



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**Civil Appeal No. 37 Of 2001**

**Between**

**HELLEN WAIRIMU MATHU.....APPELLANT**

**VERSUS**

**MOSES MWANGI MATHU.....RESPONDENT**

***(An Appeal From The Decree Of The Honourable C.D. Nyamweya, Srm***

***Dated 22nd March 2001 In Nyeri Cm's Civil Case No.537 of 2000)***

**JUDGMENT**

By a plaint dated 16th December 2000 and subsequently amended on 12th January 2001 the Respondent sued the Appellant and prayed for a permanent injunction restraining the same from interfering with the burial of one DAVID WARUI MATHU on LR 637614.

It was pleaded that his father one MOHAMED MATHU (deceased) was the proprietor of LR NO.637614 situated at Kiganjo while the Appellant was his step mother. It was further pleaded that upon the death of DAVID WARUI MATHU (hereinafter referred as the deceased), the Respondent transported the body on 9th October 2000 from Nairobi for burial on LR 637614 wherein the deceased mother and father's remains are buried.

It was pleaded that the Appellant and her children objected to the intended burial causing the Respondent to transport the body to Nyeri Provincial General Hospital mortuary for storage since the Respondent did not have any other burial site.

By a defence filed on 4th January 2001 the Appellant denied that she was the step mother of the Respondent and her deceased husband the father of the same. The Appellant further denied that the Respondent's mother was buried on LR NO.637614 and therefore the Respondent had no right whatsoever to bury the body at the said land.

It was further pleaded that the Respondent was not entitled to the relief sought and that the same was hoping to strike some claim on the said parcel by burying his brother on the said land.

## PROCEEDINGS

Based upon the above pleadings the matter proceeded for trial and it was the Respondent's case that the Appellant was his step mother. He stated that his father was one Mohamed Mathu while his mother was Grace Wangari Mathu and that both died in 1995 and 1983 respectively. He stated that David Waruhiu Mathu who was his brother died on 3rd December 2000 and that he was named after the elder brother of their father.

It was further his evidence that they made all the necessary arrangements for his burial on 9th December 2000 at their father's land where upon the appellant, her children and the OCS of Kiganjo told them that they were not known in the said home. They therefore took the body to Nyeri Provincial General Hospital where the same attracts daily charges of Kshs.200/=.

Under cross examination he stated that together with their mother they lived on the suit property but moved out in 1971 leaving their family house and that his mother died in 1983 and was buried thereat. He further stated that they were living in Nairobi at their deceased father's house at Jericho and that the appellant and her children also used to come to Nairobi for visit.

Under cross examination he stated that one of his siblings called Ngare died either in 1989 or 1990 he was buried in Muslim cemetery at Eastliegh by their father and that since 1972 they had never lived in the Kiganjo land.

After the court visited the suit land the Respondent testified that his late mother's grave had been damaged and that his mother died when she was living at Gakindu where she was carrying on business but was buried at the suit land and that before they brought the body for burial, they had informed the Appellant and the space for burial marked. He further stated that some of the children of the appellant namely Wangare, Nyambura and Njoga attended the burial arrangement meetings in Nairobi. He further stated that when their father was alive they were all Muslims.

PW2 Samuel Kariuki Gakuru testified that the Appellant was married to his friend David Mathu deceased on the same day as himself. It was his evidence that the deceased had two wives, the appellant and the mother of the respondent. He further testified that when the respondent's mother was married in 1971 the appellant chose to go to Nairobi and the mother of the respondent moved into the Kiganjo land and that when the deceased was in hospital having given birth to the respondent, the appellant went to the suit land and burnt her clothes. He further stated that the mother of the respondent died in 1983 at child birth and was buried at the suit land against the respondent's wishes.

Under cross examination he stated that on 23rd March 1995 he meet Mathu who informed him of his wishes and asked him to write what each of the two house was to inherit. He further designated a grave yard and that it is the appellant who flattened the grave of the respondent's mother.

PW3 Warui Musa Matheri the brother of the late Mohamed Mathu confirmed that the appellant was the first wife of the deceased and that he married the respondent's mother in 1971 and that the three of the respondent's siblings are named after their family while three are named after their mother's family with the deceased being named after him. He further stated that the respondent's mother is buried in the suit land. Under cross examination he stated that he was involved in the burial arrangement of the deceased at Kiganjo and that on 8th they together with the appellant informed the chief of the intended burial.

PW4 Moses Mugwe testified that in 1971 together with Mohamed Mathu took dowry of a goat, a sheep and Kshs.500/= to the uncle of the respondent's mother and that he subsequently attended burial of both

at Kiganjo. This evidence was corroborated by the evidence of PW5 Kimotho Murecha who received the dowry and stated that the body of the deceased should be buried at Kiganjo where his deceased mother is buried.

The appellant testified that she did not know the respondent and that she was married in 1954 and in 1955 both her and the deceased husband were detained. From detention they lived in Jerusalem upto 1965 when they moved to the suit land and that she did not know that her husband had married the respondent's mother. It was her evidence that on 8th December 2000 on her way to church the chief called her when she met PW2 and the respondent when the same told her he wanted to bury his brother at the suit land. It was her evidence that she objected to the burial because she did not know the respondent and the deceased.

DW1 Ishmael Maina Mathu's evidence was that he did not know the respondent neither did he knew whether his mother had been married to his deceased father. He further stated that he went to school in Nairobi between 1970 to 1976 and that they lived in Uhuru and Jerusalem estate. He confirmed that he knew PW2.

DW3 confirmed that the deceased was living in Jerusalem estate in Nairobi in 1976 and that at no time did he tell him that he was married to someone else rather than the appellant. DW4 Beatrice Wanjiru Kiragu testified that she did not know of any other wife of the deceased save for the appellant and that she had only attended two burials in the home.

DW5 Mary Wangare Mathu the appellant's daughter also testified that she went to school in Nairobi between 1967 and 1974 during which they lived at Uhuru, Jerusalem and Jericho estates and that his father did not live with any other woman. Under cross examination she confirmed that she could see her name and her sisters on the condolence book and contribution book.

Based upon this evidence the trial court found for the respondent and in finding for the respondent the trial court had this to say:-

**“I find that rather than PW2 and PW5, PW3 and PW4 were close relatives of the husband of the defendant being PW3 an elder brother to her husband and PW4 a nephew a son to the sister of the defendant's husband. These two explained clearly that the husband of the defendant was married to the mother of the plaintiff (Grace Waruguru). The defendant explained that PW3 had bad blood with her late husband...**

**I find that the witness of the defendant only came to deny that the defendant's husband was married to the mother of the plaintiff .....**

**I find that there is evidence that the husband of the defendant had no other lands .....**

**I find that the plaintiff has succeeded in proving the case on a balance of probability.”**

She further stated as follows:-

**“I will not fail to comment that the court was invited to visit the locus in quo and observed that the defendant's late husband has earmarked a portion of his land which is fenced by barbed wires to be grave yard for his family. In that grave yard stands the grave for a daughter in law who passed away in 1993 and his own grave of 1995 both are unattended and almost fading away. The 3rd grave which should be of the plaintiff's mother could not be seen although PW2**

**and PW3 pointed at where it was and explained that it was dismantled by the defendant.”**

Being dissatisfied by this judgment the appellant filed this appeal and raised the following grounds:-

1. *The Learned Magistrate erred in law and fact by failing to find that the respondent was not able to establish or identify the grave of his mother.*
2. *The Learned Magistrate erred in law and fact by failing to appreciate that the respondent was not able to establish any link between himself or his late brother with the Mathu family.*
3. *The Learned Magistrate erred in law and fact by failing to appreciate that the respondent's mother was living at Gakindu and not at Nairobi or Kiganjo.*
4. *The Learned Magistrate erred in law and fact by failing to appreciate and find that the respondent had little knowledge about the Mathu family.*
5. *The Learned Magistrate erred in law in relying on the evidence of PW2 and PW3 when the same was clearly unreliable and suspect and thereby arrived at a wrong decision.*
6. *The Learned Magistrate erred in law and fact by not appreciating Kikuyu customary law on marriage and dowry and thereby arrived at a wrong decision.*
7. *The Learned Magistrate erred in law and fact by failing to note that the evidence of PW4 and PW5 was contradictory and therefore unreliable.*

## SUBMISSIONS

Directions were given that the appeal be determined by way of written submissions which have now been filed. On behalf of the appellant it was submitted that the trial court erred in finding for the respondent despite the fact that he was unable to point out where the grave of his mother was and further that the trial court did not give due regard to the appellant's submissions.

It was submitted that the trial court did not state its decision on all the issues arising in the suit and that failure to analyse all the issues resulted in injustice and an erroneous decision and in support thereof case of **Windsor Flower Ltd -vs- George Kondu Wochuna [2010] eKLR**.

It was submitted that because of the bad blood between PW2 and PW3 the two witnesses were unreliable. It was submitted that the trial court erred in law and fact by not appreciating the Kikuyu Customary Law on marriage and dowry and therefore arrived at a wrong decision based on the naming of the children of the appellant's husband without proof of the said customary law and in support thereof the following cases were used.

### **M.W.G. -vs- E.W.K. [2010] eKLR**

#### **Njoki -vs- Muthuru (1985) KLR 874**

It was further submitted that there was contradiction between the evidence of PW4 and PW5 as to the number of the people who attended the ceremonies in the payment of dowry and the court was therefore asked to allow the appeal.

On behalf of respondent it was submitted that the appeal had been overtaken by event since the body of the deceased was buried on the suit land based on the decree issued on 22nd March 2001 and that the appeal is driven by conception that if the remains of the deceased are not exhumed which grant property rights in the parcel of the land to the respondent and his siblings.

It was submitted that the respondent was young at the time when his mother died and that the children of PW3, PW4 and PW5 who were relatives of the respondent's father were clear as analysed by the trial court and that they all testified on the marriage between the appellant's husband and the respondent's mother as confirmed by the naming of the children.

#### DETERMINATION

Having analysed the evidence tendered before the trial court as I have done herein above and from the submissions by counsel for the parties herein, I must point out that from the pleadings and proceedings the matter which was before the trial court was a prayer for a permanent injunction restraining the defendant from interfering with the burial of David Warui Mathu on LR 637614 and therefore the only issue for determination is whether the respondent had met the said conditions for grant of a permanent injunction.

It was the respondent's case that he was entitled to bury the deceased David Warui Mathu on LR 637614 since the land was his father's. The late Mohamed Mathu and that his late mother was buried at the said land. It was further his case that he had no any other place to bury his late brother noting that one of his siblings had died when their late father was alive and when they were professing Islamic father was buried at a public cemetery in compliance with the Islamic faith.

This being a burial matter as was stated by Justice HPG Waweru in **Dr. Christopher Muthini Mbatha -vs- Dr. Florence Mukii Mukita – High Court at Nairobi (Nairobi Law Courts) Civil Case No.525 of 2008** as follows:-

**“It is now well established that matters of burial are subject to the deceased's and the parties personal law and that the personal law of Kenyan is in the first instance customary laws. See the case of Otieno -vs- Ougo & another (No.2) (2008) 1KLR (GF) 948.”**

In the case before the trial court the personal law of the respondent and the deceased therein was Kikuyu customary law. I would therefore agree with the trial court's finding on fact that the respondent's mother had been married to the appellant's late husband and therefore the issue as to whether she accepted or recognized the said marriage was not relevant. It is also clear from the evidence tendered before the trial court that the respondent and his siblings were named according to the Kikuyu customary law and that some of the children of the appellant and the siblings of the respondent share similar names and of more telling is the fact that the respondent is named after the appellant's husband's brother PW3.

Having re-evaluated the evidence tendered before the Law Court and in particular evidence of PW1, PW2, PW3, PW4, PW5 and DW5, it is clear to my mind that the respondent succeeded in proving his case on a balance of probability as is in law required and therefore find no fault with the trial court's judgment herein.

I therefore in the final analysis find no merit on the appeal herein which I hereby dismiss with cost to the respondent.

**Signed and dated this day of 2014**

**J. WAKIAGA**

**JUDGE.**

Delivered by Justice J. Ngaah on behalf of Justice Wakiaga this 18th day of December 2014

**J. NGAAH**

**JUDGE.**

In the presence of:

----- for Appellant

----- for Respondent

**Dated this                    day of                    2015**



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