AKO v BKO (Civil Appeal 106 of 2011)
[2014] KECA 392 (KLR) (19 September 2014) (Judgment)

Agnes Kwamboka Ombuna v Birisira Kerubo Ombuna [2014] eKLR

Neutral citation: [2014] KECA 392 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 106 OF 2011

JWO OTIENO, F. AZANGALALA & S OLE KANTAI, JJA

SEPTEMBER 19, 2014

BETWEEN

AKO ..... APPELLANT

AND

BKO ..... RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Kisii (Makhandia, J.) dated 17th January, 2011 in H.C.C.A. NO. 132 OF 2008)

Court of Appeal rules that customary woman-to-woman marriages are discriminatory against female children

The appeal arose from a land dispute between AKO and BKO over land. The appellant, AKO, claimed co-ownership based on a woman-to-woman marriage under Gusii customary law with the original proprietor, Birita. The Senior Principal Magistrate's Court dismissed AKO's counterclaim, ruling that she had not demonstrated the existence of such a marriage. The High Court upheld the decision, citing lack of evidence and procedural irregularities. The Court of Appeal affirmed the trial court's decision, finding no legal basis for AKO's claim. According to the Court of Appeal, the practice which compelled Birita to enter into a woman to woman marriage with the respondent in order to have sons could only diminish in significance. Birita, after all, had daughters who, like their male counter parts under the Constitution were equal before the law. The court also observed that the need for such customary arrangements may diminish in significance, given constitutional provisions on gender equality and inheritance rights.

Reported by Nelson Tunoi and Riziki Emukule

Family Law *- marriages - customary marriage - woman to woman marriage - whether the appellant and the respondent were co-wives in a polygamous woman to woman marriage arrangement under the Abagusii customary law - whether the purpose of the woman-to-woman marriage under the Abagusii customary law was inconsistent with the Constitution - Constitution of Kenya, 2010 articles 27, and 60(1)(f).*

Brief facts

The appellant (*Agnes Kwamboka Ombuna*) filed a second appeal regarding a dispute over a parcel of land. The appellant claimed that even though the respondent (*Birisira Kerubo Ombuna*) was the registered owner of the land, she was only holding half of the land in trust for her since they had both been married to the original proprietor of the property, one *Birita Asairi Nyanchama*, in a woman to woman marriage practiced under *Gusii* Customary Law.

Issues

i. Whether the appellant and the respondent were co-wives in a polygamous woman to woman marriage arrangement under the *Abagusii* customary law.

ii. Whether the purpose of the woman-to-woman marriage under the Abagusii customary law was inconsistent with the Constitution

Held

1. Customary Law consisted of rules of law derived from the customs and usages of any particular community. They were customs or usages practiced by a particular community over a long period of time and had consequently acquired the binding force of law within the particular community as they had been accepted within that community. To demonstrate that such customs or usages had acquired the binding force of law a party relying on the same had to lead evidence in that regard. The issue of whether a particular custom or usage was binding on any particular community was one of fact.
2. The court would not interfere with the decision of the trial and first appellate court since they had already re-appraised the evidence on record to prove that the respondent was the only 'wife' to one *Birita*. The two courts had appreciated the existence of woman to woman marriages as practiced among the *Abagusii* community but the evidence adduced showed there was no such marriage between the appellant and one *Birita*.
3. The purpose of woman to woman marriage was to enable an old, barren or sonless woman to perpetuate her lineage. That practice was discriminatory in that it tended to favor male children who were traditionally the inheritors of property hence the enactment of the Law of Succession (cap 160), which did not make a distinction between male or female children of a deceased intestate.
4. The Constitution of Kenya, 2010 promoted the elimination of any form of gender discrimination in law and practices related to land and property in Kenya under article 60(1)(f) while article 27 criminalized any form of discrimination on any ground and enhanced equal inheritance. The practice that compelled the appellant to enter into a woman to woman marriage with one *Birita* could only diminish in significance since she already had daughters who were equal before the law just like their male counterparts as per the Constitution.

Appeal dismissed with costs to the respondent.

Citations

East Africa

1. *Kemunto, Naomi v Total (K) Limited and Kisii Total Service Station* Civil Appeal No 211 of 2008 – (Followed)
2. *Onyango & Another v Luwayi* [1986] KLR 513 - (Mentioned)
3. *Mark Khan Transporters Ltd v Mbugua* [2010] I EA 228 - (Mentioned)

Statutes

East Africa

1. Constitution of Kenya 2010 articles 27, 60(1) – (Interpreted)
2. Civil Procedure Act (Cap 21) section 72(1) - (Interpreted)
3. Law of Succession Act (Cap 160) - In general -(Interpreted)

JUDGMENT

1. This appeal is from the judgment of the High Court (Asike Makhandia, J., as he then was) in Civil Appeal No. 132 of 2008 - at Kisii. The appellant, AKO, was also the appellant in that appeal whilst the respondent, BKO, was the respondent. The appeal before the High Court was from the decision of SMS Soita, Ag. Senior Principal Magistrate – Kisii. The appellant was the respondent in a suit which was filed by the respondent. The dispute was over parcel number Nyaribari Masaba/Bokimotwe/xxxx ("the suit premises"). The respondent sought a declaration that she was the sole registered owner of the suit premises, eviction of and injunction against the appellant who had, according to the respondent, unlawfully, without reasonable or just cause or excuse trespassed upon the suit premises.

2. In her response to the respondent's claim, the appellant denied that the respondent was the registered proprietor of the suit premises absolutely as she too was entitled to the same in equal shares with the respondent. She then set up a counter- claim for half of the suit premises on the ground that she and the respondent had both been married to the original proprietor of the suit premises, Birita Asairi Nyanchama ("Birita") in a woman to woman marriage practiced under Gusii Customary Law. As co-wives of Birita they were accordingly entitled to equal shares of the suit premises and the respondent, as the registered proprietor, held her (appellant's) share in trust for her. She therefore sought a declaration of her own that she was entitled to half share of the suit premises and an order of specific performance directing the respondent to transfer half of the suit premises to her.

3. After a full hearing in which the respondent called six witnesses besides herself and the appellant gave evidence and also called six witnesses, the learned Ag. Senior Principal Magistrate allowed the respondent's claim with costs and dismissed the appellant's counter-claim also with costs. The learned Magistrate held that there was no woman to woman marriage between the appellant and Birita. With that finding her claim could not succeed.

4. It is that decision which became the subject of the appeal before the High Court. As already stated above, the High Court did not find merit in the appeal and dismissed it with costs. In doing so, the learned Judge of the High Court was of the considered view that the appellant's counter-claim had been filed out of time without the leave of the court, and further that 3rd party proceedings against Birita were irregular and ought to have been expunged from the record.

5. On the issue of whether the appellant was a co-wife of the respondent as wives of Birita in a polygamous woman to women marriage arrangement, the learned Judge of the High Court concurred with the learned trial magistrate that there wasn't such a marriage. With that finding, the appellant's appeal to the High Court was bound to fail and was indeed dismissed as already stated

6. The appellant was still aggrieved and moved to this Court on a second appeal vide her Memorandum of Appeal dated 18th April, 2011, filed by her advocates M/S Omariba & Company. The following grounds of appeal were cited:

    1. The learned Hon Judge erred in law in holding (sic) the decision of the learned trial magistrate that the appellant was not a co-wife of the respondent.

    2. The learned Hon Judge erred in law by not considering and appreciating the aspect of custom (which) was exercised by the Appellant and Respondent.

3. The learned Hon Judge erred in law as he did not take into consideration that though the respondent was the only registered proprietor of the suit land was holding the same in trust of (sic) the appellant with her children.

7. The learned Hon Judge erred in law and facts by arriving at a conclusion that the appellant lacked capacity to contract woman to woman marriage."At the hearing of this appeal Mr. Mageto, learned counsel for the appellant, relied upon written sub-missions made on behalf of the appellant before the High Court. Learned counsel faulted the decision of the High Court on the main ground that on the evidence, the High Court should have found that the appellant was indeed a co-wife of the respondent; that the same evidence, according to learned counsel, demonstrated that the respondent held the suit premises in trust for herself and the appellant and that the High Court misconstrued Abagusii customary law in holding that the appellant lacked capacity to contract a woman to woman marriage with Birita.

8. Mr. Nyandieka, learned counsel for the respondent, in response submitted that no legal issue was raised in the grounds of appeal and this Court should not therefore interfere with the concurrent decisions of the two courts below. In counsel's view, the appellant indeed had no capacity to marry Birita and with that finding the appellant's claim was lost. According to learned counsel, the High Court properly re-evaluated the evidence and reached its own independent conclusion on the same.

9. We have anxiously considered this appeal and we find that only one principal issue was raised namely whether the appellant and the respondent were both married to Birita in a woman to woman marriage arrangement under the Abagusii customary law. A determination of this issue resolves the rest of the secondary issues raised by the appellant. We say so, because the respondent sought a declaration that she was the sole registered proprietor of the suit premises and as such proprietor she was entitled to exclusive possession of the same. The appellant's answer was that she was a co-wife of the respondent and in that capacity she was entitled to a half share of the suit premises with the result that the respondent was not the absolute registered proprietor but held the half share in trust for her (appellant.) In fact it was upon her alleged status as a co-wife of the respondent that she counter-claimed for a declaration that the appellant was entitled to half share of the suit premises and for an order of specific performance directing the respondent to transfer the half share to her. On this issue the learned trial magistrate stated:

> .... "The suit land belonged to Birita Nyanchama. She testified that she transferred the same to the plaintiff whom she had married under Abagusii custom. She denied ever marrying the defendant and paying dowry. Her own daughter who testified as PW4 refuted the defendant's claim on marriage to PW1. On a balance of probabilities I find that there was no marriage between the defendant and PW1 and that she was married to one Makori Onguso. The defendant's own uncle James Ondari Rianga (PW6) testified (sic) confirmed her marriage to Makori Onguso. Having so found, the defendant's counter-claim must fail."

10. And the High Court stated:

> .... "When the evidence of the appellant and her witnesses is juxtaposed against that of the respondent and her witnesses, one gets a distinct feeling that the respondent's story is more credible and believable. Birita herself denied having married the appellant. ..... They (witnesses) all claimed lack of knowledge of such marriage. There was the evidence of the children's officer..... The witness stated that the case was dismissed because it was established that the father of the said children was not Birita but one, Makori Onguso. .....

> Then there was the evidence of the appellant's own uncle. He confirmed that the appellant was at the time of the alleged marriage already married to Makori Onguso.
>
> .....
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> To my mind, I am persuaded that there was no marriage between the appellant and Birita. ...."

11. So, on the crucial issue of whether the appellant was a co-wife of the respondent, the two courts below resolved it in favour of the respondent that she was not. To determine that issue the two courts below considered the rival evidence adduced by both parties and were unanimous that the appellant fell short of demonstrating that she was indeed married to Birita in a woman to woman arrangement under Abagusii customary law. Customary Law, as we understand it, consists of rules of law derived from the customs and usages of any particular community. They are customs or usages practiced by a particular community for over a long period of time and have consequently acquired the binding force of law within the particular community as they have been accepted within that community. To demonstrate that such customs or usages have acquired the binding force of law a party relying on the same must lead evidence in that regard. So, the issue of whether a particular custom or usage is binding on any particular community is one of fact.

12. In the appeal before us, we think it was satisfactorily demonstrated that among the Abagusii community, the practice of woman to woman marriage did exist and both parties accepted it as being of binding force of law. The two courts below however found as a fact that the appellant was not married to Birita in such an arrangement. This being a second appeal the provisions of Section 72(1) of the *Civil Procedure Act* (Cap 21 Laws of Kenya) apply. The section reads:

> 72(1) Except where otherwise expressly provided in this Act or any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court on any of the following grounds namely -
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> (a) the decision being contrary to law or to some usage having the force of law;
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> (b) the decision having failed to determine some material issue of law or usage having the force of law;
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> (c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force which may possibly have produced error or defect in the decision of the case upon the merits."

13. A plain reading of these provisions, shows that a second appeal to this Court should be on a question of law and complaints regarding facts do not ordinarily fall for consideration. The provisions have received numerous judicial pronouncements of this Court in its decisions such as in the case of N*aomi Kemunto -V- Total (K) Limited and Kisii Total Service Station* (Kisumu Civil Appeal No. 211 of 2008) (UR). There, the court stated:

> .... "This being a second appeal, we remind ourselves that Section 72 of the *Civil Procedure Act* applies and that only issues of law fall for consideration (See Kitivo - v – Kitivo (2008) KLR 119.)"

14. This Court has also severally held that it will not interfere with the findings of fact of the two lower counts unless it is clear that the magistrate and the judge have so misapprehended the evidence that their conclusions are based on incorrect bases (See *Onyango & Another - V – Luwayi* [1986] KLR 513, *Mark Khan Transporters Ltd - V – Mbugua* [2010] I EA 228, among many other cases).

15. On the central issue in this appeal of whether the appellant was a co-wife of the respondent, the two courts below were in agreement that she was not. Their findings were based on the evidence which was accepted by the two courts below, pieces of which evidence we have reproduced herein before. We cannot, in the premises, say that the findings of the two courts were not based on evidence or were based on a misapprehension of the evidence. The two courts clearly appreciated the requirements for a woman to woman marriage as practiced among the Abagusii and concurred that on the evidence, no such marriage existed between the appellant and Birita. The two courts below concurred that the appellant at the time of the alleged marriage was already married to one Makori Onguso and had no capacity to enter into the marriage with Birita. The finding was based on the evidence which both courts accepted. Both courts also accepted the evidence of Birita that her only "wife" was the respondent and that the appellant had for about ten (10) years been living elsewhere before she broke onto the suit premises. It is not our duty to re-evaluate the evidence but to consider whether the first appellate court carried out the function of re-appraisal of the evidence. Having considered the record, We have no doubt in our minds that the first appellate court admirably re-appraised the evidence and arrived at its own independent conclusion on the same. We cannot therefore interfere.

16. Before dismissing this appeal, which we must do, we feel impelled to comment briefly on the practice of woman to woman marriage as it applied to the facts in this appeal. Whereas both parties acknowledged that the practice was in existence, given that Birita had daughters who included Hebisiba Nyamwange who testified for the respondent, in the current dispensation (under *the Constitution* of Kenya, 2010), it would appear that any woman need not go through such a marriage in order to perpetuate her lineage. We say so, because, according to the experts on Abagusii customs called by both parties; Josephat Sindiga Mangabo and Nelson Kingoina, the purpose of such a marriage was to perpetuate the lineage of the "woman-husband." The marriage therefore involved a son-less or barren old woman. The practice is evidence of discriminatory practices in favour of male children who in most traditional African societies were the only ones entitled to inherit real estate. That changed with the coming into force of the *Law of Succession Act* – cap 160, Laws of Kenya, which does not make a distinction between sons and daughters of a deceased intestate.

17. The position was crystallized by *the Constitution* of Kenya 2010 which, in article 60(1), provides as follows:

> 60(1) Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive andsustainable, and in accordance with the following principles -
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> .....
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> .....
>
> (f) elimination of gender discrimination in law and practices related to land and property in land."

18. And Article 27, criminalizes any form of discrimination on any ground.

19. It provides that every person is equal before the law and has the right to equal protection before the law. It further provides that women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres. The article is crucial in enhancing equal inheritance.

20. So, given the above provisions of the Supreme Law, the practice which compelled Birita to enter into a woman to woman marriage with the respondent in order to have sons can only diminish in significance.

Birita, after all, had daughters who, like their male counter parts under *the Constitution*, 2010, are equal before the law.

21. Having considered the central issue in this appeal in favour of the respondent, the appeal cannot succeed. We find no merit in it and the same is dismissed with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF SEPTEMBER, 2014.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR