (2) older children return to live with him and to with "them" (the Plaintiff and the deceased) during holidays? Where were they during the April, 2015 holidays and not in the house in which the deceased was being nursed by DW 3? These questions remain unanswered. To my mind they militate against the presumption of marriage.
26. This court's conclusion is that the deceased and the Plaintiff were close friends. Their relationship bore LL. However, during the time of need, it is deceased's mother and siblings who were closest to her. This is why she called DW 2 to collect her from under a tree after visiting the Coptic Hospital. It is also the reason why when she fell seriously sick, she called her mother who provided help by sending her sister DW 3 to nurse her at the hour of her most need. During her final moments in this world, 28<sup>th</sup> – 31<sup>st</sup> May, 2015 it is DW 2 and DW 3 who were beside her. The Plaintiff was away in Eldoret doing business. The Plaintiff must have had his own house where he was living with his two (2) other sons and would be visiting the deceased as and when he felt the need to. There was no marriage by cohabitation. It was a relationship or friendship of convenience. This court saw all the witnesses testify. The testimonies for DW 1, DW 2 and DW 3 were not only consistent but also firm and unshaken. The court believed them
27. The next issue is, to whom should the remains of the deceased be released to? It was submitted that because the tradition of the Luo's and Luhya's, that dowry can be paid even after a woman has died, and that the 1<sup>st</sup> Defendant had sent the Plaintiff, his brother and DW 5 to go call their elders for a meeting on 3<sup>rd</sup> June, 2015 the court should sanction that tradition. Firstly, according to DW 1 and DW 4, under Luo Custom dowry can only be paid after a woman has died if the process of marriage had started during her lifetime. That is, if "Ayie" had been received and part of dowry. In this case, neither part of dowry nor "Ayie" had been paid. As regards the proposed meeting of 3<sup>rd</sup> June, 2015, I do not believe the Plaintiff's story. If there had been any agreement that the Plaintiff's elders were to return on 3<sup>rd</sup> June, 2015 to discuss about dowry, DW 4 and DW 5 the Uncle and Auntie of the deceased, who would have been very crucial for such a discussion, would not have left on 2<sup>nd</sup> June, 2015 for Kisumu and Nakuru, respectively. Accordingly, I hold that the body of the deceased should be released to her relatives, the Defendants for burial.
28. As regards the counterclaim, I am satisfied that as at 8<sup>th</sup> June, 2015, the burial plans were in top gear and the Plaintiff knew of that fact. He waited from 1<sup>st</sup> June, 2015 when his request to pay dowry and be permitted to bury the deceased was declined until the burial date of 13<sup>th</sup> June, 2015 was fixed before rushing to court and freezing those plans. Costs had been incurred as a result. The 1<sup>st</sup> Defendant testified on these costs and produced the receipts which I am satisfied had been

reasonably incurred. Looking at paragraph 17 of the Counterclaim, the advertisement will have to be repeated; the Eulogy books have to be re-done because of change of burial date; booking at Professional Centre cannot be refunded. These in my view are recoverable. As regards the costs for the Hearse, coffin and Church Service, the amount paid was a deposit there was no evidence that it had been forfeited. On the cost of Embalment and body washing and dressing, 13<sup>th</sup> June, 2015 was five (5) days away and these costs must not have been incurred. As regards the cost of Ksh.150,000/- for food in anticipation of burial of 13<sup>th</sup> June, 2015, there was no evidence that that food was consumed in the absence of the burial of 13<sup>th</sup> June, 2015. These claims are declined. Accordingly, the amount proved is Kshs.94,760/- which is recoverable.

29. Accordingly, the Plaintiffs suit is dismissed and the counterclaim succeeds to the extent stated above.

30. Before penning off this judgment, there was the Defendant's Motion dated 10<sup>th</sup> June, 2015 that was kept in abeyance on 15<sup>th</sup> June, 2015. From the evidence on record, the same also succeeds and on the basis of which this court makes certain orders relating to the deceased's house which the Plaintiff wrongfully locked.

31. The counterclaim is allowed as follows: -

- a. **The body of the deceased, P C A O lying at Mbagathi Farewell Home be released to the Defendants for burial.**
- b. **The Plaintiff, his agents, servants or representatives or any person under his instruction is hereby restrained from obstructing, scuttling, halting, stopping or otherwise interfering with the burial of P C A O.**
- c. **The Plaintiff, his agents, representatives or any other person under his instruction is hereby restrained from interfering with the Defendants' use and occupation of the house of the Late P C A O in Umoja 1 Estate.**
- d. **The Plaintiff do pay the Defendants damages assessed at ksh.94,760/- plus interest.**
- e. **The position of the child LL be referred to the Children's Court for determination.**
- f. **The costs of the suit and the counterclaim is awarded to the Defendants, in any event.**

It is so decreed.

**Dated and Delivered at Nairobi this 10<sup>th</sup> day of July, 2015.**

.....

**A MABEYA**

**JUDGE**