



**MO v MAO (Civil Case E011 of 2024)
[2024] KEHC 13558 (KLR) (Family) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13558 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL CASE E011 OF 2024
H NAMISI, J
OCTOBER 31, 2024**

BETWEEN

MO PLAINTIFF

AND

MAO DEFENDANT

RULING

1. The matter herein relates to a burial dispute between the Plaintiff and Defendant with respect to the burial of their husband, JOO (Deceased). The Plaintiff moved the Court by way of Plaint dated 15th July 2024, which was accompanied by a Notice of Motion filed under certificate of urgency. The Plaintiff got married to the Deceased in 1958 as his first wife, while the Defendant was the second wife. The Deceased passed away on 11th July 2024.
2. At the hearing of the Notice of Motion dated 15 July 2024, parties compromised the application and the entire suit by recording consent as follows:
 - i. That burial date is set for 2nd August 2024 at the Deceased’s homestead situate on Title Number Rusinga/Kaswanga Wanyama/4XX in Rusinga Central, Kaswanga sub location, Gunda village;
 - ii. That the memorial service to be held on 31 July 2024 at Maxwell SDA Church, Nairobi where the Deceased fellowshipped;
 - iii. That the Deceased’s body to be preserved in the current status at Umash Funeral Home, Nairobi and will be moved on 31 July 2024 in the presence of the Plaintiff and the Defendant for:
 - a. Church memorial service at Maxwell SDA Church, Nairobi;



- b. Transportation to the Deceased's home at Outer Ring, Nairobi;
- c. Return of the Deceased's body to Umash Funeral Home, Nairobi by or not later than 1900 hours on 31 July 2024;
- iv. That the Deceased's body to be airlifted on Kenya Airways (KQ) on 1 August 2024 in the company of the Plaintiff and the Defendant to Kisumu International Airport in the morning of 1st August 2023. Then transported in the company of the Plaintiff and Defendant and other family members by road to his home in Rusinga Central, Kaswanga sub location, Gunda Village for interment;
- v. That the Plaintiff and Defendant being the Deceased's wives, shall participate in the funeral preparations and burial of the Deceased except for the specific roles assigned under no. 10 below. The Plaintiff and the Defendant and their respective families shall jointly come up with the program and eulogy for the Deceased;
- vi. That the Plaintiff, the Defendant and their children shall have unrestricted access to the Deceased's body at Umash Funeral Home or any other morgue that the Deceased's body may be preserved;
- vii. That the Deceased's body should not be disposed of in any way including by burial or cremation unless with the consent of both Plaintiff and Defendant;
- viii. That the Deceased's body be interred on a portion of the land to be hived off from both sides of the boundary demarcating the two households on all that parcel of land known as Title Number Rusinga/Kaswanga Wanyama/4XX, being the Deceased's homestead in Rusinga Central, Kaswanga sub location, Gunda village with the consent of the Plaintiff and the Defendant. The hiving off of this area and its fencing be done before the body be moved from Nairobi.
- ix. That the Plaintiff, the Defendant and their children shall have and retain unrestricted access to the Deceased burial site with the right to erect gates and create pathways for such access as would be most convenient;
- x. That all bills and funeral expenses be settled in apportionment in the meeting held on the 22 July 2024 as follows:
 - a. The Defendant shall take care of the deceased's coffin, dress, funeral home's expenses, church fees, transport to church service, outer ring, back to the funeral home, the airlifting of the body to Kisumu and transport from Kisumu to Rusinga Central kaswanga sub location, Gunda village. The Defendant shall also take care of the grave digging, construction and tiling.
 - b. The Plaintiff secure one bus to transport people from Rusinga to Kisumu and back home to Rusinga. The Plaintiff will also provide one bus from the outer ring home to Rusinga Central, Kaswanga sub location, Gunda Village.
 - c. The Defendant shall secure one bus to transport people from the Outer Ring home, Nairobi to Rusinga Central, Kaswanga sub location, Gunda village;
 - d. The Plaintiff shall meet and foot catering, tents, seats and any necessary decoration expenses. She will also take care of the tombstone on the grave and general beautification of the grave.



7. The Plaintiff filed a Replying Affidavit dated 12th August 2024, whose contents are remarkably similar to those of the Affidavit sworn in support of the Application dated 11 August 2024.

Plaintiff's Notice of Motion dated 11 August 2024

8. On her part, the Plaintiff filed Notice of Motion dated 11 August 2024 seeking the following orders:
- i. (spent)
 - ii. That this Honourable Court finds that the Defendant/Respondent is in contempt of the Court Orders issued on the 26 July 2024;
 - iii. That this Honourable Court orders for the post mortem to be carried out on the body of the Deceased;
 - iv. That this Honourable Court sets aside the order made on 26 July 2024;
 - v. That the Honourable Court orders that the Deceased be buried at his homestead situate on Title Number Rusinga/Kaswanga Wanyama/4XX in accordance with Luo customs;
9. In her Supporting Affidavit, the Plaintiff enumerated the various breaches of the consent order occasioned by the Defendant which included removal of the Deceased's remains from Umash Funeral Home without notification to and/or consultation with the Plaintiff; failure to furnish the Plaintiff with the flight details; unilaterally picking the location of the grave and proceeding to dig the same and the intention by the Defendant to bury the Deceased at a site that had not been agreed upon.
10. Further, the Plaintiff accused the Defendant and her children of attempting to take the body of the Deceased to the Defendant's house for the night vigil, which is contrary to Luo customs. The Plaintiff averred that the Defendant's deliberate attempts to keep the family at bay made her apprehensive about the Deceased's cause of death.
11. In the midst of the applications, came another application dated 23rd August 2024 by Interested Parties, who are Luo elders and relatives to the Deceased, seeking to be enjoined as interested parties and leave to give evidence. The Interested Parties filed several Affidavits touching on Luo burial customs.
12. The Plaintiff and Defendant filed written submissions, while the Interested Party submitted orally.

Analysis and Determination

13. The issues for determination herein are:
- i. Whether the consent order of 26 July 2024 ought to be set aside
 - ii. Whether the Plaintiff and Defendant are in contempt of the consent orders
14. Consent orders are binding on the parties and can only be varied on grounds that justify the setting aside or variation of a consent order or by another consent by the parties involved. In the case of Wasike vs. Wamboko (1988) KLR 429, it was held:

“A consent Judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract, or if certain conditions remain to be fulfilled which are not carried out”



15. In Jonathan Namulala Nyongesa v. Multi Business Shooters Investors Ltd & 2 Others (2015) e KLR, the court stated:-

“There is no dispute that the order herein was entered by consent In Kenya Commercial Bank Vs. Specialized Engineering Company Ltd. [1982] KLR 485 the court held,

“An advocate has general authority on behalf of his client as long as he is acting bona fide and not contrary to express negative direction, in the absence of proof of any express negative auction, the order shall be binding.”

16. Further it was held that,

“A consent entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or by an agreement contrary to the policy of the court. Or where the consent was given without sufficient material facts or misapprehension or ignorance of such facts in general for reason which would enable the court to set aside an agreement.”

17. In the case of Brooke Bond Leibig (T) Ltd. versus Maliya 1975 [EA] 266 it was also held that a consent order made in the presence and with the consent of counsel is binding on all the parties to the proceedings. It cannot be varied or discharged unless it is obtained by fraud or collusion or is contrary to the public policy of the court.

18. The Court of Appeal in *Samuel Wambugu Mwangi Vs. Othaya Boys High School, Nyeri Civil Appeal no. 7 of 2014* held that a consent order has a contractual effect upon the parties. That it cannot be set aside unless there is fraud, collusion or any of the reasons that can justify the setting aside of the consent as in a contract.

19. I have looked at the reasons presented by the Plaintiff in her application seeking to have the consent orders set aside. In her Supporting Affidavit, the Plaintiff presents only one reason, “From the consent, it is evident that I ought to have given my consent to all the matters referred to in 11 above”. From that statement alone, it is not clear exactly which clause of the consent the Plaintiff takes issue with.

20. When this matter first came up in court on 23 July 2024, counsel for the Plaintiff and Defendant informed the Court that there were ongoing negotiations, with a view to settling the matter amicably. They requested time to finalise the consent with their respective clients, which was allowed. The matter then came before the Court on 26 July 2024, when the consent was adopted by the Court. In view of the fact that counsel were acting on the instructions of their clients, and without any evidence adduced by the Plaintiff to suggest that she did not instruct her counsel to enter such consent, I find no justifiable reason to set aside the same.

21. Further, even the averment that the Plaintiff entered into this consent without proper knowledge of Luo customs holds no water. The Plaintiff stated that she is elderly and got married in 1958. Definitely as a person of her advanced age, it is presumable that the Plaintiff is very knowledgeable in Luo customs and traditions and that she entered into this consent with full knowledge.

22. With respect to the prayers for contempt, I note that both parties have in one way or another acted in a manner that steps away from the consent. In my view, these acts or omissions by the parties are backdoor attempts at getting the Court to review the consent orders in place. The attempts were then formalised in the form of the prayers in the two applications which invite the Court to vary or review the orders. I decline to do so.



23. I find no valid reason to set aside or vary the consent order that was made by the parties in court, represented by their Advocates. A change of mind alone is not one of the reasons that can make a court of law set aside or vary a consent order of the parties. It is also important to point out that this is not a succession matter and the directions herein do not confer any rights of inheritance to any party herein.
24. The upshot of the foregoing is that the applications herein, in as far as they seek the variation of the orders issued on 26 July 2024, have no merit and are dismissed, with no orders as to costs. For the avoidance of doubt, the Consent order of 26 July 2024 stands.

DATED AND DELIVERED AT NAIROBI THIS 31 DAY OF OCTOBER 2024.

HELENE R. NAMISI

JUDGE

Delivered on virtual platform in the presence of:

Mungla..for the Plaintiff

Ms. Kioge h/b Ms Kayugirafor the Defendant

Adala.....for the Interested Parties

