



**Mwaniki v Mwaniki (Environment and Land Appeal 98 of 2014)
[2015] KEELC 847 (KLR) (15 June 2015) (Judgment)**

Beatrice Wanjugu Mwaniki v Josephine Wanjiku Mwaniki [2015] eKLR

Neutral citation: [2015] KEELC 847 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL 98 OF 2014**

L WAITHAKA, J

JUNE 15, 2015

BETWEEN

BEATRICE WANJUGU MWANIKI APPELLANT

AND

JOSEPHINE WANJIKU MWANIKI RESPONDENT

JUDGMENT

1. By a plaint dated 11th January, 2011 and amended on 24th January, 2011 the Respondent instituted a suit in the lower court to wit, Nanyuki SPMC's Civil Case No. 4 of 2011 seeking judgment against the appellant in this appeal for:-
 - a) A permanent injunction restraining the defendant (now appellant) either by herself, her children, servants, employees and her agents from collecting, transporting, burying or in any way interfering with the deceased's body which was at that time lying at Nanyuki General Mortuary till they actively involved her in the burial arrangements of the deceased.
 - b) Costs of the suit and interest thereon;
 - c) Any other or further relief that the court may deem fit to grant.
2. Upon hearing the case presented before him by the parties to the suit, the Trial Magistrate (hereinafter TM) entered judgment in favour of the Plaintiff (now Respondent) in the following terms:-

“...to me the plaintiff was a wife of the deceased as per Kikuyu Customary Laws. The defendant was first wife while plaintiff was 2nd wife. The plaintiff and defendant were both wives of the deceased as per Kikuyu Customary Laws.The plaintiff and the defendant have lost their husband and the two and their children should sit together and plan a



dignified send off for their late husband. Co-wives refusal to appreciate and accept one another is common practice but this cannot extend to denying any of them her rights.

Having observed all the above I order that:-

- i) the plaintiff as a wife of the deceased be actively involved in the burial arrangements of the deceased;
- ii) this being a family matter, each party to bear its own cost of the suit.”

3. Being dissatisfied with the decision of the TM, the appellant filed this appeal challenging the judgment of the lower court on the following grounds:-
 1. That the learned TM erred in law and fact by entertaining a claim which was beyond his jurisdiction under Section 2 of the Magistrate Court’s Act, Cap 10 Laws of Kenya;
 2. That the learned TM erred in fact by finding that there was a valid Kikuyu customary marriage between the deceased and the Respondent when there was no evidence capable of proving that fact;
 3. That the learned TM erred in law and in fact by failing to find that existence of a custom had to be proved through evidence;
 4. That the TM erred in law and in fact by entertaining a claim that raised no cause of action against the appellant thereby arriving at an abstract finding;
 5. That the learned TM erred in law by failing to appreciate the legal principles applicable to granting an order of permanent injunction;
 6. That the TM was biased against the appellant thereby failing to correctly analyze her evidence; and
 7. That the judgment is not supported by the evidence on record.
4. For the foregoing reasons, the appellant prays that the appeal be allowed with costs; the judgment of the lower court be set aside and in its place an order dismissing the suit before the lower court with costs be made.
5. In considering the appeal, this court must evaluate afresh the evidence on record in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify. See *Selle & Another vs. Associated Motor Co. Ltd & Others* (1968) E.A. 123.
6. The case presented before the TM was that the respondent married the deceased, Francis Mwaniki Njogu in 1995. Thereafter they lived together as husband and wife in Naromoru/Ragati No.42. The respondent and the deceased were blessed with 4 children.
7. The court heard that the deceased had another wife and other children who were all grown ups. The deceased and the other wife had separated. At the time the deceased met his death he was living with the respondent.
8. After the death of the deceased, the appellant and her children are said to have threatened to harm the respondent if she attended the deceased’s burial. The appellant and her children are said to have claimed that the respondent was responsible for the deceased’s death.
9. The trial court further heard that there existed bad blood between the deceased and the appellant and her sons over distribution of the deceased property; the appellant had taken the deceased to court.



10. The court further heard that the deceased had caused the respondent's names as they appeared in her identity card to be changed so that his name featured in her Identity Card. The deceased had also paid dowry for respondent and carried out the other rites concerning marriage. This was done in the absence of the deceased relatives because they allegedly refused to come for dowry negotiations. According to the testimony of the respondent, dowry payment was witnessed by friends of the deceased namely, Mugweru and Warutere.
11. The trial court heard that the deceased had expressed his wishes on how he wished his properties to be shared and that the respondent knew the deceased's brother, John and the deceased's mother Nyawira but did not know the deceased's uncles.
12. Maintaining that she was a wife of the deceased, the respondent urged the court to direct that she be involved in burial arrangements for the deceased. To prove the assertions in her testimony, the respondent produced the following documents:-
 - a) Her identity card and that of the deceased as Pexbt 1 and 2 respectively;
 - b) Dowry payment book as Pexbt 3;
 - c) Deceased wish over his properties as Pexbt 4;
 - d) Title deeds in respect of Narumoru/Block/Ragati/142 and Narumoru/Block/Ragati/383 as Pexbt 5 and 6 respectively;
 - e) Suit papers to show that appellant had sued the deceased as Pexbt 7;
 - f) Police bond issued in respect of Nyeri Criminal Case No. 1476 as Pexbt 8;
 - g) Land disputes tribunal award Pexbt 9,
 - h) Letter to tribunal by deceased Pexbt 10,
 - i) Photographs showing the deceased with the Respondent and their children Pexbt 11;
 - j) Letter by the the deceased showing that appellant lived with another man as Pexbt 12;
13. Agnes Wanjiru, informed the court that the deceased had married her daughter (the respondent) according to Kikuyu customs - With Mwati and Harika. After marriage the two went to live at Ragati. P.W.2 was however, unable to remember when the dowry was paid.
14. Patrick Kiama Mwaniki, a son of the respondent informed the court that he had grown at Ragati and that on the day the deceased met his death, his mother had prepared food for him before he left home at 6.00 a.m for the shamba. He recognized the deceased as his father.
15. Lydia Muthoni Mwangi, stated that she knew the deceased and the Respondent as husband and wife. The two had sold a portion of Narumoru/Block 1/Ragati/ T 383 to her. She produced a copy of the sale agreement executed between herself and the deceased as Pexbt 13.
16. On her part the appellant, Beatrice Wanjugu Mwaniki informed the court that she got married to the deceased in 1962 in accordance with Kikuyu Customs regarding marriage. Their marriage was blessed with 6 children all of whom are adults.
17. The appellant denied having had knowledge of the respondent or her marriage to the deceased. She stated that she only got to see the respondent in court.



18. The appellant further stated that she is the one who bought the land at Ragati and that three of her sons live there. The court heard that the land at Ragati was sub-divided into 5 parcels and 4 of them were given to her sons.
19. The appellant explained that they applied for consent to subdivide and transfer the subdivisions but the transfer was not effected because some of her children were still in school. She produced a copy of mutation in respect of the parcel of land, copy of consent to transfer and a copy of the application for consent to subdivide as Dexbt 1 to 3 respectively.
20. She explained that she could not involve the respondent in burial arrangements because she did not know her.
21. Concerning the exhibits she produced in support of her case, she stated that they belonged to the deceased and that the deceased had indicated who was to benefit from his land. She explained that her share was to remain with the deceased.
22. The appellant admitted having sued the deceased in Court over the suit properties and that the deceased and herself were separated.
23. D.W. 2 Mugweru Wakahuha informed the trial court that he was conversant with Kikuyu customs. He stated that the deceased was his nephew; that the only wife of the deceased he knew was the appellant. The court heard that he took dowry to the appellant's father and carried out all the necessary ceremonies in respect of her marriage but did not do so for the respondent.
24. He stated that as the deceased's father, the deceased ought to have told him about dowry payment in respect of the respondent because according to Kikuyu customs regarding marriage, it is a father who is supposed to pay dowry for his son.
25. Concerning burial, the court heard that it is the oldest son who ought to bury his deceased father together with the deceased's father and other children. D.W.2 explained that wives are not involved in burial.
26. D.W.2 admitted that under Kikuyu customs a man can marry as many wives as he wishes.
27. According to D.W.2, for one to be considered as married he has to take Mwati and Harika and perform other ceremonies e.g Nguracio. He maintained that he could only say that the deceased had married the respondent if the deceased had done so in his presence.
28. D.W.3 Cornelius Warutere Njogu, a brother of the deceased informed the court that he knew the appellant as the deceased wife but not the respondent. He asserted that he was not aware that the deceased had another wife. He however knew that the appellant had cases with deceased in court.
29. The foregoing was the evidence presented before the trial court and which formed the basis of the impugned decision.
30. The appeal was disposed of by way of written submissions.

Appellant's submissions:-

31. On behalf of the appellant, it is submitted that from the pleadings and evidence on record, it is clear that the claim before the lower court was a burial dispute under kikuyu customary law. That fact is said to be discernable from paragraphs 3, 6, 7, 9 and 10 of the amended plaint.
32. Since a court of law derives its jurisdiction from the law; the constitution or statute, given that the claim before the lower court fell under customary law, it is submitted the court's jurisdiction is donated by



Section 2 of the Magistrate's Court's Act as read with the Judicature Act, Cap 8. The definition of a customary law claim provided under Section 2 of the Magistrate's Courts Act is said to be exhaustive. Because the Section does not expressly address the issue of burial disputes, it is submitted that the trial court had no jurisdiction to hear and determine the dispute brought before him. Reference is made to the the decision in the cases of Kiplagat Korir v. Dennis Kipngeno Mutai (2006) e KLR and Christine Ndaka Mbiti & Another v. Joseph Githinji M' Eringo and another Nyeri HCCC No.40 of 2010 and submitted that what was before the lower court was a civil claim and not a succession cause. The respondent's contention that the trial court was dealing with an issue of intestate succession is said to be baseless.

33. In the case of Kiplagat Korir v. Dennis Kipngeno Mutai (supra) Luka Kimaru J., observed:-

“A Resident Magistrate Court can only hear customary law disputes as specified in Section 2 of the Magistrate's Court Act. A Resident Magistrate cannot extend jurisdiction and hear matters which are not specifically provided for in the said Section 2 of the Act. Such, disputes including in this case, a customary burial dispute, shall be heard by the High Court only.”

34. On whether the respondent proved that she was customarily married to the deceased, it is submitted that the respondent's evidence did not suffice to prove that she was customarily married to the deceased. In this regard, it is submitted that the respondent failed to call an independent witness to vouch for her allegations. The testimony of her mother (P.W.2) is said to have been very scanty and incapable of supporting the respondent's claim. In support of the submission that the testimony of an independent witness was necessary to vouch for the respondent's claim, reference is made to the case of Priscilla Waruguru Gathogo v. Virginia Kanugu Kathigo (2004)e KLR where Okwengu J. (as she then was) stated:-

“having carefully considered the evidence I find that evidence adduced by the protestor in proof of her alleged marriage to the deceased fell short of proving the alleged marriage. Apart from her daughter and two brothers there were no other independent witness to the customary formalities, there was no evidence there was any ngurario ram slaughtered nor was there any evidence that there were any elders from the deceased's relative who participated in the alleged formalities. Moreover, if the deceased and the protestor got married in 1979 there is no explanation why the formalities were being done almost seventeen (17) years later in 1996.”

35. Since the respondent based her entitlement to the claim to entitlement to bury the deceased on her alleged marriage to the deceased, it is submitted that the TM ought to have enquired whether such rights existed under Kikuyu Customary law based on the decision in the case of Ernest Kinyanjui Kimani v. Muiruri Gikanga & Another (1965)EA 735 where it was held:-

“where African customary law is neither notorious nor documented it must be established for the court's guidance by the party intending to rely on it and the appellant had failed to do so....As a matter of practice and convenience in civil cases the relevant customary law if it is incapable of being judiciary noticed should be proved by evidence or experts opinion adduced by the parties; Section 87(10) of the Civil Procedure Act and section 13. Section 51 and section 60 of the Evidence Act, 1963 did not cast the burden of establishing the customary law on the court through assessors, to do so would deprive parties of the opportunity to test the assessor's views by cross-examination or further evidence.”



And submitted that it is the duty of the party intending to rely on a custom to prove that indeed such a custom exists. The respondent is said to have failed to adduce any evidence to show that she was entitled to enjoyment of any customs vesting upon her the right to bury the deceased.

36. Based on the testimony of D.W.2, Mugweru Wakahuha to the effect that according to Kikuyu customs the responsibility of burying the deceased vested with his sons led by the eldest son and the decision in the case of Njoroge v. Njoroge & Another (2004)1 KLR where it was held:-

“...the law of marriage is particularly concerned with standing of persons within the family unit. It follows that it is the marriage regime, rather than the succession scheme that should prevail in determining questions of burial. ...it is not contested that under kikuyu customary law today, responsibility for burial of a man falls in the first place on his eldest son and on the brothers of the deceased. From the foregoing analysis, I have serious doubts that the applicant, in her main suit has a prima facie case with a probability of success; or the applicant stands to suffer irreparable injury if her prayers are not granted...”

It is submitted that the TM ought to have arrived at an irresistible conclusion that the respondent had neither an accrued right under kikuyu customs to bury the deceased nor a cause of action against the Appellant.

37. The TM is said to have erred by issuing an order of permanent injunction against the appellant when no prima facie case had been established against her.

Respondent's submissions:-

38. On behalf of the respondent it is submitted that the appeal should be dismissed because:-
1. under Section 2(f) of the Magistrates Court's Act, Magistrate courts have power to deal with intestate succession and administration of intestate estates so far as they are not governed by any written law. In this regard reference is made to the case of Apeli v. Buluku (2008)1 KLR 873 where the Court of Appeal observed that after the death, the custody and possession of the body of a deceased person belongs to the executors until it is buried. In the circumstances of this case, it is submitted that the custody and possession of the body of the deceased belonged to the persons entitled to administer the estate of the deceased person.
 2. It is submitted that burial disputes, based on succession and administration of the deceased's intestate estate are within the jurisdiction of the magistrate's court.
 3. There is adequate evidence that the deceased had performed the requisite customary rights. For instance plaintiff's exhibit 3 is said to be prove that dowry was paid. The evidence of P.W.2 who was the recipient of the dowry is said to be corroboration of that fact. The cohabitation of the respondent with the deceased and the fact that they had children together is said to be enough proof of the fact that the deceased and the respondent were married.
 4. Because Africans treat their dead honorably and with lasting attachment even after death, it is submitted that burial is revered and respect for the dead survives such burial.
 5. It is conceded that African customs provide for who should bury a deceased person and where to bury them and submitted that the person who is the first in line of duty in relation to the burial of any deceased person is the one who is closest to the deceased in terms proximity and whoever can prove this fundamental proximity in law to the deceased has the colour of right of burial, a head of any other claimant. In this regard reference is made to the case of Njoroge



v. Njoroge (supra) where it was so held. Since the Respondent was the one living with the deceased at the time of his death, it is submitted that she had every right to participate in the burial arrangements.

6. Threat of any form of injury whether in rem or in persona invites refuge in injunctive relief. In the circumstances of this case, it is submitted that a wife being denied the revered duty to bury her departed husband is threat to her entrenched obligation, particularly in a customary set up. The imminent injury to her feelings as such wife are said to have long-lasting and immense ramifications, both to herself and in the eyes of the public who regard her as such wife.
39. In view of the foregoing, it is submitted that the TM was right in granting injunctive orders against the appellant.

Analysis and determination

40. From the memorandum of appeal filed in this appeal and the submissions by the advocates for the respective parties, the issues for determination are:-
- (i) Whether the trial court had jurisdiction to hear and determine the dispute brought before it?
 - (ii) Whether the respondent proved her case against the appellant?
 - (iii) Whether the respondent had any cause of action against the appellant?
 - (iv) What order(s) should this court make?

Whether the trial Court had jurisdiction to hear and determine the dispute brought before it?

41. With regard to this question, based on the provisions of Section 2 of the *Magistrates' Courts Act* and the decision of Kimaru J. in the case of Kiplagat Korir v. Dennis Kipngeno Mutai (supra), it is submitted that the TM did not have jurisdiction to hear and determine the dispute before it, the same not having been expressly provided for under Section 2 of the *Magistrates' Courts Act*.
42. In answering this question, it is important to consider the provisions of Section 2 of the Magistrates' Court Act alongside the Provisions of Section 9 of the same Act which provides as follows:-
- “A district magistrate's Court shall have and exercise jurisdiction and powers in proceedings of civil nature where-
- (a) the proceedings concern a claim under customary law.”
43. Section 2 of the *Magistrates' Courts Act* defines a claim under customary law as a claim concerning any of the following matters under African customary law:-
- (e) Matters affecting status of, and in particular status of women, widows and children.”



44. Faced with the question of jurisdiction of the magistrates' courts to hear and determine burial disputes, Achode J., stated:-

“There are two schools of thought on this issue. The first school of thought can be discerned in decisions such as that of Kimaru J in *Kiplagat Korir v Mutai HCC App No. 52 of 2005* at Kericho (unreported), in which he stated that:

“A resident Magistrate's court can only hear customary law disputes as specified in section 2 of the Magistrate's court Act. A Resident Magistrate cannot extend jurisdiction and hear matters which are not specifically provided for in section 2 of the Act.”

The second school of thought is such as can be found in the decision of Mwera J (as he then was) in HCC App No. 19 of 2008 (unreported). Mwera J was of the view that a Magistrate's Court had jurisdiction to determine a burial dispute. In particular the judge had this to say:

“...And on this point this court would, with respect, disagree with the Kiplagat Korir case which held that a resident magistrate had no jurisdiction to adjudicate over a burial dispute. Quite probably Section 9 of Cap 10 was not brought to the attention of the learned judge presiding over that appeal.”

I have considered the pertinent provisions of the law and I am of the view that Section 2 should not be read in isolation, but rather it should be read together with Section 9 of the Magistrates Court's Act. Such a reading indicates that the magistrate's Act does not oust the jurisdiction of the magistrate's court to determine burial disputes. I am therefore, of the same persuasion as the school of thought held by Mwera J above.” See *Martha Wanjiru Kimata & Another v. Dorcas Wanjiru & Another* (2015) eKLR.

45. Being of the view that the decision in the case of *Martha Wanjiru Kimata & Another* (supra) captures the right legal position concerning the jurisdiction of Resident Magistrates' Courts to hear and determine burial disputes, I return a positive verdict to this question.

Whether the Respondent proved her case against the Appellant?

46. Concerning this question, it is submitted that the respondent did not adduce evidence capable of proving that she was customarily married to the deceased and that she was entitled to participate in preparation of the deceased's burial. In this regard, it is submitted that the evidence adduced by D.W.2, an expert on Kikuyu customs regarding marriage, shows that wives had no role to play in burial of their husbands.
47. On whether the respondent adduced evidence capable of proving that she was married to the deceased in accordance with Kikuyu customs regarding marriage, I begin by pointing out that the only evidence adduced in that regard was the dowry book, Pexbt 3 and the oral testimony of the respondent and her mother, P.W.2. In my view that testimony, on its own cannot be said to have adequately proved existence of a customary marriage between the respondent and the deceased. However, a reading of the said evidence alongside the other evidence adduced before the lower court leaves no doubt that the respondent was a wife of the deceased. In this regard, see the statement of the deceased in the case before



the Land Disputes Tribunal which formed part of the record of the trial court. In that statement the deceased had rendered himself thus:-

“I am residing in a house left by my wife Beatrice before she moved to my father’s land at Ragati i Mathira. My second wife stays in a rented house belonging to Mr. Waigwa Wahome. I want to sub- divide my plot Naromoru/Block1/Ragati/t/383 into two plots of ¼ each and ¼ should be given to Lydia Muthoni and the other ¼ be given to Eunice Wambui Karani. Both of them have paid me and they are using the plots. I spent the money to pay my second wife’s hospital bill after being poisoned by my first wife’s son Mr. Joseph Maina Maguru.

For Naromoru/Block 1/Ragati 142 it should be divided as follows; my first wife Beatrice Wanjogu Mwaniki 4 ½ acres. My second wife Josephine Wanjiku Mwaniki 4 ½ acres and 2 acres mine.... I want the cautions removed so that I can do the above. Beatrice Wanjugu Mwaniki the objector has been summoned for many times to come before the tribunal and she has never shown up.”

48. The above statement forms part of the tribunal’s ruling dated 4th August, 2009.
49. The replying affidavit by the deceased in the case filed by the appellant for division of matrimonial properties also makes reference to the respondent being a wife of the deceased.
50. Since there is evidence that the respondent and the deceased lived together as husband and wife and that they had children together, the TM cannot be faulted for having arrived at the decision that both the respondent and the appellant were wives of the deceased.
51. Was the respondent as a wife of the deceased entitled to participate in burial preparations for her deceased’s husband?

With regard to this question I adopt the decision of Ojwang J., (as he then was) in the case of Ruth Wanjiru Njoroge v Jemimah Njeri Njoroge & Another [2004] eKLR, where he held:-

“In the Social Context prevailing in this country the person who is first in line of duty in relation to the burial of any deceased person is the one who is closest to deceased in legal terms. Generally the marital union will be found to be the focus of the closest chain of relationships touching on the deceased. And therefore, it is only natural that the one who can prove this fundamental proximity in law to the deceased, has the colour of right of burial, ahead of any other claimant.”

52. I also find the decision of Mabeya J., in the case of John Omondi Oleng and another vs. Sueflan Radal (2012) eKLR to be instructive on this question. In that case the judge (Mabeya J) stated:-

“...When it comes to the disposal of the body of a married man or woman the spouse should play a leading role. It would be better if the relatives of the deceased can sit down and agree on how to give their loved one a dignified exit. When they fail to agree and approach the Court for solution, the court has no option but to step in...”

53. In the circumstances of this case, I do not agree with the argument that the burial of the deceased was to be carried by his sons and father in exclusion of his wives. The fact that the wives may not play an active role in the burial ceremonies does not mean that they should be excluded from the burial preparations. In fact, in practice, they are never excluded from such preparations.



Whether the Respondent had any cause of Action against the Appellant?

54. From the evidence adduced in the case before the lower court, it is not in dispute that the appellant and her sons did not want to involve the respondent in burial preparations for the deceased. Having found that the respondent was a wife of the deceased and entitled to participate in the burial preparations of the deceased, I find and hold that she had a course of action against the appellant.
55. The upshot of the foregoing is that the TM did not error or exceed her mandate by determining the dispute before her. On the strength of the evidence adduced before her and the circumstances of the case, she arrived at the right decision. Consequently, this appeal has no merit and is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NYERI THIS 15TH DAY OF JUNE, 2015.

L N WAITHAKA

JUDGE

In the present of:

N/A for the appellant

N/A for the respondent

Court assistant - Lydia

