



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL APPEAL NO 7 OF 2013

(Being an appeal from the judgement of V.A Otieno, AG Senior Resident Magistrate in Mwingi Resident Magistrate's Civil Case No 87 of 2012)

J M K

G M I.....APPELLANTS

VERSUS

D M K.....RESPONDENT

JUDGEMENT

The appellants have moved this court on appeal seeking to have the judgement and orders of the Acting Senior Resident Magistrate at Mwingi in Civil Case No 87 of 2012 be set aside and in its place this court makes the orders that the deceased formally divorced and therefore a free woman; the family of the deceased including the appellants and the children of the deceased to determine the deceased's final resting place; the remains of the deceased be released to the appellants/her parents or children for burial; that the custody of the minor child remain with the sister and brother E M and P K M respectively and costs of the appeal and mortuary charges be paid by the Respondent. The Appellants are represented by Mr. Kinyua while the Respondent is represented by Mr. Nzili.

The appellants who preferred this appeal are two, the brother and uncle to the deceased. They have filed a memorandum of appeal dated 14th May 2013 and filed on 15th May 2013 and have listed five grounds of appeal as follows:

- i. The learned trial magistrate was in error when he held that the deceased L M was married under two systems of marriage and that the customary marriage superseded the statutory one.
- ii. The learned trial magistrate showed open bias and outright hostility towards the defendant and their counsel.
- iii. The court erred in granting custody of the child to the respondent.
- iv. The judgement is ambiguous and was delivered in a casual manner.

The Respondent had sued D M M, J M K and G M I in the lower court Civil Case No. 87 of 2012. The first defendant D M was sued for allegedly marrying the deceased without returning the dowry to the Respondent; J M is uncle to the deceased and G

is the deceased's brother. The plaintiff sought the following prayers:

- i. A declaration that the deceased was not validly married to the 1st defendant without refund of dowry in accordance with customary law.
- ii. A permanent injunction restraining the defendants, their agents, servants or employees from collecting, burying, interring the deceased's remains at the defendant's home or any other place until compliance with Kamba customary law.
- iii. Custody of the children be granted to the plaintiff.
- iv. Any other relief the court may deem fit to grant.

The lower found favour of the Respondent in the following terms:

“It is clear that the deceased and the plaintiff married under two systems. The customary marriage however preceded the Christian one and in this court's view takes precedent especially in light of the latter subsequent customary marriage. The process/rites involved in renouncing a customary marriage are well spelt out and the same were never performed and in this court's view the same remain valid and binding, a fact supported by evidence of the plaintiff. In the same vein the plaintiff has proved entitlement to custody over any minor children of the marriage namely C K, 15 years. The upshot is that this court finds the plaintiff's claim has been proven (sic) on a balance of probability and the same is allowed.”

The 2 Appellants before me were dissatisfied with the judgement and have moved this court on appeal. They have framed issues for determination as follows:

- i. Under what system of law was deceased married at the time of filing for divorce?
- ii. Whether divorce cause No 5 of 2009 at Mwingi was final
- iii. Whether custody of the child to the respondent is proper
- iv. Who has the right to bury the deceased?

The Appellants submitted that a person can only be married under one system of law and in this case the customary marriage ceased to exist the day the parties solemnized their marriage in church; that the statutory marriage is superior and that under the Kenyan law, customary law is only applicable where it is not repugnant or inconsistent with the written law; that the divorce cause in the Mwingi court was final and decree absolute issued; that and no appeal has been preferred; that the Respondent has not been supporting the minor child for the last eleven years and cannot therefore seek custody of the said minor; that the lower court did not give orders concerning the burial of the deceased after issuing an injunction to stop the defendants from burying the deceased and that the judgement of the lower court does not state who should bury the deceased leaving it to various interpretations; that the judgement of the lower court is casual as it does not determine the rights of the parties in a clear manner; that the trial court made a finding that there was a subsequent customary marriage without evidence to support this.

On the other hand, the Respondent has identified issues for determination as follows:

- i. Did the lower court fairly and reasonably exercise its constitutional mandate in handling this case?
- ii. Was the lower court guided by the pleadings, facts, law and evidence in arriving at its decision?
- iii. If 1 and 2 above are answered in the affirmative can the lower court's decision be faulted?
- iv. What is the position in law on custody of a minor child where the other spouse has passed on?
- v. Which of the two systems is superior over marriage, divorce and burial and was the lower court at fault in choosing the African Customary law over statutory one?

The Respondent has submitted that the lower court was guided by the pleadings, evidence and the law to arrive at the decision it did; that there was a subsequent marriage between the deceased and 1st defendant in the lower court without refund of dowry paid by the Respondent; that the Appellants did not seek custody of the minor child; that the lower court cannot be faulted for following the Kamba customary law as provided for in the Judicature Act; that the Respondent is the only surviving parent of the minor and it is befitting to grant custody to him; that there is no statutory law on burials and that in burial issues personal law is applicable; that it is not practical to allow the deceased to be buried on a piece of land the

deceased co-owned with the 1st defendant in the lower court.

The Respondent asks the court to find that the decree of the lower court was proper and in line with law and precedent.

From what can be ascertained from the pleadings in the lower court case, D M K, the respondent, married L M, deceased, under Kamba customary law. All rites and processes of a customary marriage under the Kamba customary law were performed including payment of dowry in terms of 24 goats, 8 heads of cattle and Kshs 26,000. To that union, three children were born, namely P K 26 years old; E M 22 years old and C K 16 years old. The marriage was later solemnized in church on 28th December 1996 at Kiomo Catholic Church. There is certificate of marriage No. 401794 to attest to that fact. In 2009 the deceased filed for divorce in Divorce Cause No 5 of 2009 at Mwingi leading to the dissolution of the marriage between the respondent and the deceased. Temporary custody of the children was granted to the deceased.

The evidence on record supports the fact that the deceased and the Respondent contracted a customary marriage and thereafter solemnized the same in church. The couple separated in 2002 and lived apart until 2009 when the deceased filed for divorce. The marriage was dissolved in 2011. Upon the death of the deceased the Respondent filed the case in the lower court the subject of this appeal. His intention was to bury the deceased claiming that she was his wife and that he had a right to bury her. On the other hand the Appellants, uncle and brother to the deceased claimed that the deceased had divorced the Respondent and that she has wished to be buried at her land at Mutyangombe. E M and P K, deceased's children also testified that their mother had wished to be buried at her land in Mutyangombe.

I have considered this case and all the evidence tendered in the lower court. That the Respondent had married the deceased under Kamba customary law and later solemnized the marriage in church is not in dispute. That the marriage between the Respondent and the deceased was dissolved by the court in Divorce Cause No 5 of 2009 is also factual and not disputed. It is noteworthy that no appeal was preferred against the dissolution of the marriage order. What makes the Respondent contest this appeal is the belief that his marriage to the deceased, especially the customary law part of it, still stands in so long as he did not get a refund of the dowry.

The Judicature Act (Cap 8 Laws of Kenya) Section 3 (2) guides the courts in Kenya in the manner the African Customary Law is to be applied. The Kamba Customary Law is part of the African Customary Law. The Section states as follows:

The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.

When the Respondent and the deceased made a decision to solemnize their customary marriage in church, they unequivocally chose to have their marriage governed by a statute known as **The African Marriage and Divorce Act, Cap 151** of the Laws of Kenya. This choice removed their marriage from the ambit of the Kamba customary law. It was on that basis that the deceased filed for divorce. The marriage she sought to dissolve when she filed Divorce Cause No 5 of 2009 was the Christian marriage and not the Kamba customary law marriage. The grounds she relied on are grounds for divorce as provided for under this statute. Upon the issuance of decree absolute in a divorce cause, the marriage becomes dissolved and the parties free to contract any other marriage if they so wished.

The Respondent alleges a subsequent customary marriage between the deceased and the 1st defendant in the lower court. I have considered this issue and find that the evidence on record does not prove on a balance of probability that the deceased was married to the 1st defendant. I find mention of cohabitation between the deceased and the 1st defendant but it was not established that both had contracted any form of marriage. I wish to state that even if this were the case, the deceased was a free woman after the

dissolution of her marriage with the Respondent.

On the issue of marriage, it is my finding that the deceased and the Respondent were not married under two systems of law. They initially married under Kamba customary law but converted this marriage under the statute law. The trial magistrate was therefore wrong and misdirected himself in law in finding that the two were married under the two systems of law and that the customary marriage took precedent over the statutory marriage. Our system of law is that one has a choice to be governed by one system of law in matters of marriage and not two or more systems.

On custody of the minor child, the lower court granted temporary custody to the deceased. In all matters dealing with minor children the best interest of the child is of paramount importance (see Article 53 (2) and Section 4 (2) of the Children's Act). Evidence on record and the Respondent's own admission he has not been in touch with the issues of marriage between him and the deceased since 2002, he has not been providing for their upkeep, education and other needs. There is only one minor child, C K. According to the evidence, the minor goes to school in Eldoret and lives with his older siblings. The Respondent is remarried with other children by this marriage. Would it be in the best interest of C K to remove her from the home she knows and put her under the custody of the Respondent and his other family who are strangers to her? In my view I do not think so. To my mind the minor's best interests will be served by not disturbing her life.

On the issue of burial, I have considered all the evidence. I have stated in this judgement that the deceased was married under statutory law. When it comes to burial disputes, it is personal law that comes into play. This is because there is no statute in Kenya that governs burials. I have stated that the deceased was legally divorced from the Respondent. **In Njoroge v. Njoroge & Another [2004] 1 KLR** the court held that:

“.....the person who is the first in line of

duty in relation to the burial of the deceased person is the closest to the deceased in legal terms. Generally the marital union will be found to be the focus of the closest chain of relationship touching on the deceased.....”

In a case like the one before me, the marriage between the deceased and the Respondent had been dissolved so the issue of spouse does not come in. Without a spouse, the first person(s) in line of duty in relation to the burial of the deceased and the closest persons(s) is her children followed by her parents and brother in that order. Evidence shows that the deceased has three children with the Respondent and two of them have testified that their mother had wished to be buried at her land in Mutyangombe. A letter from the Ministry of Lands dated 8th November 2012 confirms that parcels numbers 3213 and 4378 which have been demarcated and surveyed belonged to the deceased.

The Appellants testified to the deceased's wish to be buried at Mutyangombe land. The Respondent alluded to deceased owning some land at Mutyangombe although according to him the deceased co-owned the land with the 1st defendant. There is however no evidence of co-ownership except for the letter from the Ministry of Land that gives the last deceased's name as M. Her identity card was not produced to show what names appear on it nor was a deed poll produced to show change of names. In the case of **James Apeli & Another v. Prisca Bululu Civil Appeal No 12 of 1979** the court was of the view that the wishes of a deceased person ought to be given effect to.

I have taken time to read the cited cases including **Otieno v. Ougo & another (2008) 1 KLR** and **Edwin Ombajo v. Martin Odera Okumu (1996) eKLR** among others. They are distinguishable with this case because in this case the marriage between the deceased which was a statutory one with the Respondent had been dissolved. I think I have demonstrated that the law applicable here was The Christian Marriage and Divorce Act and not the Kamba customary law. By virtue of Section 3 (2) of the Judicature Act statutory law is superior to customary law. The trial court was wrong in finding that the customary marriage takes precedent over statutory marriage. I also find that lower court handled the case in a casual manner and did not consider the issue of what happens to the body of the deceased now that the

Appellants had been restrained from burying it. He failed to determine what to do with the body and who was to bury it.

I have considered the issues framed by each party. In answer to the issues framed by the Appellants, it is my finding as explained in this judgement:

- a. That the deceased was married under statutory law and she filed the divorce under the African Christian Marriage and Divorce Act. The orders of the court dissolving that marriage were final in the absence of an appeal overturning them.
- b. The lower court exercised its discretion to grant custody of the minor child to the Respondent. I will not fault the exercise of that discretion but I wish to state that given the fact that the Respondent did not bother to maintain the children from 2002 to the time the order for custody was made it would not be in the best interest of the child to grant custody to the Respondent at this stage.
- c. The children of the deceased, the parents of the deceased and the siblings of the deceased in that order have the right to bury the body of the deceased.

In respect of the issues framed by the Respondent, I wish to state that:

- a. The lower court has a duty to exercise its discretion guided by the pleadings, evidence and law, in the manner it decided the case but where that court failed to properly direct its mind, this court must come in and make corrections.
- b. In cases where a marriage existed between a deceased spouse and one who is alive the issue of the custody of a minor child of such marriage would automatically go to the surviving spouse. This is not the situation obtaining in this case. There was no existing marriage between Respondent and deceased at the time of her death.
- c. On the systems of law I have stated that for the marriage the African Christian Marriage and Divorce Act is the relevant law. As regards burials, personal law of the deceased is the relevant one in the absence of statute. The wishes of the deceased ought to be respected and the closest persons to bury her remains are her children, in their absence her parents and or brothers.

Having considered all the issues raised in this appeal, my final orders are that the judgement of the lower court being Civil Case No. 87 of 2012 and all subsequent orders are hereby set aside. In its place I make the following orders:

- i. That the marriage of the deceased and the Respondent, which had been converted from a customary law one to a statutory law marriage, was dissolved in Divorce Cause No 5 of 2009 and therefore the deceased ceased to be a wife of the Respondent.
- ii. The custody of the minor child, C K is granted to jointly to E M and P K, her sister and brother respectively until she attains the age of majority or until she is capable of supporting herself materially.
- iii. The remains of the deceased L M are to be released to her three children to inter the same at deceased's land at Mutyangombe in line with her wishes.
- iv. The mortuary charges shall be borne by the Respondent.
- v. Each party will bear its own costs in respect of this Appeal.

I make orders accordingly.

S.N. MUTUKU

JUDGE

Dated, signed and delivered this 1st day of October 2013.