



REPUBLIC OF KENYA

IN THE HIGH COURT, AT NAIROBI

CIVIL CASE NO 3642 OF 1987

ENOCK OWITI OKANJA.....PLAINTIFF

VERSUS

BILLY ONYANGO.....1ST DEFENDANT

MEDICAL OFFICER OF HEALTH, NAIROBI.....2ND DEFENDANT

JUDGMENT

This suit was begun by Plaintiff dated 14th September 1987 and filed in court on the following day. It is brought by Enock Owiti Okanja, as plaintiff, against two defendants who are named as Sgt Billy Onyango, first defendant, and the Medical Officer of Health, Nairobi, second defendant. Mr Ger appears as advocate for the plaintiff; the first defendant is represented by Mr Ombogo. The second defendant has not appeared or been represented, and has taken no part in the proceedings. In paragraph 3 of the plaintiff, the second defendant is described as the Officer-in-charge of the City Mortuary where, it is said, the body of the late Christine Dolly Owiti is lying. In paragraph 4 of the Plaintiff, the plaintiff avers that he is the lawful husband of Christine Dolly Owiti who died in a road accident near Nakuru on 8th September, 1987. It is averred that their marriage took place according to Luo customary Law, and the plaintiff paid bride price. In paragraph 5, it is averred that the plaintiff, in conjunction with the elders of his home and clan, has made all necessary arrangements for the burial of the deceased and that a grave has been prepared on Plot No 220, Ngere sub-location, West Seme Location, Kisumu District. The plaintiff prays for a declaration that he is entitled to take the body of the deceased away from the City Mortuary, and bury it as already arranged. The plaintiff also seeks an injunction restraining the first defendant from taking away the body of the deceased, and an order that the second defendant do deliver up the body of the deceased to the plaintiff. He further seeks a declaration that he, the plaintiff is entitled to bury the body as he wishes, and he asks for costs against both defendants.

On the same day, 15th September 1987, the plaintiff appeared on an application *ex parte* before the Hon Mr Justice Akiwumi, and there obtained an *ex parte* interlocutory injunction restraining the defendants from removing the body of the deceased. The injunction was to remain in force until 22nd September, 1987.

Meanwhile, on 17th September, 1987, the first defendant filed a defence and counterclaim.

In paragraph 2 of the defence, the first defendant denied that the plaintiff had been the husband of the deceased, denied that the plaintiff had been married to the deceased under Luo customary Law and denied that the plaintiff had paid bride price. He denied that the plaintiff had made the burial arrangements

proposed in paragraph 5 and 6 of the plaint, and claimed, in paragraph 3 of the defence, that he himself had made elaborate arrangements for the burial of the deceased, whom he referred to as his wife, at his own home. Particulars of these arrangements were to be found in the counterclaim. There the first defendant averred that the deceased was his lawful wedded wife under Luo Customary Law, and that she should be buried on the first defendant's land at Plot 386 Kaganda, Kanyidoto Location, Mirango Village, South Nyanza District which had also been the deceased's own wish.

The first defendant asked for a declaration that he was entitled to possession of the body of the deceased, and entitled to bury the body of the deceased at his home. He asked for an injunction to restrain the plaintiff from burying the deceased elsewhere, and that the plaintiff's suit be dismissed with costs.

On 22nd September, 1987, the plaintiff's interlocutory application was heard *interpartes* before myself. Upon the plaintiff expressing his willingness to do so, it was ordered that the plaintiff should make arrangements to ensure the preservation of the body and that the injunction already granted by Mr Justice Akiwumi should be extended to 24th September 1987 when the suit would be mentioned.

On 24th September, 1987, it was ordered that the hearing of the interlocutory application would be consolidated with the hearing of the main suit which was fixed for Monday, 28th September, 1987. It was further ordered that the interlocutory application and the suit itself would be heard in open court upon both oral and affidavit evidence, and that the interlocutory injunction would be continued to 28th September 1987.

On 28th September, 1987, the hearing of the suit began, and it was ordered that the interlocutory injunction should continue until further order.

The plaintiff himself gave evidence, and, on succeeding days, was followed by Pamela Onyango, the daughter and eldest child of the deceased, Denis Otieno, the eldest son of the deceased, Philip Got, the uncle of the plaintiff, Zephania Odera Okanja, the elder brother of the plaintiff, Athanasio Otondi Duolo, a cousin of the plaintiff, Samuel Juma Ondiyo, also a cousin of the plaintiff and Albert Kadondi Onyango who was not related to the plaintiff but who came from Uyoma Katwenga in Siaya District and was, or claimed to be, well versed in Luo customs. Hezekiah Okanja, the plaintiff's father gave evidence, and Pamela Onyango, whom I have already mentioned, was recalled to give further evidence.

For the defence, the defendant himself, Sgt Billy Onyango Oduk, gave evidence. He called, as witness, Helidah Abuonj, sometimes referred to as Mrs Nungo, who was the mother of the deceased, Benedict Oluoch Hungo who was the brother of the deceased, and Peter Odero Owambo who was Mrs Nungo's brother, and a maternal uncle of the deceased.

Reference was made to affidavits which had been sworn and filed in connection with the interlocutory application. The first, that of the plaintiff, was sworn on 14th September, 1987. There was an affidavit in reply or answer, sworn by the defendant on 17th September, 1987, and there were affidavits sworn by Helida Abuonj w/o Nungo Oluoch and by Benedict Oluoch which were also dated 17th September, 1987.

There were three other affidavits which had not been sworn or filed in this suit but were presented as exhibits. One was sworn by the defendant and dated 17th July, 1986. The second, bearing the same date, was sworn by the deceased. The third, dated 21st July, 1986 was sworn by Silvester Owino Oundo, the elder brother of the deceased. All three affidavits had been sworn about a year before this dispute arose and were unconnected with it. As appears from paragraph 16 of the defendant's affidavit, they were sworn for the purpose of changing the deceased's name on her identity card. The deceased's identity number had been 1906005/64. Exhibited to the plaintiff's affidavit was an identity card bearing that number and giving the name Christine Owiti. The plaintiff, in paragraph 2 of his affidavit, contended that that identity card in the name of Christine Owiti showed that the deceased was his wife. In each of the three affidavits sworn in July, 1986 it was deposed that the defendant and the deceased had married in 1979.

Accordingly the deceased obtained an identity card which bore her original number, 1906005/64 but gave

her name as Christine D Awuor Onyango. Applying the plaintiff's own reasoning, this identity card shows that the deceased was the wife of the defendant. The plaintiff, however, contended that the deceased could not be the wife of the defendant, and could not have married the defendant in 1979 since at that time the deceased was already married to the plaintiff. It was common ground between the parties that the deceased could not be married to two husbands at the same time, and it was also common ground that the deceased had never been involved in any divorce proceedings. The defendant's case was that he had married the deceased in 1981, and that he and the deceased had been able to contract that marriage because the deceased had not already married the plaintiff or anyone else. The deceased, it was acknowledged, had co-habited with the plaintiff, and had borne children by the plaintiff but her relationship with the plaintiff had been a relationship outside marriage. There was missing from that relationship an element which precluded it from being a marriage. This was the alleged failure or omission on the part of the plaintiff to pay bride price.

On that point, the plaintiff joined issue with the defendant maintaining that he had indeed paid bride price, and that his relationship with the deceased was that of husband and wife in a valid marriage. On the pleadings, ie on the plaint and on the counterclaim, I am asked to determine which of the two parties, the plaintiff or the defendant, should be entitled, and authorised by the court, to undertake the burial of the deceased. I propose to confine myself to that task. In arriving at a decision, the fact that one of the parties was the husband of the deceased is an important consideration though by no means the only one. Other considerations will be mentioned later, but for the present I turn to examine the evidence as to bride price.

The plaintiff, in evidence in Chief, said that, in accordance with Luo custom, he married the deceased on 1st May, 1967. He had therefore been married to her for more than twenty years. He had paid bride price of six head of cattle and shs 3,500/-. The bride price was paid in stages and by instalments. The first instalment was paid on 1st June, 1967 and consisted of a bull, a cow or heifer, and shs 300/-. The bull was brown in colour and the heifer was speckled or dappled. The plaintiff did not deliver the cattle himself but sent his brother, Zephania Odera with them. Zephania Odera was accompanied by another person named Athanasia Otondi. They went to the deceased's home at Siaya District in Ugenya location.

Zephania Odera Okanja gave evidence that he was the elder brother of the plaintiff, and that, together with Athanasio Otondi Duolo, he took the cattle and the money which, according to the plaintiff, constituted the first installment. He said that the deceased's parents, both her father and her mother, were there, and also her uncles and some women. The witness and his companion were well received, and spent a night there. They returned to Seme the following day.

Athanasio Otondi Duolo gave evidence which fully corroborated the evidence given by the plaintiff and Zephania Odera Okanja. He said that the deceased's mother's house was a big house with a gate, and that it faced the entrance to the deceased's homestead. Zephania Odera Okanja had also said the deceased's mother's house was situated directly facing the main gate.

The second installment, the plaintiff said, was paid on 4th June, 1968. This time only money, ie shs 500/- was paid. The plaintiff's father took the money.

Hezekiah Okanja, the plaintiff's father, gave evidence. He said he was eighty-five years old and came from Seme in Kisumu District. He said he was invited by the father of the deceased to visit her home, and he went there with two other people and of who, Kilian Oduola is now dead. The deceased's father welcomed them, and slaughtered a sheep for them to eat. They stayed there for two nights, and also met the deceased's mother. Her house was directly opposite the gate of the homestead. In a Luo homestead, that is the first or senior wife's house.

The third installment was paid on 17th May, 1969. That was a sum of shs 1,500/- and the plaintiff's brother, Zephania Odera Okanja went alone with the money. Zephania Odera Okanja corroborated the plaintiff's evidence as to the payment of this third instalment.

The fourth and final payment was made by the plaintiff personally. The plaintiff went with his brother, Samuel Juma on 2nd February, 1970, and they took four head of cattle and each of shs,1200/-. He

described the cattle as being a black bull, a brown heifer, a spotted bull and a brown bull. That, the plaintiff said, was the bride-price he paid. It will be seen that these four instalments amounted to six head of cattle and shs 3,500/.

The brother, Samuel Juma Ondijo, gave evidence of accompanying the plaintiff on 2nd February, 1970 when the plaintiff went to pay the final installment. He differed from the plaintiff as to the cattle. The plaintiff's evidence was that they were three bulls and one heifer. The witness said that they were two bulls and two heifers. The witness remembered the lay-out of the deceased's homestead. He was taken to the house directly facing the gate and stayed the night here.

When the deceased's mother, Helida Abuonj gave evidence she was referred to a letter which she had written to the plaintiff and which had been marked as Exhibit p19. The plaintiff had given evidence of receiving this letter on 16th February, 1979 or, correcting himself, 16th February,

1980. Unfortunately the letter itself was undated, but the letter date is the more likely one. The witness was writing to the plaintiff about the quarrel or unhappiness that had arisen between the plaintiff and her daughter, the deceased. The witness wanted to know the whereabouts of her daughter, and was protesting against the plaintiff's meddling in her daughter's employment and spoiling her work. On the question of bride-price, or dowry as the witness called it, one passage in the letter was particularly significant. It reads

“Myea (meaning the deceased's father) died before even touching your money.”

The witness said that what she meant by that was that the plaintiff had not paid any dowry. The witness went on to say that her late husband had been married polygamously, and had had three wives. The witness herself was the third wife. Someone entering the homestead would find her house on the left hand side of the compound. The house that directly faced the gate was not her house but the house of the first or senior wife. The witness said that evidence of people coming to pay dowry and going direct to the house facing the gate was not true. The plaintiff and his witnesses, she said, had told lies.' “If they had come to pay dowry,” she said, “they would have entered my house and not the one opposite the gate; they can not enter a co-wife's house.” The witness said she had not seen either the plaintiff or his brother at her house. It was admitted that the plaintiff had paid college fees to enable the deceased to undertake a secretarial course but it was emphatically denied that, either directly or indirectly, he had ever paid any dowry or bride price at all. The relationship between the plaintiff and the deceased had begun by the deceased eloping with the plaintiff. It might have evolved into marriage if they had paid bride price but he did not do so, and what began as an elopement remained merely an elopement.

Benedict Oluoch Nungo, the brother of the deceased, gave evidence that when he was living at Kahawa, the plaintiff, and another man, the witness Philip Got, came to visit him at his home in Kahawa. The plaintiff informed Benedict that he loved Benedict's sister, now sadly deceased, and that he wished to discuss marriage. Benedict advised him to visit the deceased's parents in Ugenya since both her father and mother were still alive. The plaintiff, however, did not take Benedict's advice, and did not go to see the deceased's parents.

The witness wrote a letter to the plaintiff which was dated 27th May, 1980 and marked D 1. In that letter the witness reproached the plaintiff for despising the deceased and for not considering her as his wife at all. He referred to the deceased's father dying without getting any benefit from his daughter, and challenged the plaintiff to say whose daughter he had seen being married for free?

The plaintiff replied to this letter by a letter of his own dated 30th May, 1980. It is clear, from the second paragraph of that letter, that the plaintiff was making no claim to have paid dowry but was suggesting merely that there might be some discussion or negotiation about it. This is in stark contrast to the evidence given by the plaintiff and his witnesses to the effect that a substantial dowry, consisting of six head of cattle and shs 3,500/- had been paid by four installments, and that the final installment, which made up the grand total, had been paid on 2nd February, 1970. This was about ten years before the plaintiff wrote this letter, yet nowhere in the letter does the plaintiff make any reference to it. Nowhere in the letter does he contradict Benedict's assertion that no dowry had been paid. It would have been easy

for the plaintiff to write “Dear Brother Benedict, have you forgotten about the six head of cattle and the shs 3,500/- I delivered to your parent’s home in Ugenya?”

The plaintiff, when he had the opportunity to do so, wrote nothing of the sort, and I am driven to the conclusion that the plaintiff did not claim to have paid dowry or bride price because he could not claim to have done so for the simple reason that he had not done so. It is, to me, inconceivable that if the plaintiff had paid bride-price in the way he described in giving evidence he would have omitted to remind Benedict of that payment, and would have allowed to go unanswered Benedict’s reproach that no bride price had been paid.

In commenting on this second paragraph of the letter D2, Benedict said:

“I understood the plaintiff to be admitting that he had not paid dowry; I took him to mean that he wanted us to sit down and talk about dowry.” I agree with Benedict, and hold that the passage can only be construed in the sense in which Benedict construed it. Because of that letter, written by the plaintiff himself in May, 1980, I am unable to accept the evidence given by the plaintiff and his witnesses that bride price or dowry was paid in the years 1967 to 1970. Because of that letter I am able to accept, without hesitation, the evidence of Helida Abuonj and Benedict Oluoch Nungo that bride price was not paid by the plaintiff.

I further accept the evidence of those two witnesses, and also the evidence of Peter Odero Owombo, who was the last witness to give evidence in the case, and the evidence of the defendant himself, that the defendant married the deceased in 1981. I am further satisfied that at the time of the marriage between the defendant and the deceased, the deceased was not married to the plaintiff or anybody else and was capable of contracting a marriage with the defendant. I further hold that that marriage complied with Luo custom in the matter of consent, payment of agreement money, and payment of bride price.

As I mentioned earlier, the question of bride price, though important is not the only factor to be considered in reaching a decision. I take into account that the deceased and the plaintiff, for many years before the death of the deceased, had been the worst possible terms. Perhaps as early as 1975, the deceased had left the plaintiff to seek solace in the arms of the defendant. From that time on the defendant was first the *de facto* husband of the deceased, and subsequently, as I hold on the evidence, the *de jure* husband of the deceased. There is evidence that after the deceased left the plaintiff, the plaintiff behaved towards her in a vindictive spirit and, in particular, tried to have her dismissed from her employment. The letter dated 19th May, 1982, which was written by the deceased to her brother, Benedict, and marked Exhibit D9 contained proof of the resentment and animosity felt by the deceased towards the plaintiff. There is in my judgment, some incongruity in the plaintiff, after all that has happened between the deceased and himself, putting himself forward as a devoted and grief stricken husband, and as the appropriate person to undertake the ceremonies of burial. I do not think he is.

The deceased lost her life in a tragic accident which occurred when she was on *safari*. Had it not been for that tragedy, that *safari* would have ended happily in the arms of the defendant. Of that, there can be no doubt whatsoever. The possibility was that the happiness of the deceased’s return from *safari* would have been the defendant’s happiness; the reality is that the sorrow of her not returning is the defendant’s sorrow. Inseparable from that sorrow is the duty which, in my judgment, now falls upon the defendant, of observing the ceremonies used among the Luo people to mark the end of life on earth.

Before leaving this case, I must express my gratitude to Mr Ger and Mr Ombego, advocates for the plaintiff and the defendant, respectively, for the painstaking research they have made into the law and custom of the Luo people, and for the authorities and writings they have placed at my disposal.

There will be judgment for the first defendant against the plaintiff on both the plaint and the counterclaim, and it is hereby declared that the first defendant, Sgt Billy Onyango Oduk is entitled to the mortal remains of the late Cristine D Awuor Onyango who died on the 8th day of September, 1987 and whose body now lies in the care of the Superintendent of the Nairobi City Mortuary, and the said Superintendent is hereby authorized to deliver up into the possession of the said Sgt. Billy Onyango Oduk the said body

for the purpose of the same being buried in the manner proposed in the said counterclaim, and it is further ordered and provided that the application for an injunction contained in paragraph B of the prayer to the said counterclaim do stand adjourned *sine die* with liberty to restore, and it is ordered that the costs of this suit, including the costs of the plaint, the defence and the counterclaim and the costs incurred in interlocutory proceedings be taxed if not agreed and be paid by the plaintiff to the first defendant together with interest thereon calculated at court rates from the date of such taxation or agreement until the same are paid by the plaintiff to the first defendant, and it is ordered that the second defendant viz the Medical Officer of Health for the City of Nairobi be dismissed from the suit with no order as to costs.

The injunction originally granted by Mr Justice Akiwumi on 15th September, 1987 is not extended, and it now lapses.

Dated and Delivered at Nairobi this 14th Day of December, 1987

J.W.A BUTLER-SLOSS

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JUDGE