



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appeal 207 of 1995

ESTHER MBATHA NGUMBI.....

APPELLANT

AND

1. MBITHI MULOLI

2. MULI NTHOME

3. SAVETH NDUKU.....

RESPONDENTS

(Appeal from the judgment of the High Court of Kenya at Nairobi (Lady Justice Alouch)

delivered on the 12th February, 1991

IN

H.C.C.A. NO. 229 OF 1986

JUDGMENT OF THE COURT:

The ultimate result of this second appeal to this Court turns on whether or not the appellant, Esther Mbatha Ngumbi, was legitimately married to the deceased, Ngumbi Mutie alias Kotoe under the Kamba customary law. On account of that, the point for determination by the two courts below was whether or not she had been divorced from her first husband, Peter Musyoki Mati, under the Kamba customary law before being married to her second husband, Ngumbi Mutie.

Ngumbi Mutie died on 22nd October, 1983 and by an undated Originating Summons taken out under order XXXVI rule 1 of the Civil Procedure Rules and intituled High Court of Kenya at Nairobi Civil Case No.193 of 1984 (O.S.) the appellant sought inter alia the determination of the question whether or not she was entitled to a share in the estate of the late Ngumbi Mutie together with the ascertainment of the heirs to the said estate. That Summons was on 13th June, 1995 by consent of parties transferred to the District Magistrate's Court at Kangundo for the determination and ascertainment of heirs to the aforesaid estate and became Kangundo District Magistrate's Court Miscellaneous Civil Case No. 1 of 1985. In that case, notwithstanding the evidence of the appellant and her twin-brother, Ngati Nyumbu, that the former had been divorced from her first husband, Peter Musyoki Mati, under the Kamba customary law before being married to her second husband, the late Ngumbi Mutie, the trial magistrate nevertheless proceeded to hold that she had not been so divorced. That holding was based on the assumption that that had been the

decision in her Maintenance Cause No. P.164 of 1966 in respect of which no record was in existence save a photostat copy of a summons served on the late Ngumbi Mutie alias Kotoe, requiring him to appear before the Kangundo Court to answer the appellant's claim of maintenance of 7 children against him and in which Mbithi Mutie (D.W.2) and Munguti Mwovi (D.W.3) claimed to have been present at the hearing wherein the appellant's first husband, Peter Musyoki Mati, declined the return of his dowry as he said that he had children with the appellant with the result that the late Ngumbi Mutie was ordered to slaughter a bull and a goat for the appellant's first husband or pay to him Shs. 500/= in lieu thereof being compensation for illegally staying with the latter's wife. The late Ngumbi Mutie, according to these two witnesses, paid the Shs.500/= and under the Kamba customary law, the appellant remained a wife to her first husband. According to the trial magistrate therefore, the appellant had neither proved before him on a balance of probabilities that she was heir to the estate of the late Ngumbi Mutie nor that she was entitled to any share of it whatsoever. The trial magistrate then proceeded to declare the three other living wives of the late Ngumbi Mutie, namely; Nduku, Mumbua and Katuku together with their respective children as the only heirs to his estate. Dissatisfied by this decision, the appellant appealed to the High Court of Kenya at Nairobi in that court's Civil Appeal No. 229 of 1986 and in that appeal she applied under Order XL1 rule 22 of the Civil Procedure Rules to be allowed to produce additional evidence. That application was granted by the superior court for the reason that the additional evidence sought to be produced, if believed, was of a decisive nature in that it would enable that court in its appellate jurisdiction to make a decision whether or not the appellant was validly divorced from her first husband and thereafter validly married to the late Ngumbi Mutie. That evidence related to the production of a book wherein the return of dowry to the appellant's first husband was recorded together with the testimony of those who were present on that occasion including the appellant's twin-brother, Ngati Nyumbu. The superior court ordered the said evidence to be taken by the Kangundo District Magistrate's Court which was done and the same was then forwarded to the appellate side of the High Court of Kenya at Nairobi.

From the evidence before the trial magistrate together with the additional evidence submitted to the appellate side of the High Court of Kenya at Nairobi, the appellant, according to her, had been married to Peter Musyoki Mati who had paid dowry to her father in that regard as was required under the Kamba Customary law. Peter Musyoki Mati confirmed this at the taking of additional evidence referred to above and added that the appellant had left him in 1957 as a result of some domestic disagreement and had returned to her father's home. He had one child with her at that time. Peter Musyoki Mati who said that in 1950 he was working with King's African Rifles and knew how to read and write claimed that the appellant ceased to be his wife under the Kamba customary law in 1958 when on 8th of October of the same year his dowry to the appellant's father comprising of 5 heads of cattle, 10 goats and Shs.503/50 was returned to him at the home of her father in the presence of elders representing him, the appellant's father and her subsequent husband, the late Ngumbi Mutie. The latter had paid to the appellant's father the dowry being returned to her first husband, Peter Musyoki Mati. Thereafter a "Mbui ya Ulee" ("Maleo") was slaughtered to signify that Peter Musyoki Mati and the appellant were no longer husband and wife and thereby sealing the dissolution of their marriage.

The fact of return of dowry to the appellant's first husband was, according to those present at the occasion who included the local Assistant Chief, Philip Muema Nduu, recorded in a book which latter was primarily the reason for the appellant's application in the superior court to be allowed to produce additional evidence as is mentioned earlier in this judgment. That record was endorsed by the Assistant Chief who also affixed his purported official rubber stamp therebelow which latter gave his Postal address as P.O. Box 131, TALA. This Postal address was a source of considerable disquiet to the magistrate who took the additional evidence as the existence of a Post Office in Tala in 1958 was gravely in doubt. Because of this, he held that the aforementioned rubber stamp was a forgery and accordingly refused to admit the book in question as part of the additional evidence. However, when the appeal in the superior court came up for hearing on 25th July, 1990, the parties thereto agreed by consent to have the said book as part of the record of the additional evidence submitted to the superior court by the Kangundo District Magistrate's Court as is outlined earlier in this judgment.

The position taken by the respondents both at the trial of the appellant's case before the Kangundo District Magistrate's court and at the subsequent taking of the additional evidence before the same court was that the appellant had never been divorced from her first husband, Peter Musyoki Mati, for although

she may have left him in 1957, there was no return of dowry to him as is required under the Kamba customary law and for that reason, she remained his wife whether or not she cohabited with the late Ngumbi Mutie after she left her first husband. That is what was articulated in the evidence of Mbithi Mutie, a cousin of the late Ngumbi Mutie, before the trial magistrate at Kangundo and by Munguti Mwovi both at the trial and at the taking of the additional evidence before the same court. As indicated earlier in this judgment, these two witnesses had maintained that the appellant's first husband, Peter Musyoki Mati, had refused to accept the return of his dowry as he considered the appellant to be his wife having had children with her. When this was put to Peter Musyoki Mati at the taking of additional evidence, he denied it and also said that he neither had any knowledge of the late Ngumbi Mutie having been ordered by the court in 1966 to slaughter a bull and a goat or pay Shs.500/= in lieu thereof to him for illegally cohabiting with the appellant when she was still his wife nor had he attended any court proceedings in which such an order was made. With this denial and in the absence of the court record in the Maintenance Cause No.P.164 of 1966 at the Kangundo Court, the assertions by Mbithi Mutie and Munguti Mwovi as are outlined above remain unverified.

In her judgment dated and delivered on 12th February, 1991 the first appellate judge, Alouch, J.(Mrs.) held on the all important issue whether or not the appellant had been divorced from her first husband, Peter Musyoki Mati, that she was in agreement with the magistrate who took the additional evidence as was ordered by the appellate side of the superior court that the book in respect of which that evidence was ordered to be taken was a complete fabrication and its contents as relates to the return of dowry to the appellant's first husband was rightly excluded by the magistrate taking that evidence. The effect of that holding, according to her, was that to date, there is no evidence that the late Ngumbi Mutie paid dowry to the appellant's father which in turn was to be returned to the appellant's first husband, Peter Musyoki Mati, to signify her divorce from him under the Kamba customary law. On account of this therefore, the learned judge concluded that the appellant's marriage to Peter Musyoki Mati had not been terminated and that she could not have been validly married to the late Ngumbi Mutie. That conclusion sealed the fate of the appellant's first appeal in the superior court which save for the holding that the appellant's female child fathered by the late Ngumbi Mutie was entitled to inherit from his estate was otherwise dismissed with costs to the respondents.

Aggrieved by the decision of the superior court in its appellate jurisdiction, the appellant appealed to this Court putting forward six grounds of appeal all of which only grounds one and two are pivotal to the issue whether or not the appellant was legitimately married to the late Ngumbi Mutie under the Kamba customary law and upon whose determination depends the outcome of the appellant's appeal to this Court. These two grounds are that:

"1. There was no legal basis for rejecting M.F.I. 1 of

the Additional Evidence and even if there was which is denied the learned Judge erred in law in rejecting the additional evidence as given by witnesses on grounds that she had rejected M.F.I.1. This holding was wrong in law as the same failed to appreciate that the additional evidence proper was Independent and separate from the contents of M.F.I.1, and ought to have been treated as such. The said holding has caused a miscarriage of Justice."

"2 The learned Judge was wrong in law in finding that

the Appellant had not been divorced according to Kamba customary Law despite the fact that there was adduced evidence that dowry had been returned to the first husband to the Appellant and the "MBUI YA ULEE" ("MALEO") slaughtered which according to Kamba customary Law signified the dissolution of the marriage between the appellant and her first husband."

M.F.I. 1 referred to in ground one of the appellant's appeal as is set out above is the book in respect of which inter alia additional evidence was sought to be produced and was allowed as is outlined in this judgment.

At the hearing of this appeal on 20th February, 1997, counsel for the appellant, Mr. Kisebu, argued

the two grounds of appeal set out above together and submitted that the rejection of the book referred to above by the first appellate court was wrong considering that there was other evidence relating to the return of dowry to the appellant's first husband and the slaughter of "Mbui ya Ulee"("Maleo") both of which signified the dissolution of the appellant's marriage to her first husband. Counsel for the respondents, Mr. Muoki, on the other hand responded to this submission by contending that the evidence relating to the return of dowry to the appellant's first husband and the slaughter of "Mbui ya Ulee" ("Maleo") was concocted and none of these events ever took place. The appellant therefore remained and still is the wife of her first husband, Peter Musyoki Mati.

There never was any dispute that the appellant had first been legitimately married under the Kamba customary law to Peter Musyoki Mati whom she subsequently left and returned to her parents. According to her, she thereafter got married to the late Ngumbi Mutie. For her to have been legitimately married to the latter she had to have her first marriage to Peter Musyoki Mati dissolved. According to the Kamba customary law, this could only have been effected by the return of dowry to her first husband by her father and thereafter a goat "Mbui ya Ulee"("Maleo") slaughtered and eaten to signify that the two were no longer husband and wife. On this, there was no quarrel. The dispute lay on whether or not these requirements were carried out. In this regard, whatever was the status of the record in connection therewith in the book referred to above, the best evidence, we think, was that of the appellant's first husband, Peter Musyoki Mati, who in this respect said:

"My first wife was called Esther Mbatha. She is no longer my wife. She ceased to be my wife in 1958. We had a domestic disagreement. I was refunded my dowry on 8th October, 1958. I was refunded by a certain man called Kotoe. I hear Kotoe is dead. I was refunded the dowry at the home of Esther's father. There were elders on my side. My elders were my young brother called Antony Maingi Mati and Ndulu Musyoki alias Muli Musyoki. Kotoe had elders. One of them was Munguti Mwovi. I can't tell who the other one was. Nyumbu had his elders but didn't know who is who. There was Assistant Chief Philip Muema Nduu when dowry was refunded to me. I was given 5 heads of cattle, 10 goats and Shs.503/50. The property came from Kotoe."

"When I received my property my elders took the property home. They were Antony Maingi and Ndulu Musyoki: I went with them. I gave them a goat as my elders. It is called "Mbui ya Maleo". Goat of "Maleo". It signified that Esther was no longer my wife. She became Kotoe's wife. Esther's father was paid dowry in 1958 for Esther. We had separated in 1957. I came to know Esther was married by Kotoe."

This evidence was corroborated by Peter Musyoki Mati's elders, Ndulu Musyoki alias Muli Musyoki and Anthony Maingi Mati, who represented him at the home of the appellant's father, Nyumbu Makuthi, when his dowry was returned. There is nothing in the record of the additional evidence taken by the Kangundo District Magistrate's Court that indicate that the evidence of the appellant's first husband, Peter Musyoki Mati, was not credible. Notwithstanding therefore the record of the event in the book referred to in this judgment, there was the evidence set out above of the person directly affected by the return of his dowry in respect of his first marriage to the appellant and against whom there was not even a suggestion that he had any reason to lie in that regard. This fact eluded the first appellate judge and whether or not the relevant record in the book aforementioned was a fabrication as the learned judge held, there was inter alia the independent evidence of Peter Musyoki Mati who categorically said that his dowry in respect of his first marriage to the appellant was returned to him in 1958 and a "Mbui ya Ulee"("Maleo") was slaughtered to signify the dissolution of his marriage to her as is set out above. The learned judge did not advert to this evidence. Had she done so, we think that despite the exclusion of the relevant record in the book referred to in this judgment, she could not have concluded that there was no evidence to show that the late Ngumbi Mutie paid dowry to the appellant's father to be returned to her first husband, Peter Musyoki Mati, signifying her divorce from him under the Kamba customary law. The specifics of the dowry returned to the appellant's first husband as contained in his evidence and in the evidence of the majority of the witnesses who testified at the taking of the additional evidence before the Kangundo District Magistrate's Court leads to no other conclusion than that the dowry paid to the appellant's father by the late Ngumbi Mutie was returned to her first husband in 1958 at the home of her father and that on such return a "Mbui ya Ulee"("Maleo") was slaughtered sealing the end of her marriage to her first

husband, Peter Musyoki Mati. Henceforth, the appellant became the wife of the late Ngumbi Mutie and under the Kamba customary law she has since remained so. On account of this, she and her children are beneficially entitled to a share in the estate of the late Ngumbi Mutie alias Kotoe and we so order. To this end and without adverting to the appellant's other grounds of appeal which, we think, are spent in view of what we have outlined above, we allow this appeal with costs both here and in the superior court being on the estate of the late Ngumbi Mutie alias Kotoe.

Dated and delivered at Nairobi this 7th day of March, 1997.

J.E. GICHERU

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR