



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 233 OF 2007

MICHAEL MUSAU KITIVO APPELLANT

AND

MAURICE NDAMBUKI KITIVO RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Machakos (Sitati, J.) dated 13th July, 2007

in

H.C.C.C. NO. 36 OF 2005)

JUDGMENT OF THE COURT

In a suit commenced by plaint before the Chief Magistrate's Court at Machakos, the plaintiff in that suit, *Maurice Ndambuki Kitivo (Maurice)* prayed for principally, two orders. First a declaration that a gift of *land Parcel No. Kalama/Katanga/1522* to him by his father to which Land Control Board consent had been given, was his to the exclusion of all other people and therefore the body of the defendant's deceased mother could not be buried there without his consent. Second, an order of injunction issue restraining the defendant, his agents, servants, assigns and any other person claiming under him from entering the aforesaid parcel of land for purposes of burying *Esther Nzakwa Kitivo*, without his consent. The defendant in the suit was named as *Michael Musau Kitivo (Michael)*, the step-brother of the plaintiff.

Gideon Kitivo Ndambuki, was the father of both *Maurice* and *Michael*. He had three wives, *Esther Nzakwa Kitivo*, the deceased, *Beatrice Ndila Kitivo (Beatrice)* and *Esther Mutono Kitivo (Esther)*. The deceased was the first wife, and was the mother of the defendant, the appellant in this appeal. *Gideon Kitivo Ndambuki* predeceased all his three wives. It was Maurice's case that before his death he (*Gideon Kitivo Ndambuki*) gifted various parcels of land to his children. To him he gifted *land Parcel No. Kalama/Kalanga/1522*, signed all the necessary documents, including an application to the Local Land Control Board, for its consent for the transfer of the land to him, and also the transfer form. He, however, later died but before the land was transferred to Maurice. Land Control Board consent had however already been given for the transfer.

Upon his death in *December, 2000*, *Gideon Kitivo Ndambuki* was buried on *Parcel No. Kalama/Katanga/1522*. Later, however, the deceased also died and an issue arose as to where she should be buried. The deceased died on or about *31st August, 2004*, and although *Michael* and his siblings had

allegedly also been given land, he did not wish his mother to be buried on his land. It was his case that under Kamba Customary Law, she is supposed to be buried next to her husband. So he took steps to have the body buried on *Parcel No.Kalama/Katanga/1522*. As was expected, Maurice objected. He therefore brought the action we stated earlier, fearing that if he did not do so Michael would try to forcibly bury his mother there and a breach of the peace would ensue.

The gist of Michael's defence was that the land in question was the property of his deceased father and the same had not been gifted to Maurice. Consequently, he had the right to bury his mother on it and next to her deceased husband in accordance with Kamba customs.

Both parties called witnesses and at the conclusion thereof the *trial Magistrate T.O. Okelo, SRM*, held that a burial site had been agreed upon by the clan from which the deceased hailed, and it was not open to him to decide to the contrary. Regarding the first prayer in the plaint, the learned trial Magistrate rendered himself as follows:-

"..... the suit basically is about the place where the deceased should be buried, I am alive to the fact that there is a succession cause at the High Court, I have categorically stated earlier in the judgment that I was not dealing with the issue of the distribution of property. The plaintiff has consents and transfers he should take appropriate steps with lands offices to deal with the same. I shall decline to grant prayer 9(a) of the plaint. I shall grant prayer (b) in terms of issuing a permanent injunction to restrain the defendant, his agents, assigns and/or any other person claiming under him from entering into the suit premises."

In his first appeal, Michael attacked the foregoing remarks and other findings of fact. He termed the trial magistrate's judgment as a layman's judgment which failed to deal with the issue of injunction on the basis of accepted principles. He particularly complained that there was no unanimity in the decision of the family members as to the place of burial, and the learned trial magistrate erred in holding that there was a concluded agreement on the matter.

The superior court (Ruth Sitati, J.) after setting out all the evidence that had been presented to the trial court, held that needless energy had been spent by witnesses on trying to establish certain Kamba Customs and in her view that was a digression from the real issues. She then proceeded to consider whether, as had been alleged by Maurice, the parcel of land in question had been gifted to him. In the end she held that the land had been gifted as alleged and on that basis she held that the appellant there who is also the appellant here had no right to forcibly seek to bury his mother's body on that land. She dismissed the appeal and hence the appeal before us.

We remind ourselves that this is a second appeal. *Section 72(1) of the Civil Procedure Act, Cap 21 Laws of Kenya*, provides as follows:-

"72.(1) Except where otherwise expressly provided in this Act or by any other written 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-

- (a) the decision being contrary to law or to some usage having the force of law;*
- (b) the decision having failed to determine some material issue of law or usage having the force of law;*
- (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."*

It is clear from that section that only issues of law fall for consideration. The first ground of appeal attacks the decision of the superior court on the basis that it failed to reconsider and evaluate the evidence concerning the purported gift of the subject land. Particulars have been set out which the court failed to

consider which on a careful reading suggest that had the court reconsidered and re-evaluated the evidence, it would have discovered variance between the pleadings and evidence on material aspects. We do not consider it desirable to deal with this issue because the aspects complained about relate to the ownership of *Parcel No. Kalama/Katanga/1522*, which is among the properties which, according to the evidence, is the subject matter of a Succession Cause pending determination at the High Court, at Machakos. The same is true of *grounds 2 and three* of the *Memorandum of Appeal*. These state as follows:-

“2. *In view of the Contents of the application for consent of the Land Control Board, the letter of consent and the transfer document, the learned Judge of the superior court misdirected herself and erred in law in holding that there was a binding contract between (Gideon) Ndambuki and the Respondent.*

3. *The learned Judge of the superior court misdirected herself and erred in law by upholding the trial court’s judgment where the trial magistrate declined to grant prayer (a) of the plaint which sought, inter alia for a declaration of absolute ownership of the suit land and proceeded to grant prayer (b) of the plaint which sought a permanent injunction in respect of the same land while the said two prayers would not, in the circumstances of the case be severable.”*

The succession cause we talked about earlier concerns the estate of *Gideon Kitivo Ndambuki*. According to the evidence that cause was first in time to this one. That being the position, we are of the view that by dint of the provisions of *Section 6* of the *Civil Procedure Act*, the issue relating to entitlement to *Parcel No. Kalama/Katanga/1522* was in issue in a previous suit or proceeding and was not available for determination in this matter. We think that the trial Magistrate was quite right in declining to deal with it. The learned Judge of the superior court overlooked the above provision. Besides, what was in dispute before her was the question whether or not the deceased could be buried on that land. As there was a dispute regarding the ownership thereof, it was not open to her to deal with the dispute before determining the burial dispute. The matter was pending before either the same or another court for determination pursuant to the provisions of the *Law of Succession Act, Cap.160 of the Laws of Kenya*, which has clear provisions for determining heirs to a deceased person’s estate. To the extent that she made a determination on the issue of ownership of *Parcel No. Kalama/Katanga/1522*, she erred. She also erred when she held that an attempt to establish certain Kamba customs on the issue of burial was a digression from the real issues. *Section 82 (4)(b)* of the Constitution of Kenya clearly permits the application of customary laws relating to burials, among other matters. In absence of any other provisions relating to burial, the Kamba Customary Law was the relevant applicable law. Mr. Mulwa, for the appellant, took up this issue and submitted that Sitati, J. erred by declining to consider the Kamba Customary Law. With respect he was right.

It is however, quite clear from the evidence, that there is no law under Kamba Customary law which mandatorily requires that at all costs the first or any wife of a deceased Kamba man should be buried next to her husband. That is only a general principle. That emerged clearly from the evidence of one, *Paul Kyungu*, who was called by the appellant. It was his evidence that it was the deceased who felt that upon death she should be buried next to her husband. That was wishful thinking.

In view of the foregoing, and considering that there was a dispute regarding the ownership of *Parcel No. Kalama/Katanga/1522*, was the trial court right in granting an injunction? The trial Magistrate was clear in his mind that allowing the deceased to be buried on the above parcel of land was undesirable because the dispute as to its ownership was pending before court. In his mind he thought an injunction was necessary. True, the reason he gave for it was not correct. He stated that he believed the land in question had been gifted to Maurice. However, even if he had not made up his mind on it and there was no clear evidence regarding ownership, the fact that there was a dispute over the land regarding its ownership, was of itself without more a good reason to issue an injunction to prevent a breach of the peace. The land was still registered in the name of a deceased person. The respondent was and is possibly still in possession. In the circumstances, an injunction was merited.

In summary, we say this. Sitati, J. erred in purporting to deal with the issue of ownership of the subject land when the dispute over the same land was pending before another court. She also erred in

declining to consider the evidence on the applicable customary law which was adduced before the trial court as a dispute regarding burial of a person subject to customary law and practices may only be resolved following that law and practice.

What is the effect of the conclusions we have come to? Although as we stated earlier the learned Judge erred on those two aspects, she affirmed the judgment of the trial court, which, with respect, was correct in its result. That being the conclusion we come to, we are left with no alternative but to set aside the reasons for the judgment but dismiss the appellant's appeal. We make no order as to costs.

Dated and delivered at Nairobi this 25th day of July, 2008.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

J. ALUOCH

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR