



REPUBLIC OF KENYA



**KENYA LAW**  
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**JKK v RKO (Civil Appeal E025 of 2024)  
[2024] KEHC 17156 (KLR) (28 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 17156 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CIVIL APPEAL E025 OF 2024  
WA OKWANY, J  
AUGUST 28, 2024**

**BETWEEN**

**JKK ..... APPELLANT**

**AND**

**RKO ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree of the Principal Magistrate's Court at Keroka Hon. Ombija (SRM) delivered on the 2nd day of August, 2024 in Keroka PMCC No. E080 of 2024)*

**JUDGMENT**

**Introduction**

1. The Respondent herein was the Plaintiff before the Trial Court where she sued the Appellant, through the Plaint dated the 20<sup>th</sup> June 2024, seeking the following orders: -
  - a. A declaration that pursuant to Abagusii customary laws and rites, the remains of Nyakundi Wilfred Job Omari be interred at their matrimonial home at Mong'oni Sub-location, Nyankoba Location within Nyamira County as she is the deceased's 2<sup>nd</sup> wife.
  - b. An order compelling the defendant to involve and consult the Plaintiff in all funeral and burial arrangements of the deceased NYakundi Wilfred Job Omari
  - c. Costs of the suit
  - d. Any other and/or further orders as the court may deem fit to grant in the in the interest of justice.
2. Concurrently with the Plaint, the Respondent also filed an application dated 20<sup>th</sup> June 2024 seeking, inter alia, orders of injunction to restrain the Appellant/Defendant or her agents, servants or anybody



claiming under her from burying the remains of Nyakundi Wilfred Job Omari (Deceased) pending the hearing and determination of the suit.

3. When the matter came up for pre-trial on 26<sup>th</sup> June 2024, parties agreed to dispense with the interlocutory application and proceed with the hearing of the main suit while maintaining the status quo in respect to the burial of the deceased.
4. The Respondent's case before the trial court was that she got married to the deceased as his second wife sometime in the year 1995 and that they were blessed with two children, namely; Melody Bosibori and Purity Nyaboke. She stated that the deceased later on married the Appellant as his third wife in 2006 and that the said wife also had two (2) children.
5. The Respondent stated that problems between her and the Appellant started after the death of the deceased on 9<sup>th</sup> June 2024 when the Appellant commenced the deceased's burial arrangements without her consent or consultation as the elder wife. She contended and that the Appellant intended to bury the deceased at an unknown place contrary to the Abagusii Customary Laws. She added that the Appellant intended to unilaterally collect the body of the deceased from the mortuary for burial without including her or her children in the burial plans.
6. The Appellant opposed the Respondent's case through her Statement of Defence and Counterclaim dated 25<sup>th</sup> June 2024 wherein she confirmed that she got married to the deceased under the Abagusii Customary in 2006. She however denied the Respondent's claim that she was the deceased's 2nd wife or that the Respondent's children were sired by the deceased and proposed that the Respondent's said children be subjected to a DNA test to establish their paternity.
7. The Appellant contended that the Respondent forcefully, and with the assistance of the area Chief, came into the deceased's life sometime in the year 2018 when she compelled the deceased to sign an agreement acknowledging her as his wife ostensibly as a condition for the withdrawal of assault charges against the deceased. She stated that the deceased did not pay any dowry or construct a house for the Respondent and that at no time did the deceased live under the same roof with the Respondent.
8. The Appellant claimed that she was the deceased's only surviving widow following the death of the first wife, one Dinah, and that she was therefore the only person entitled to bury him in accordance with the Abagusii Cultural Laws. She sought the following orders in the Counterclaim: -
  - a. A declaration that the Defendant/Counter-claimant is the only lawful surviving wife of the deceased herein Wilfred Nyakundi Job Omari.
  - b. An order that the remains of Wilfred Nyakundi Job Omari be released to the Defendant/Counter-claimant herein for burial at her home in Ensake location where they had been staying with the deceased.
  - c. An order for the DNA test to be conducted on the Plaintiff's children to ascertain their paternity, if the results turn positive, they be allowed to participate in the funeral of the deceased.
  - d. An order of injunction restraining the Plaintiff either by herself, servants, agents or any other person acting under her instructions from interfering with the burial of the late Wilfred Nyakundi Job Omari.
  - e. An order directing the OCS Riotonyi Police Station to provide security during burial of the deceased herein.
  - f. Costs of the counterclaim.



9. The trial court heard the matter by way of viva voce evidence. The Respondent presented the evidence of 5 witnesses while the Appellant presented 3 witnesses. The trial court rendered a judgment on 2<sup>nd</sup> August 2024 in the following terms: -
- i. That the plaintiff and the defendant herein are both wives to the deceased herein Nyakundi Wilfred Job Omari pursuant to the Abagusii Customary laws. It is hereby directed that both of them shall therefore be included and/or participate in the burial/disposal of the remains of the deceased
  - ii. That the said burial to take place at Mong'oni sub-location, Nyankoba location within Nyamira County.
  - iii. That the Management/Director St. Joseph's Nyansiongo mortuary is directed to release the remains of the late Nyakundi Wilfred Job Omari upon the plaintiff for purposes of order No. 2 above.
  - iv. That the OCS Keroka police station and the area chief, Mong'oni sub location, Nyankoba location to ensure that the above orders are complied with, accordingly
  - v. Spent
  - vi. That this being a burial dispute, there are no orders as regards costs.
  - vii. That the previous conservatory orders are hereby vacated.

### **The Appeal**

10. Aggrieved by the findings and orders of the trial court, the Appellant initiated the instant appeal on 2<sup>nd</sup> August 2024 and listed the following grounds in the Memorandum of Appeal: -
- a. The learned trial magistrate erred in law and in fact when he failed to establish that the Plaintiff did not prove her case on a balance of probability that she is a wife to the deceased considering both the documentary evidence she produced contradicted her own allegations.
  - b. The learned trial magistrate erred in law when he failed to make a clear finding that if indeed there were two wives, who is the 2<sup>nd</sup> and who is the 3<sup>rd</sup> wife.
  - c. The learned trial magistrate erred in law and in fact when he failed to determine the glaring contradiction in the agreement produced by the Plaintiff/Respondent herein stating that she was a long term girlfriend since 2000 and her own averments in her statement saying that she was married in 1995. Further the witness also had contradictions; the PW4 stated that dowry was paid twice in 1996 and 2018, while the PW2 stated that dowry was paid only once. These statements contradict that of the Plaintiff/Respondent herein.
  - d. The learned trial magistrate erred in law and in fact when he failed to correctly apply the Abagusii customary law on marriage; that living cows and goats must be paid as dowry for there to be a valid Abagusii marriage just like the Abagusii Expert witness Mr. Samson Nyamoko guided the court.
  - e. The learned trial magistrate erred in law and fact when he failed to establish that place of burial should be in the deceased's matrimonial property at Ensakia Location where he lived for most of his life until his demise and instead blatantly ignored the law and judicial precedents and ordered that he be buried in Mong'oni Location a place he left in 2011 because the proper rituals that were supposed to be done according to the Abagusii customs were not done to



clean that home after it was defiled by the first wife; she cut the deceased and blood was shed and according to Abagusii customs, the said house was to be cleansed which was never done and therefore the deceased cannot be buried there.

- f. The learned magistrate erred in law and in fact for finding that both the Plaintiff and Defendants are wives yet he ordered that the body of the deceased be released to the Plaintiff (Respondent herein) for burial.
  - g. The learned magistrate erred in law and fact for ignoring the fact there was no proof of dowry payment, no evidence of commencement of marriage between the Plaintiff and the deceased and no consent of the said two parties to confirm marriage yet he found the Respondent to be a wife to the deceased.
  - h. The judgment of the learned magistrate dated 2<sup>nd</sup> day of August, 2024 was against the weight of evidence.
  - i. The learned magistrate erred in law when he failed to set grant a stay of execution of his judgment requested in open court by the Appellant's counsel in the interest of justice considering the nature of the matter and that the judgment having been delivered on a Friday, he proceeded to issue a 24 hours conservatory orders knowing courts don't work on weekends.
11. The Appellant seeks the following orders in the appeal: -
    - a. An order that the said judgment of the magistrate's court be set aside.
    - b. That the Appellant be allowed to bury her husband.
    - c. Costs of the Appeal.
  12. The Appeal was canvassed by way of written submissions.

### **Appellant's Submissions**

13. The Appellant, through her advocate Ms. Biyaki, echoed the words of Higgins J. in the case of *Doodeward vs Spence*: 6 CLR 406, on the need to interrogate and establish the kind of relationship that the deceased had with the Respondent. In the said case, the learned judge observed that: -

“From first to last, I can find no instance of any court asserting any property in a corpse except in favour of persons who wanted it for purposes burial, and by virtue of their close relationship with the deceased might be regarded as under a duty to give the corpse a decent interment. I confess that I am unable to see how we can ignore such definite decisions and pronouncement as to the law.”
14. The Appellant's case was that the Respondent cannot be said to have been the deceased's wife because full dowry was not paid to her parents in accordance with the Abagusii Customary law. The Appellant referred to the evidence by the Abagusii Customary law expert and insisted that the Respondent's alleged marriage to the deceased was not valid since no goats were paid as dowry.
15. The Appellant submitted that the Respondent's case was not proved to the required standards as her evidence was riddled with contradictions and inconsistencies that could only lead to the conclusion that she was not married to the deceased.
16. The Appellant referred to an agreement dated 13<sup>th</sup> May 2018 and noted that the first paragraph of the said agreement indicated that the Respondent was the deceased's long-term girlfriend since 2000 and not a wife.



17. The Appellant contended that at no time did the Respondent live with the deceased under the same roof as husband and wife as the Respondent only mentioned a few instances when she visited the home of the deceased during functions.
18. The Appellant submitted that as opposed to the Respondent's evidence, which fell short of proof of marriage to the required standards, her evidence was consistent as it showed that she got married to the deceased in the year 2006 and that full dowry was paid in accordance with the dictates of the Abagusii Customary Law.
19. It was submitted that the deceased bought a piece of land at Ensakia Location in the year 2011 where they constructed their matrimonial home and lived until the deceased's demise in the month of June, 2024. The Appellant produced the Land Sale Agreement of support the deceased's ownership of the said land.
20. The Appellant's case was that she single-handedly took care of the deceased during his illness until his demise without any assistance from her brothers-in-law or the Respondent as shown in the medical documents which show that she is the deceased's next of kin. The Appellant referred to the decision in *San vs. GW* [2020] eKLR where it was held that: -

“...the law only recognizes persons who are closest to the deceased to have the right to bury the deceased. These persons have been identified as the spouse, children, parents and siblings in that order”
21. Reference was also made to the case of *Gladys Nekesa Peter vs. Alice Inganza Siahi*, NAIROBI CIVIL CASE NO. 11 OF 2019 where it was held that: -

“the determination of the place of burial ought to be based upon the proof, by the parties in dispute of their proximity to the deceased by virtue of marriage.”
22. It was submitted that the Appellant proved her claim, before the trial court, on a balance of probabilities. According to the Appellant, she was the only legal surviving wife of the deceased who is entitled to bury him at their Matrimonial home at Ensakia. The Appellant also referred to the case of *Ontweka & 3 Others vs Ondieki* (Civil Appeal E692 of(2023){20234} KCEA 11 (KLR) where the Court of Appeal observed that the people of Gusii are buried where they set up their homestead which need not to be their paternal homestead but where they have built a home in the said case. The court held that the burial is conducted in the place where the deceased had spent considerable amount of time during his lifetime. The court also held that the wife to the deceased was first in rank in burial rights and proceeded to rule that the place of burial was in his matrimonial home at Kamulu where he had lived to the time of his demise and not in his Kisii Home even though both homes were built by him.
23. It was therefore the Appellant's case that since the deceased lived in Ensakia Location from the year 2012 till his death in June, 2024, his body should be buried at his home in Ensakia.
24. Regarding the Respondent's contention that the Ensakia home is not a suitable place for burial because the deceased held no title to the land on which the home is erected, the Appellant submitted that they had acquired title to the said land by adverse possession having occupied it peacefully and without any interruption for more than 12 years. It was also submitted that no title was presented for the deceased's ancestral home so as to justify the Respondent's claim that the ancestral land was the suitable burial place. The Appellant argued that there was no land dispute at the Ensakia home.



## The Respondent's Submissions

25. The Respondent, who was represented by Mr. Ochoki advocate, isolated the issues for determination to be as follows: -
- a. Whether the Respondent is a wife of the deceased?
  - b. Whether the deceased should be buried at his ancestral home at Mong'oni sub-location, Nyankoba location or at the Appellant's home at Ensake Location?
  - c. Whether the appeal is merited?
26. On the place of burial, the Respondent noted that courts have mainly relied on customary laws, marriage law, succession law, land law and other legislations when dealing with burial disputes. The Respondent submitted that since the deceased was from the Kisii tribe, his burial should be conducted in accordance with the dictates of the Abagusii Customs and practices. Reference was made to the decision in *Jones vs. Dodd* where the court held that: -
- “... proper respect and decency compel the courts to have some regard to what Martin J [in *Calma vs. Sesar*] refers to as ‘spiritual or cultural values’, even if the evidence as to the relevance of such considerations in a particular case may be conflicting”
27. The Respondent referred to the prayers sought in this appeal especially the prayer that the deceased's body be released to the Appellant for burial at Ensakia location on the basis that he bought and settled on land thereat known as Isoge Settlement Scheme/isoge Keneni/153 (hereinafter “Isoge land”) and submitted that the purported sale was illegal and amounted to intermeddling with the estate of a deceased person. The Respondent noted that the registered owner of the Isoge land was deceased and that the seller admitted that he was merely a beneficiary of his deceased father's estate. The Respondent cited the decision in *Re Estate of Paul M'Maria (Deceased)* [2017] eKLR where the court held that;
- “10] The restriction provided by law that no immovable property shall be sold or distributed before confirmation of grant is not merely directory or an embellishment. It is a statutory command with fatal consequences on any transaction done in contravention of the said law. Accordingly, acquisition of immovable property of the estate in contravention of the *Law of Succession Act* is tainted with killer poison; and is unlawful acquisition; thus, property so acquired does not enjoy the protection of property rights under Article 40(6) of *the Constitution*.”
28. It was the Respondent's position that since the deceased had established a home at his ancestral abode where all his kin, including his first wife, are buried, he should be buried on the said ancestral land at Mong'oni sub-location, Nyankoba location in accordance with the Abagusii culture.
29. On whether the Respondent was married to the deceased, counsel for the Respondent submitted that customary law marriages are recognized as valid marriages in Kenya by dint of Section 6 of the *Marriage Act*, 2014. The Respondent noted that the essential ingredients to be proved for a valid marriage, under the Abagusii Customs, are captured in *Reinstatement of African Law Vol.1*, as follows: -
- (a) Capacity. The parties must have the capacity to marry and the capacity to marry each other.
  - (b) Consent. The parties to the marriage and their respective families must consent to the union.
  - (c) Chiombe Cho Oboko. There can be no valid marriage under Kisii law unless a part of the Chiombe cho oboko has been paid.



- (d) Commencement of Cohabitation. The moment at which a man and woman become husband and wife legally is when the man and woman commence cohabitation, i.e. when the marriage is consummated at the beginning of the honeymoon period.
30. It was submitted that to satisfy the requirement for dowry payment, evidence was presented to show that a sum of Kenya Shillings Forty Thousand (Ksh. 40,000/=) only was given to the Respondent's family as dowry. The Respondent added that the deceased built for her a home at his ancestral home and that their union was blessed with two children namely Purity Nyakundi and Melody Nyakundi born in 1997 and 2000, respectively.
31. The Respondent maintained that she occupies the house that the deceased constructed for her in his ancestral home to date thus signifying her position as the elder wife of the deceased. She further stated that vide the agreement dated 13<sup>th</sup> May 2018, further dowry was given to her family to clear off the outstanding dowry balance.
32. It was submitted that at no point, during his lifetime, did the deceased divorce the Respondent or treat her in a manner to show that they were no longer husband and wife. According to the Respondent, she was the legal elder wife of the deceased and is thus entitled to bury her him at their home in Mong'oni sub-location, Nyankoba Location.
33. Turning to the merits of the appeal, the Respondent submitted that the instant appeal is frivolous and tainted with malice as it is intended to derail the deceased's burial. The Respondent noted that while the Appellant seeks orders to set aside and/or vary the impugned judgment so that she can be allowed to bury the deceased, she did not state how the said judgment affects her interests since she has been included as a participant in the deceased's burial. The Respondent cited the decision by the Supreme Court of Canada, in the case of *Sattva Capital Corp. vs. Creston Moly Corp.* [2014] 2 SCR 633, where the court explained what may amount to a miscarriage of justice as follows: -
- “In order to rise to the level of a miscarriage of justice ... an alleged legal error must pertain to a material issue in the dispute which, if decided differently, would affect the result of the case. According to this standard, a determination of a point of law “may prevent a miscarriage of justice” only where the appeal itself has some possibility of succeeding. An appeal with no chance of success will not meet the threshold of “may prevent a miscarriage of justice” because there would be no chance that the outcome of the appeal would cause a change in the final result of the case.”
34. It was submitted that despite numerous attempts, by the Respondent and the deceased's family, to meet the Appellant and come to a consensus on the burial site, the Appellant remained adamant and insisted on excluding them from the burial arrangements. The Respondent relied on the decision in *Re Burial of Musa Magoda Keya (Deceased)* (2021) eKLR, where it was held that: -
- “136. What emerges is that there was a ploy to exempt some of the deceased's family members from the funeral arrangements despite claims to the contrary. However, during the conduct of the trial, it appeared that all the parties were in agreement that all of the deceased's family members should participate in his interment together with the members of the Bashirima clan and the deceased's church. I find guidance in Article 45 of *the Constitution* which is categorical that family is the natural and fundamental unit of society and the necessary basis for social order, and shall enjoy the recognition and protection of the State.”



35. In the said Musa Magoda case (supra), the court went on to hold that:-

“138. Throughout these proceedings, it appeared that all that the parties were seeking was to ensure that the deceased receives a dignified send-off. Accordingly, I find no reason why the deceased should not be interred in the presence of not only his wives and children, and the church which he founded and led as Arch-Bishop, but also his clan who constitute his extended family. Since the deceased’s family is in agreement that everyone should participate in the deceased’s interment, the order directing the Officer Commanding the nearest police station to ensure compliance of this order is not necessary.”

36. The Respondent urged the court to dismiss the appeal for lack of merit and to order for the release of the deceased’s body to her for burial at Mong’oni Sub Location.

### **Analysis and Determination**

37. I have carefully considered the appeal herein, the pleadings and evidence presented before the trial court together with the submissions filed by both parties. The duty of the first appellate court is to comply with the requirements under Section 78 of the Civil Procedure Act.

38. It is long established that the role of this court on first appeal is to re-evaluate all the evidence availed in the lower court and to reach its own independent conclusions while bearing in mind the fact that it neither saw nor heard the witnesses testify. This is the position that was taken in Oluoch Eric Gogo vs. Universal Corporation Limited [2015] eKLR and in Peter M. Kariuki vs. Attorney General [2014] eKLR where the court held inter alia as follows:

“We have also, as we are duty bound to do as a first appellate court [to] reconsider the evidence adduced before the trial court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See Ngui -vs- Republic [1984] KLR 729 and Susan Munyi -vs- Keshar Shiani, Civil Appeal No. 38 of 2002 (unreported).”

39. The above holding captures the locus classicus decision in the case of Selle vs. Associated Motor Boat Co. [1968] EA 123 where it was held that:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

40. The evidence presented before the trial court was as follows:- The Respondent, who testified as PW1 adopted her witness statement as her evidence in chief and testified that she met the deceased in the year 1986 and later on got married to him in 1995. She later learnt that the Appellant was her co-wife in the year 2006.



41. The Respondent testified that the deceased paid dowry to her brother one David Mageto in the form of cows, goats and some money. She testified that dowry was paid in 2018 and that the ugali ceremony was conducted in which her sisters, Caren Kwamboka, Okebiro Manyotu and Jeremiah Makoa participated.
42. PW1 testified that the deceased's first wife died in the 2014 and that she was buried in the deceased's ancestral home at Mong'oni. She stated that the said first wife had a house in the deceased's ancestral home which she inherited as her house following the demise of the said first wife. She added that she had 2 children with the deceased.
43. PW2 Francis Omari was the deceased's brother. He testified that his wish was that the deceased be buried at their ancestral home in accordance with the Abagusii customs. He stated that he was 90 years old and was therefore very conversant with the Abagusii customs. He further stated that the deceased married the Respondent under the Abagusii customs and that dowry was paid and the ugali ceremony conducted. He confirmed that the Appellant was also married to the deceased as his third wife.
44. On cross-examination he stated that the deceased married the Respondent in 1995 and that dowry was paid in 1996. He also confirmed that he participated in the ugali ceremony. He named the people who escorted the cows to the Respondent's home as Maurice Anasi, Aricha Anasi and Oyugi Nyanchoka. He also confirmed that a dispute arose between the Appellant and the Respondent in the year 2018 following the death of the deceased's mother and that he acted as a mediator in the said dispute where an agreement was signed.
45. PW3, Philip Ongera, also a brother to the deceased, testified that a reconciliation family meeting was held in 2018 after the death of their mother to settle the dispute between the Respondent and the deceased wherein resolutions were reduced into writing. He confirmed that the deceased married the Respondent in 1996 and that he escorted cows that were paid as dowry to the Respondent's parents in 2018. He also escorted the cows paid as dowry to the Appellant's parents in the same year
46. On cross examination, he stated that the deceased purchased land at Ensake. He confirmed that he was present at the ugali ceremony conducted in respect to the Respondent in 2018 and that he is the one who was sent to buy the goat and chicken. He stated that their desire is that the deceased be buried at their ancestral land where his parents, first wife and other brothers are buried.
47. PW4, Alfred Anasi Onsinyo, the deceased's first cousin, testified that deceased had 3 wives but that the 1<sup>st</sup> wife was deceased. He stated that all the wives were married under the Abagusii customary law. He noted that he participated in the Respondent's traditional marriage ceremony in 1996 where 4 cows and Kshs. 40,000 was paid. He testified that the meeting and agreement signed in 2018 was about peace following a conflict between the Appellant and the Respondent that was reported to the police. He testified that he is the one who drafted the said agreement/minutes of 2018 which he produced as P. Exhibit 1. He explained that the agreement was specifically for reconciliation and withdrawal of an assault case that had been reported to the police and not on the issue of marriage between the Respondent and the deceased.
48. PW5, Otuoma Manyora, the area Assistant Chief of Mong'oni Sub Location testified that the deceased hailed from his jurisdiction. He stated that he was aware that the deceased had 3 wives and that only 2 were alive. He wrote a letter which he produced as P. Exhibit 7 to confirm that both the Respondent and the Appellant were the deceased's widows. He confirmed that he participated in the reconciliatory meeting between the parties herein in 2018 where a written agreement was signed.
49. DW1, the Appellant herein, adopted her witness statement as her evidence in chief and testified that she got married to the deceased under the Abagusii customary law in the year 2006 and that they were



blessed with 2 children. She added that her dowry was paid in December 2008 comprising of 2 bulls and 2 goats after which the ugali ceremony was conducted. She confirmed that the deceased had a first wife called Dinah who died and was buried at the ancestral home in Mong'oni.

50. The Appellant testified that she lived with the deceased at Mong'oni for 16 years before they moved to the Isoge land where they bought land and built a house. She denied the Respondent's claim that she is the elder wife and stated that she is the senior most wife over the Respondent and should therefore be allowed to bury the deceased. She confirmed that there was a meeting in 2018 where an agreement was reached following a rift between the deceased and the Respondent. She stated that she signed the agreement for purposes of withdrawal of an assault case.
51. On cross examination DW1 stated that the Isoge land is not registered in the name of the deceased and that they purchased it from one Wilfred Genge Onchiri but that the land belonged to one Onchiri Patrice Nyagwanga (the father of the seller) who is deceased. She confirmed that a succession case in respect to the estate of the said Onchiri Patrice was yet to be filed.
52. The Appellant further testified that under the Abagusii customs, funerals are not organized by women and neither do they participate in dowry negotiations. She stated that the deceased did not pay any dowry to the Respondent's parents and that she doubted if the Respondent's children belonged to the deceased. She testified that it was the deceased's wish to be buried in the Isoge land. She further stated that the deceased disagreed with his family members because they organized to pay dowry to the Respondent's family in April 2024 without his consent.
53. DW2, Lawrence Onyiego Kimanga, the Appellant's brother, confirmed that the deceased married the Appellant in 2006 and that dowry was paid according to the Abagusii customary law. He stated that the deceased informed him of his wish to be buried at the Isoge land.
54. DW3, Margaret Kerubo, was the wife of DW2. She confirmed that the Appellant got married to the deceased under the Abagusii customary law in a traditional marriage ceremony in which she participated.
55. Having considered the evidence presented before the trial court alongside the grounds of appeal, and the parties respective submissions, I find that the main issues for determination is the question of who is entitled to bury the deceased herein, Nyakundi Wilfred Job Omari and the place of burial.
56. Courts in Kenya have taken the position that they will resort to customary law, common law, marriage law, succession law, human rights law, land law and other bodies of personal law in resolving burial disputes. This is the position that was taken by the Court of Appeal in *SAN v GW* (supra) where it was held that: -

“In burial disputes, the two questions that will always arise are, who has the right to bury the deceased and the place of burial. Customary law has been held to be the applicable personal law regulating burial disputes in Kenya. See *Virginia Edith Wamboi Otieno vs. Joash Ochieng Ougo & another No.4*, (1987) KLR 407 (the SM case) and *Kandie & 2 others vs. Beatrice Jepkemoi Cherogony* (2002) 2 KLR 613. But since customary law exists in almost all ethnic groups in Kenya with a homogeneous value system and the customs vary from one ethnic group to another means that the resolution of burial disputes will depend largely on the peculiar circumstances of each case.”



57. Customary law is applied by dint of Section 3 (2) of the *Judicature Act* which stipulates that:

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 and without undue delay.

58. Article 44 (1) of *the Constitution* provides that every person has a right to participate in the cultural life of their choices. In *Johnstone Kassim Mumbo & 2 Others vs. Mwinzi Muumbo & Another* the Court held that:

“Custom is not mandatory where the wishes of the deceased are clear.”

59. The same position was taken in the case of *Jacinta Nduku Masai vs. Leonida Mueni Mutua & 4 others* (2018) eKLR where the Court held that:

“The wishes of the deceased if established to have been expressed during his lifetime would take precedence over consideration.”

60. Section 51 of the *Evidence Act* provides that:

In proving a custom, evidence of its existence must be called to provide the juridical and philosophical basis.

61. In the case of *Nyariba Nyankomba vs. Mary Bonareri Munge* [2010] eKLR the Court stated inter alia that:

“In cases resting purely on customary law, it is absolutely necessary that experts versed in the customs be summoned to testify so as to assist the court reach a fair verdict since the court itself is not well versed in those customs and traditions. In the absence of such expert testimony, there can only be one conclusion, such claim remains unproved.”

62. In *Jacinta Nduku Masai vs. Leonida Mueni Mutua & 4 Others* (supra) it was held, reiterating what the Court of Appeal stated in *Apeli vs. Buluku* [1980] eKLR that:

“It is trite law that there cannot be property in a dead body and a person cannot dispose his body by will, but it should be noted that courts have long held that the wishes of the deceased, though not binding must so far as practicable be given effect, so long the same is not contrary to the general law or policy.”

63. Section 6 of the *Marriage Act* stipulates as follows: -

- “(1) A marriage may be registered under this Act if it is celebrated—
- (a) in accordance with the rites of a Christian denomination;
  - (b) as a civil marriage;
  - (c) in accordance with the customary rites relating to any of the communities in Kenya;”



64. The governing law(s) and practices when it comes to customary marriage are detailed in Section 43(1) of the Marriage Act, 2014 which provides that;

“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.”

65. It was not disputed that the deceased herein died intestate and therefore did not leave a will on his place of burial. This means that the court will be guided by the Abagusii Customary Laws and practices in determining his place of burial. It was also not contested that the deceased was born in Mong’oni Sub Location, Nyankoba Location and that he was a polygamous man having married more than one wife.

66. The dispute herein involves two main protagonists who both claim to have been married to the deceased and therefore entitled to bury him. While the Appellant’s case was that the deceased should be buried at the land he bought at Isoge, the Respondent was for his burial at the ancestral land at Mong’oni Sub Location. The Respondent also claimed that she is the elder wife having been married to the deceased way back in 1996, the Appellant, on the other hand, contended that she was the only surviving wife of the deceased and therefore entitled to bury him at a home they had established at the Isoge land. The Appellant denied the Respondent’s claim that she was married to the deceased in 1996 or at all.

67. I note that the Respondent presented the evidence of her brothers in law PW2, PW3, and PW4 who confirmed that indeed, the deceased married her and paid dowry to her parents in accordance with the Abagusii customary law. PW5, the area Assistant Chief also confirmed that he recognized both the Appellant and the Respondent as the deceased’s widows which recognition he reduced into writing in a letter dated 10th June 2024 that he produced as an exhibit.

68. The trial magistrate made the following findings on the issue of marriage: -

“It is therefore my finding that what we have before us are two marriages that were just contracted through the Abagusii Customary Law. Important to note is that both the plaintiff and the defendant acknowledge that such regime of marriage is considered valid marriage and it does affect all of them if not to say that the deceased and them are subject and/o affected by the Abagusii customary law. To me the same is not repugnant to justice and/or morality. The plaintiff and the defendant are both wives to the deceased by virtue of the Abagusii custom. Such marriages therefore subsist and therefore legally considered valid.”

69. My finding is that the trial court arrived at the correct verdict on the issue of the marriage between the protagonists herein and the deceased. It is instructive to note that while the Respondent does not have a problem recognizing the Appellant as her co-wife and the deceased’s widow, the Appellant was categorical that the deceased was not married to the Respondent. This court finds the Appellant’s position and argument to be quite strange and untenable in the face of the overwhelming evidence from the deceased’s own brothers including PW2, a 90-year-old man, who attested to the marriage between the deceased and the Respondent. This court finds no reason to doubt the evidence of the Respondent’s witnesses.

70. The Appellant insisted that there were inconsistencies and contradictions in the evidence presented by the Respondent on the circumstances under which the dowry was paid thus leading to her conclusion that there was no marriage. My finding is that even though there may have been some discrepancies in the witnesses’ testimony in as far as the fine details of dowry payment is concerned, such lapses do not take away the fact that dowry was paid in respect to the marriage between the deceased and the



Respondent thus sealing their relationship. It did not also escape the attention of this court that the Respondent produced the birth certificates of her children which indicated that the said children were born in 1997 and 2000, long before the deceased married the Appellant in the year 2006.

71. I further note that, in her own evidence during cross examination, the Appellant appears to be conceding to the fact that dowry was paid in respect to the Respondent while at the same time denying the same. The Appellant testified as follow: -

“My husband has never paid dowry for the plaintiff as alleged in the pleadings. I also acknowledge that dowry can be in the form of cash and if money was paid in 1996 then dowry was paid in 1996. In that agreement I am the one that is recognized as the senior wife, no dowry had never(sic) been paid for the plaintiff, she would later have her dowry paid later on in the month of April 2024 without the consent of my late husband and even the cow that was paid belonged to me.”

72. As I have already stated hereinabove, the Appellant appears to be blowing hot and cold on the issue of the Respondent’s marriage to the deceased and does not seem to be very forthright on the issue.

73. The Appellant also referred to an agreement signed by the parties on 13th May 2018 where the deceased allegedly referred to the Respondent as ‘a long term girlfriend whom he had now confirmed as a wife’ and argued that such an agreement could not be construed to constitute a marriage. I have considered the contents of the said agreement and the explanation offered by the witnesses over the circumstances under which it was executed and I find that the said agreement has no probative value in as far as proof of marriage is concerned. I do not wish to comment on the said agreement any further in view of the undisputed fact that it was executed as a way of making peace following the filing of an assault case by the Respondent. Needless to say, in the said agreement, the Appellant conceded that the Respondent was her co-wife.

74. On the merits of the appeal, I find that the trial court was very balanced in its decision as it granted both the Appellant and the Respondent an opportunity to participate in the burial of the deceased to be conducted at Mong’oni Location. To my mind, this is a case where it can be said that there was no winner or loser as both widows were accorded an equal opportunity to send off their loved one. This means that the Appellant was not excluded from the burial thus making her prayer, in this appeal, to be allowed to bury the deceased, superfluous.

75. Turning to the place of burial, the Appellant contended that the deceased should be buried at his Isoge land where he had built a house while the Respondent supported the trial courts verdict that the burial be conducted at the deceased’s ancestral home. According to the Respondent, the land at Isoge was purchased under circumstances that were not entirely legal and amounted to intermeddling with the estate of a deceased person.

76. It was not disputed that neither the deceased nor the Appellant are registered as the owners of the Isoge land. Indeed, the Appellant conceded that they bought land belonging to a deceased person from a vendor who is an alleged beneficiary of the estate of the deceased land owner and that no succession case has been filed in respect to the said estate. It was the Appellant’s case that they had acquired the said land by adverse possession having occupied peacefully and for an uninterrupted period of more than 12 years.

77. The Respondent, on her part, argued that no adverse possession can arise in respect to land belonging to the estate of a deceased person and that all that the Appellant was asking the court to do is to ratify an illegality.



The Appellant testified as follows on the acquisition of the Isoge land:-

“I wish to bury the deceased at Ensakai Location Borabu Sub-County at a property that we bought from one Wilfred Genge Ochuri. The said property is not yet transferred to our names. I do not know the parcel number...Refer to the sale agreement dated 14.2.2011. The land belonged to Onchiri Patrice Nyagwanga who was since deceased and succession had not yet been done. We bought the land to the son of the late Onchiri Patrice Nyagwanga.... I am not aware of the beneficiaries of the late Onchiri Patrice Nyabwanga neither do I know their views on the said property.”

78. I have perused the land sale agreement dated 14th February 2011 and I note that it was made between the deceased herein and one Wilfred Marita Onchiri who described himself as the son of the registered proprietor of the land parcel Isoge Settlement Scheme/Isoge Keneni/153, Onchiri Patrice Nyabwanga (deceased).
79. This court has to warn itself that this is, strictly speaking, not a land matter where interests to land can be determined, but as I have already noted elsewhere in this judgment, burial disputes more often than not, involve a consideration of the relevant land laws especially where the disputes revolves around the place of burial as was the position in the instant case. This means that this court cannot turn a blind eye to the applicable land law in determining the place of burial.
80. My finding is that, as correctly submitted by the Respondent, the alleged sale of the Isoge land through the agreement dated 14<sup>th</sup> February 2011 amounted to intermeddling with the estate of a deceased person which is an offence as provided under Section 45 of the Law of Succession Act which provides as follows;
- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with any free property of a deceased person.
  - (2) Any person who contravenes the provisions of this section shall –(a)be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or both fine and imprisonment ...
81. In Veronica Njoki Wakagoto (Deceased) (2013)eKLR Musyoka J. held that: -
- “The effect of [section 45]...is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by the Law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”
82. Similarly, In Re Estate of M'Ngarithi M'Miriti (2017)eKLR the term “intermeddling” was discussed as follows: -

“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of



the free property of the deceased in contravention of the Law of Succession Act. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”

83. Applying the principles expressed in the above cited cases to the instant case, I find that alleged sale of the Isoge land to the deceased was a clear case of intermeddling with the estate of a deceased person, a scenario which a court of law cannot countenance or perpetuate by allowing the Appellant’s prayer to be allowed to inter the deceased remains in the said land which technically and legally, still belongs to the estate of the Onchiri Patrice (deceased).
84. Before I pen off on the issue of the place of burial, I am minded to consider the Appellant’s counter-argument that the lack of title to the Isoge land should not be a stumbling block to the burial at Isoge since the Respondent had also not produced the title deed to the ancestral land. I note that it was not disputed that the land in Mong’oni was the deceased’s ancestral land where he constructed a house and even buried his first wife. There was evidence that the deceased’s parents and brothers were also buried on the said ancestral land. I find that Appellant’s argument that there was no proof of ownership of the ancestral land is hollow and of no consequence in the face of the overwhelming evidence of the existence of the said land.
85. For the reasons that I have stated in this judgment, I find that the instant. appeal is without merit and I therefore dismiss it with no orders as to costs. For avoidance of doubt, I uphold the trial court’s verdict and make the following orders: -
- a. The Appellant and the Respondent herein are both the widows of Nyakundi Wilfred Job Omari (deceased). I direct that both the Appellant and Respondent shall be included and/or participate in the burial/disposal of the remains of the deceased.
  - b. That the said burial shall take place at the deceased’s ancestral home at Mong’oni Sub-Location, Nyankoba Location in Nyamira County.
  - c. The management/Director of St. Joseph’s Nyansiongo Mortuary is hereby directed to release the remains of the late Nyakundi Wilfred Job Omari to the Appellant and the Respondent for burial as stated in order no. (b) hereinabove.
  - d. That the OCS Keroka police station and the area chief, Mong’oni sub location, Nyankoba location to ensure full compliance with the above orders.

**DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS PLATFORM THIS 28<sup>TH</sup> DAY OF AUGUST 2024.**

**W. A. OKWANY**

**JUDGE**

