REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 133 OF 2019

ASA.....APPELLANT

-VS-

NA.....1ST RESPONDENT

DA.....2ND RESPONDENT

(*Being an appeal from the judgment and decree of Hon. M.O Obireo, Principal Magistrate in Migori Chief Magistrate's Court Civil Case No. 25 of 2019)*

JUDGMENT

Introduction

The Appellant herein, **ASA**, instituted this appeal vide Memorandum of Appeal dated 04/09/2019 and filed in Court on 06/07/2020.

It is her case that the Trial Court was wrong in making a finding that she was not the wife of **WA** (hereinafter '**the deceased'**) and as such could not access her supposed matrimonial home nor take part in the burial arrangement of the deceased.

Background

The Appellant instituted, **Civil Case No. 25 of 2019** before the trial court claiming that she was the wife of the deceased. It was her claim that she had a child with the deceased by the name **BOJ (**hereinafter **'The minor')**.

That she got married to the deceased through Luo Customary Law on **15th December 2012** where the deceased paid dowry of 2 cows and KShs. 10,000/- to her parents.

That they stayed with the deceased from the year 2010 while she was still a student and he used to pay her school fees.

She further stated that she was chased from the matrimonial home and her attempts to go back were refuted by the Respondents until the death of the deceased.

Based on the foregone, the Appellant further sought a declaration to issue recognizing her and the minor as widow and child of the deceased respectively.

Briefly, the Respondents in the statement of defence stated that the Appellant was a stranger to them, the deceased and his family.

It was their case that the pronouncement by a court of law as to who is entitled to a share of the deceased's estate could not be made in a claim regarding the right to bury or participate in the burial of a deceased person. They stated that the Appellant's case was a means to claim an interest in the deceased's estate which is an abuse of process.

The Trial Court dismissed the Appellant's case. Dissatisfied, with the judgment, the Appellant preferred the instant appeal on the following grounds as set out in the Memorandum of Appeal.

a. "That the learned Trial Magistrate erred in law and fact when he held that the Plaintiff/ Appellant had failed to prove that she was married to the deceased and therefore was not a wife of the deceased merely because the deceased had not built for the Plaintiff/Appellant her own house prior to her death.

b. The learned Trial Magistrate was biased against the Appellant as can be seen by the fact that the Trial Magistrate on a suo moto basis made an order that the Plaintiff/Appellant would pay hospital and mortuary bill at the end of the case regardless of the outcome. The said order being so adverse to the plaintiff was made even before the Plaintiff's case was heard despite protest by the Plaintiff's advocate."

The role of the first appellate court was settled in the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**. It was observed that the Court is duty bound to revisit all the evidence on record, evaluate it and reach its own conclusion. The court nevertheless will not ordinarily interfere with the findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga& Another (1988) KLR 348).**

The Evidence

It was the appellant's evidence that they got married in the year 2010 and on 15/12/2012, the deceased paid dowry to her parents at their home. To corroborate her claims, the Appellant produced exhibit 1-4 being her Identity card, authority to sue, certificate of birth for the minor, clinic card, two photographs and a letter from the chief. She stated she was the second wife to the deceased.

In cross-examination, the appellant's evidence was that her step father, KO was present when dowry was paid; that the deceased came with two of his friends, Manoa Omondi and Otieno Joshua; that the deceased did not involve his brothers in the ceremony.

BO testified as PW2. She was the deceased's sister. It was her testimony that the deceased got married to the appellant in the year 2010 and that the deceased paid dowry. In cross examination however, it came out clearly that her evidence was hear-say. She was only informed by the deceased that he paid dowry.

MA testified as PW3. She is the Appellant's mother. It was her evidence that the deceased went to her home in the company of two other people and paid dowry. Upon cross-examination, she stated that the payment of dowry was witnessed by her sister, LO and her husband KO. It was her further evidence that she did not know who the deceased came with. On re-examination, she stated that she did not tell the deceased to bring two cows, that he decided to pay KShs.10,000/-.

The evidence of **PW4, Christopher Owino**, the area chief was confined to production of the letter he authored. The letter confirmed that the appellant was the wife of the deceased. This court has taken the liberty to peruse the said exhibit. What is immediately flagged is the statement that two cows were paid and cash amount of Kshs. 10,000/-. The probative value of this letter is very little. The said witness was acting on instructions in writing the contents of the letter. He never witnessed the actual ceremony so as to be in a position to say with certainty that dowry was paid. It is thus hear-say evidence.

Manoah Omondi was PW6. It was his evidence that he was one of the two friends that accompanied the deceased to pay dowry. It was his testimony that they took two cows, a heifer and a cow and an amount of KShs.10,000/- . He stated that they bought the cows in the market. His evidence was that there were no negotiations on how much was to be paid in terms of money.

The Respondents called a total of 5 witnesses. DW1 was a 15-year-old son to the deceased born to the 1st wife. He denying knowing who the appellant was to the deceased. DW 2 was NA. She testified that she was the 2nd wife of the deceased; that the 1st wife was IA now deceased. That her dowry was paid to her parents at Kanyamkago; that the deceased was accompanied by his brothers GO

and DA. It was her evidence that she did not know the Appellant. On cross-examination however, she admitted that that in the clinic book the father of the Appellant's child was the deceased.

DW3 was the deceased's step sister. She largely reiterated the evidence of DW2, that the Appellant was unknown to them. DW 4 was the deceased's cousin. He stated that the deceased had two homes, for IA (deceased) and NA, the 1st and 2nd wives respectively; that he did not have any other home. It was further his testimony that in Luo culture, a person must be accompanied by his brothers and friends when going to pay dowry. Upon being cross-examined, he stated that he did not know the minor but conceded that the deceased's name appeared in the clinic book.

DW5's was the deceased's step brother. He testified that he only knew two wives of the deceased; the 1st wife IO who was married in the year 2002 and 2nd wife N who was married in the year 2013; That when he was marrying the two wives, the deceased informed family members and accompanied him to pay dowry. On cross-examination, DW5 could not tell whether dowry for the Appellant was paid or not.

Initially, the instant appeal had been consolidated with **Civil Appeal No. 37 of 2019 (**hereinafter **'Interlocutory Appeal')**. However, Counsel for the respective parties recorded a Consent on 06/10/2020 and agreed to have the said Appeal marked as withdrawn.

The Interlocutory Appeal sought to challenge the Trial Court's orders directing the appellant to pay the hospital and mortuary bill at the end of the case regardless of the outcome.

This court will therefore confine itself to the issues as raised in the instant Appeal; 133 of 2019. That said, it is clear that the second ground of appeal falls within the ambit of the Interlocutory Appeal and this court will not delve into its merits.

Appellant's Submissions

Mr. Jura appeared for the appellant on 03/11/2020. There was no appearance for the Respondents. Mr. Jura indicated that they filed their submissions long before they recorded the Consent and as such wished to highlight a few issues.

He submitted that the Trial Court relied on the evidence of **MA**, and that an expert witness was called who confirmed essentials of Luo custom on dowry and whether failure to build a house for a wife renders the marriage a nullity.

It was his case that dowry was paid but the deceased did not build the Appellant a house; that he hosted her in the house of the 1st wife. To buttress the existence of a marriage, Counsel sought to distinguish the decision in **K.O & Another -vs- J.O [2018] eKLR** where Mrima J in dismissing existence of marriage held as follows;

"marriage must be distinguished from sexual relationship that results into siring of children whereas such relationship raises fundamental legal issues, the presumption of marriage transcends such boundaries. Considering the facts as pleaded and the evidence as tendered in this matter, a return in a finding that this is not one of the safe instances where a court can presume a marriage. I therefore hold that there was no marriage between the deceased and the Respondent whether by way of statute, customs or operation of the doctrine of presumption of marriage.

In his written submissions dated 27/07/2020, Counsel submitted that the appellant proved on a balance of probability that there existed Luo Customary Marriage. He reiterated that dowry was paid and that the minor was sired by the deceased. Exhibits evidencing that the minor was the child of the deceased, the chief's letter, clinic note book among others, were produced.

Counsel further referred the court to the evidence of Beatrice Onyango, the sister of the deceased, whose testimony was that her deceased brother was married under Luo Customary Law. Counsel also relied on the evidence of MA, the Appellant's mother who stated that dowry was paid to her and even visited the deceased at their Migori home where they were living together.

Counsel reiterated the evidence of Christopher Owino, the area assistant chief, whose evidence was that the he knew the Appellant and the deceased as husband and wife. He also relied on the evidence of Thomas Nyabega, who testified that for a Luo Customary Marriage to be celebrated, dowry must be paid and its acceptance must happen in the presence of brothers or friends.

Counsel further relied on the evidence of Manoah Okeyo who testified that he accompanied the deceased to go and pay dowry at the Appellant's home at Kilgoris.

With respect to the Respondents evidence, Counsel urged the court to exercise caution since they did not call any independent expert on Luo Customary marriage. He further stated that their evidence was biased.

To prove existence of the customary union, and the fact that the absence of the brother/family members in the ceremony could not render their union null and void. Counsel relied on **section 3(2)** of **The judicature Act** which acknowledges customary law as a system of marriage in Kenya. Counsel further relied on the Court of Appeal decision in **Eliud Maina -vs- Margarete Wanjiru Gachanga (2019) eKLR** where it was stated that;

"customary law is not static. Like all other human inventions it is dynamic and keeps evolving from generation to generation…. To insist on rigid customary ceremonies at all times is the surest way of rendering customary law obsolete. …. The bottom line appears to be that the essential steps and ceremonies must be performed irrespective of the form in which they were performed.

Counsel further relied on the writing of **Eugene Cotran** in his book **Restatement of African Law Vol.1, the Law of Marriage and Divorce** where it was stated that there cannot be customary marriage unless a part of *dho I keny* (bride price) was paid. The author goes ahead to state that nowadays, if the husband has independent means and can pay *dho-i-keny* without the assistance of the family he may marry even without their consent.

Counsel submitted that since this was not the 1st marriage of the Appellant, the deceased could dispense with consent of his family members.

On the question whether failure to construct a house for the Appellant was fatal to the marriage, Counsel stated that the deceased was living with the Appellant in the house of the first wife and that was allowed in the Luo Customary union. To that end he referred to the book by Eugene Cotran (supra) which states that in modern development, it is possible for two wives to share the same hut.

The Respondent's submissions are dated 7/10/2020. It was submitted that there was no sufficient evidence adduced by the Appellant to show that there was a valid marriage between the Appellant and the deceased.

Counsel stated that the ingredients for a valid customary marriage include dowry payment which must follow a prescribed format a and matrimonial home established for the wife. Counsel stated that the mere payment of dowry is not adequate. The groom must be accompanied by close family members. He referred to the court to page 234 of the Record of Appeal and contended that going with friends for the dowry ceremony was against the Luo Custom which affected the validity of the marriage.

In closing, Counsel for the Respondent reiterated their lower court submissions and prayed that the Appeal be dismissed with costs.

From the foregoing discourse, the single issue that arises for determination is;

a. Whether the Appellant was a wife of the deceased.

Analysis and Determination

The only question is whether the Appellant and the Deceased were husband and wife.

In doing so, this court will be guided by the provisions of **Article 2(4)** of the Constitution. It states as follows;

"Any law, including customary law, that is inconsistent with this Constitution, is void to the extent of this inconsistency…."

Guidance is further sought from **section 3(2)** of the **Judicature Act** which provides as follows;

(2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure sand without undue delay.

A determination of the existence or non-existence of the marriage will also be based on satisfaction of the provision of **section 43** of the **Marriage Act, No.4 of 2014** which provides that;

43 (1) a marriage under this Part shall be celebrated in accordance with the customs of the communities of one or both of the parties to the intended marriage.

(2) Where the payment of dowry is required to prove a marriage under customary law, the payment of a token amount of dowry shall be sufficient to prove a customary marriage.

The most important fact tom be proved is the evidence of payment of dowry in fulfilment of the requirement of customary law marriage.

The biggest contention in this case revolves around the issue as to whether the ceremony for the payment of dowry took place. In considering the probability of the occurrence of the said ceremony, this court will consider the evidence tendered. The standard of proof in civil cases was discussed in the Court of Appeal decision in **Civil Appeal 15 of 2016, Samuel Ndegwa Waithaka v Agnes Wangui Mathenge & 2 others [2017] Eklr.** The Court while referring to Lord Nicholls observed as follows;

12. In Civil cases such as this case, the standard of proof is on the balance of probabilities. This standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. In H (Minors) [1966] AC 563 at pg 586, Lord Nicholls explained that the test on the balance of probabilities was flexible. Said he,

"When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation, the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury.....

…..Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue, the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."

Proof of customary marriage was brought out clearly by the Court of appeal in the case of **Kimani v Gikanga [1965] EA 735.** It was observed that;

"To summarise the position; this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity, the customary law must be accurately and definitely established. The Court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward customary law. This might be done by reference to a book or document reference and would include a judicial decision but in view, especially of the present apparent lack in Kenya of authoritative text books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law would have to call evidence to prove that customary law, as would prove the relevant facts of his case."

The onus rests on the appellant to prove her allegation that dowry was paid. From the evidence of the Appellant, this court cannot establish the link between the appellant's claim of dowry having been paid and the exhibits produced. The exhibits only point toward the siring of the minor as can be seen by the Mother and Child health booklet and certificate of birth for the minor. The photographs produced do no more than show a place of residence.

As regards the chief's letter, it is of little evidentiary value towards proving payment of dowry. It attests to an event the chief did

not witness. as described in the foregone paragraphs. It is hearsay evidence which cannot be relied upon by this court.

Similarly, PW2's evidence is of low probative value. The witness only heard that dowry was paid.

A further doubt as to the credibility of the alleged marriage is PW4's evidence in cross-examination that the Appellant did not have a house. That was despite being the second wife yet the fourth and fifth wife had their own houses. It is out of the ordinary for a younger wife to have a house when the one married earlier does not.

This court further notes the inconsistency in the evidence of PW3, MA (Appellant's mother) and that of PW6, Manoa Omondi, who allegedly accompanied the deceased to pay dowry. Whereas PW3's testimony was that she witnessed negotiations, PW6 evidence was that there were no negotiations at all. The two witnesses were at the place of the ceremony but have different accounts of what happened. That casts doubt as to the credibility of the events having taken place.

It is very curious that immediate family members of both the Appellant and the deceased were not present in the dowry ceremony. These are the people who ordinarily are present during such ceremonies and would be the first port of call in giving primary evidence. It is even more curious that the ones who witnessed the ceremony were not called. LO and KO, the Appellant's aunt and her husband respectively witnessed the alleged ceremony but were not called to give evidence. KO, the step father to the Appellant was also not called. Their evidence would have shed light on the existence of the disputed fact of payment of dowry.

What stands out consistently from the evidence of all the witnesses is the fact that co-wives can share houses. As can be discerned from the evidence, an elder wife can accommodate the younger wife. If indeed this was the case in this instant, there should have been proof of the other requirements of a marriage.

In the case of **Hortensia Wanjiku Yawe v The Public Trustees, Civil Appeal 13 of August 6, 1976** (Wambuzi, P Mustafa V-P and Musoke, JA), Justice Kneller laid down three principles regarding proof of customary marriages in Court. They are:

i. The onus of proving customary law marriage is generally on the party who claims it;

ii. The standard of proof is the usual one for a civil action, namely, one the balance of probabilities;

iii. Evidence as to the formalities required for a customary law marriage must be proved to that evidential standard.

On a balance of probability and having regard to the foregoing analysis and authority, this court is not convinced that dowry was paid. Eugene Cotran in his treatise "***Restatement of African Law; The law of Marriage and Divorce*** states as follows**;**

7. Effect of non-payment of marriage consideration

a. No legal marriage can arise in Luo if no dhok keny is paid.

This court does not find fault in the Trial Court's analysis of the evidence and eventual determination. The Court properly directed itself on the question respecting the process of customary marriage and adopts it in this judgment.

The last issue that this Court must resolve is whether it can presume a marriage of the appellant and the deceased. In doing so guidance will be sought from the decision in **Mary Njoki v John Kinyanjui Mutheru & 3 Others 1985 eKLR** where the Court of Appeal stated as follows;

"In my judgment, before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute. If the woman bears a child or better still children, so that the man could not be heard to say that he is not the father of the children, that would be a factor very much in favour of presumption of marriage. Also, if say, the two acquired valuable property together and consequently had jointly to repay a loan over a long period, that would be just what a husband and wife do and so it would be unreasonable to regard the particular man and woman differently. Performance of some ceremony of marriage would be strong evidence of the general repute that the parties are married. To sum it, there has to be evidence that the long cohabitation is not close friendship between a man and woman, that she is not a concubine but that the cohabitation has crystallized into a marriage and

that it is safe to presume that there is a marriage. To my mind, these features are all too apparent in the Yawe and in Mbiti (supra). To my mind, presumption of marriage, being an assumption does not require proof, of an attempt to go through a form of marriage known to law."

In my considered view, it has not been demonstrated to the required standard that the Appellant and the deceased were of the repute of husband and wife. It is not clear to this court, given the allegation that the appellant shared a house with the 1st wife as to whether there was actual cohabitation. No property was acquired by the two jointly, performance of the ceremony of the marriage is riddled with many uncertainties, and on the last days of the deceased, it was clear that the Appellant never participated in the business of looking after him or contributing funds towards his medical bills.

The totality of the circumstances of this case makes it unsafe for this court to make a finding in favour of presumption of marriage.

Before I make the final conclusion, it is my view that the determination of whether or not the appellant was the deceased's wife touched on issues of inheritance and would have been best determined in a succession cause.

The upshot is that the Appeal lacks merit and is hereby dismissed with costs. It is so ordered.

DATED, SIGNED and DELIVERED at MIGORI this 16th day of December 2020

R. WENDOH

JUDGE

Judgment delivered in open court and in the presence of: -

Mr. Adawo holding brief for Mr. Mudeyi for Respondent

Ms. Nyauke & Josephine Court Assistant