



Yuko v Yuko (Civil Appeal E139 of 2021) [2023] KEHC 157 (KLR) (23 January 2023) (Judgment)

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E139 OF 2021
FA OCHIENG, J
JANUARY 23, 2023**

BETWEEN

MARTIN YUKO APPELLANT

AND

DAVID YUKO RESPONDENT

(Being an appeal from the decision, Judgment/decree of the CMC of Kenya at Kisumu by Hon. K. Cheruiyot (SPM) dated 1st December, 2021 in the original Civil Case known as Kisumu Chief Magistrate's Civil Suit No. 472 of 2021)

JUDGMENT

1. This appeal arises from the decision by the learned trial Magistrate, who rejected the plaintiff's request for a permanent injunction to restrain the defendant from interring the body of Lucia Agono Yukoon land parcel No Lambwe West/lambwe West 'B'/984. The plaintiff wished to have Lucia buried on land parcel No Seme/kaila/1314.
2. Following the dismissal of the plaintiff's suit, Lucia was buried in Lambwe. The plaintiff filed an Amended Memorandum of Appeal in which he sought an Order for the exhumation of the body of Lucia from Lambwe, so that it could thereafter be buried in Seme.

In the appeal, the appellant urged this Court to find that;

- a. The trial court framed the wrong issue, concerning who ranked in priority between the parties, on the question concerning who ought to bury the deceased.
- b. The place of burial for a married Luo woman was governed by Luo Customs and Traditions.
- c. The Expert evidence tendered by the Expert Witness showed that the deceased should have been buried at her matrimonial home, next to the grave of her late husband.



- d. The pleadings, exhibits, evidence and submissions ought to have led the trial court to order that the deceased be buried at her matrimonial home.
3. Being the first appellate court, I am obliged to re-evaluate all the evidence on record, and to make my own conclusions. In other words, I am not bound to follow the findings of the trial court. However, when a finding by the trial court is founded upon the demeanour of a witness, I would have to be very slow to interfere with such a finding, because I did not have the benefit of observing the witnesses when they were testifying.
4. However, if the trial court failed to take into account a particular factor, this court could reverse a finding that had been hinged upon the demeanour of a witness.
5. Secondly, if the finding which was informed by the trial court's impressions of the demeanour of a witness, was inconsistent with the totality of the evidence on record, this first appellate court would be entitled to interfere with the finding.

Applicable Law

6. Pursuant to the provisions of Section 3(2) of the *Judicature Act*,

“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.”
6. It is well appreciated that whilst legislation has been enacted to govern several areas of personal law, such as marriage, divorce and succession, there is no legislation that currently governs burial. Therefore, the courts are required to derive guidance from the relevant African Customary Law when called upon to make determination on burial disputes. In this case, both the deceased (Lucia) and her late husband John Epaphras Yuko Ndinyahailed from the Luo community. In principle, therefore, it is the Luo Customary Law that was applicable to disputes appertaining to the burial of Lucia.
7. The learned trial Magistrate did acknowledge, albeit somewhat obliquely, that the applicable law in this case was Luo Customary Law. However, he then proceeded to hold that because the Luo Customary Law did not recognise the wishes of women on matters of burial, the said customary law was repugnant to justice.
8. The appellant drew the attention of this court to the fact that he called a witness who was an expert in matters pertaining to Luo Customary Law. That person testified as PW2.
9. Gabriel A. Owiti(PW2) told the court that he is a herbalist of many years. Apart from that, he also taught about matters of Marriage, Life and Burials. He taught on radio: first he was at Radio Ramogi and more recently, he was at Mayienga FM.
10. PW2 testified that, according to Luo Customary Law, a married woman ought to be buried at her husband's home. He explained thus:

“She is buried where her husband is. That is the proper place for the community to sit and decide, otherwise it would bring a curse. Even if a wife gets another home that is not her matrimonial home. The Luo call it ligala.

A woman cannot have two homes otherwise it would be a curse.



A woman has no authority.”

11. He said explicitly that a wife cannot decide, and has no authority to decide where she would be buried. His testimony was that a wife must be buried next to her husband.
12. PW1 Martin Yuko, is a step-son of the deceased, Lucia. Following the death of Lucia, members of the family held meetings and finally made a decision to inter her remains next to her husband. It was the understanding of PW1 that the said decision was in accordance with Luo tradition and customs.
13. However, after the said decision had been made, the eldest brother of Martin informed him that there was a change of mind. The said eldest brother is David Yuko, the respondent herein. David informed Martin that they had decided to bury Lucia in Lambwe.
14. Martin acknowledged that Lucia had a home in Lambwe. However, in his considered view, the existence of Lucia’s permanent house in Lambwe, did not make the home there, her matrimonial home.
15. PW1 emphasised that Lucia’s matrimonial home was in Seme. He expressed the view that although Lucia had moved to Lambwe Valley in 1964, the home where she lived in there, was only a farm.
16. PW3, Prisca Aketch, was a co-wife of Lucia. She got married to John in 1965, and she lived with Lucia in the same compound, in Lambwe Valley. Nonetheless, PW3 stated that the home of Lucia was not a “fully fledged Luo homestead”. Therefore, PW3 believed that Lucia ought to be buried next to her husband, in Seme. If Lucia was not buried in Seme, PW3 would have to look for an alternative resting place; but if Lucia was buried in Seme, PW3 would also be buried there.
17. The said explanation may be suggestive of the motivation which drives PW3, in her desire to have Lucia buried in Seme. However, I also appreciate that it may be indicative of her appreciation of the customs of the Luo.
18. PW3 corroborated the evidence of PW1, regarding the fact that Lucia was a practicing Christian; and that Lucia was never inherited, after the death of her husband. PW3 also confirmed what PW1 had said, concerning the fact that Lucia buried her son Ezekiel in Lambwe, in the year 2016. The 2 witnesses also said that Ezekiel’s elder brother, Francis was buried in Lambwe.
19. And although PW1 said that he never heard Lucia express a desire to be buried in Lambwe, PW3 told the court that when Francis was being buried, Lucia said that she would like to be buried in Lambwe. When she was asked whether or not she would like her wishes to be respected, PW3 answered in the affirmative.
20. PW4, Wilson Olila Oyuko is a brother-in-law to Lucia. He said that the responsibility of determining the burial place for Lucia vested in the Elders. In this instance, the Elders held a meeting and decided that Lucia be buried next to her husband.
21. PW5, Michael Ngoma Nyamoris a neighbor to John Yuko. He was a retired teacher and a counselor. He said that a wife should be buried next to her husband, but not next to her children. However, he had heard that Lucia had expressed her desire to be buried in Lambwe.
22. Meanwhile, the plaintiff had never heard that Lucia wished to be buried in Lambwe. Nonetheless, he told the court that it was possible for someone to change his mind. He gave that answer after confirming that Lucia had buried her son, Ezekiel, in Lambwe. After PW5 testified, the plaintiff closed his case.
23. DW1 David Yuko Odhiambo, is the first-born of Lucia. He testified that his late father, John, had established a home for Lucia in Lambwe, in the year 1964. He said that during the burial of his late



- father, John, the deceased herein (Lucia) stated publicly that she wished to be buried next to her husband, in Seme. The burial of John was in 1998.
24. DW1 said that in 2016, during the burial of Ezekiel, his mother (Lucia) said that she wished to be buried in Lambwe. He further testified that it was in Lambwe that Lucia lived consistently, since 1964. DW1 corroborated the evidence of the plaintiff's witnesses, that Lucia used to visit her home in Seme. However, he reiterated that Lucia had expressed a wish to be buried in Lambwe.
25. DW2 Christine Awuor Yuko Jowi, is a daughter of Lucia. She is the wife of Prof. James Jowi, who hails from KaNo. Therefore, DW2 said that she has an ancestral home in KaNo. DW2 testified that it is the place where Lucia built her home, in Lambwe, which she (DW2) considered as home.
26. DW3, Tairus Charles Omondi Yuko, testified that the meeting held by the members of the Kasosi Clan resolved that Lucia would be buried in Seme. During re-examination, DW3 said that if customary law was in conflict with written law, the latter would carry the day.
27. DW4, Edward Alulo Ototois a priest serving in the Anglican Church. He told the court that Lucia requested him to put in writing, her wishes concerning her preferred place for burial. DW4 put in writing the wish of Lucia, which was that she should be buried in Lambwe. He signed the said statement, in the presence of several children of Lucia. DW4 further said that Lucia was a staunch Christian, who embraced Christian values, as opposed to traditional values. He also said that Lucia had repeated her wishes many times, whenever DW4 made a pastoral visit to her home. After DW4 testified, the defendant closed his case.
28. I have already found that the learned trial Magistrate was alive to the fact that Luo Customary Law was, in principle, applicable in this case, as Lucia is a Luo, and so also was her late husband.
29. In his submissions before me, the appellant has submitted as follows, based on the probative value of expert evidence, as was held in the case of *Stephen Kinini Wang'ondu v The Ark Limited* [2016] eKLR;
- “Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance ...
- Secondly, a Judge must not consider expert evidence in a vacuum. It should not therefore be ‘artificially separated’ from the rest of the evidence. To do so is a structural failing.
- A court’s findings will often derive from an interaction of its views on the factual and the expert evidence taken together.
- The more persuasive elements of the factual evidence will assist the court in forming its own views on the expert testimony and vice versa.”
30. In sum total, a court is obliged to give due consideration to all the evidence in the case, including that of the experts.
31. I do share in the opinion expressed by the appellant herein, concerning the need for the court to examine the testimony of an expert in terms of its rationality and internal consistency, in relation to all the evidence on record. The expert herein is a herbalist. He did not give information from which the court could determine the quality of his expertise.
32. Secondly, if it was so settled a custom, that a married woman had to be buried next to her late husband, I do not understand why there was a need for either the Clan or Elders or members of the family holding a meeting to determine the place for the burial of Lucia.



33. But then again, there does not appear to be any dispute about Luo custom regarding the place where a married woman should be buried; it is supposed to be next to her late husband.

However, the appellant also added that a married woman should;

“ ... be buried in the matrimonial home which she shared with her husband, but also affected by its traditions during her lifetime and after her death.”

34. The evidence on record shows that whilst the husband first built a house for Lucian Seme, he also built a house for her in Lambwe. The deceased (Lucia) lived in Lambwe from 1964 until her demise in 2021.

The appellant invited this Court to find that;

“ ... the deceased should be buried in accordance with the Luo Customary Law, which the deceased espoused up to the time of her death, and more specifically, at their matrimonial home in Seme on Land Title Number Seme/kaila/1314 within Kisumu County.”

35. In my evaluation of the evidence on record, I find that the deceased expressly espoused Christian values and an affinity to her home in Lambwe.

36. The trial court held that the strong Christian beliefs held by Lucia militate against Luo Customary Law. The court further held that Luo Customary Law was retrogressive and repugnant to justice and also to the spirit of the *Constitution*, because it did not recognise the rights of women.

37. I hold the view that that holding has to be evaluated within the context of whether, in comparison to women, the Luo menfolk had a right to determine where they can be buried.

38. Secondly, it has to be determined whether or not the requirement that married women be buried next to their husbands was, of itself, retrogressive or repugnant to justice.

39. In the case of *Virginia Edith Wamboi v Joash Ougo Otieno* [1987] eKLR the deceased was a man, S. M. Otieno. He had expressed a wish to be buried at his home which was located in Upper Matasia, Ngong. S. M. Otieno hailed from Siaya. Therefore, the Luo clan which he hailed from insisted that he could not determine the place where he should be buried.

The court expressed itself thus;

“We think at this stage, we should say that Luo Customary procedures do not permit for expression of wishes such as the appellant mentioned. Under the particular custom, a Luo who wishes to be buried outside his father’s homestead, takes steps to have a home elsewhere, but acceptable under custom.”

40. By necessary implication, a man can make a wish, but such a wish can only be made through actual actions which enable the man to establish a home. In effect, the wishes which were expressed verbally were totally inadequate.

41. To the extent that the right of a Luo man, to choose where he can be buried is tied up by custom, I find that the trial court erred when it held that the Luo custom did not recognise the rights of women.

42. I also find that there is nothing either retrogressive or repugnant to justice, in a custom which requires that a married woman be buried next to her late husband. There is nothing un-Christian in having a married woman buried next to her late husband.



43. I find that the findings of the trial court were thus in error, to the extent that such findings are inconsistent with my decision. But I also cannot turn a blind eye to the reality of the life lived by the deceased, Lucia.
44. Since 1964, she had lived in her home, in Lambwe. Lucia did not set up the said home single-handedly or in the absence of her husband. John was well aware that he had built a house for Lucia in Seme. Yet he went with her to Lambwe and built a home for her there. As Lucia lived at her home for over 57 years, there can be no doubt that that was her home.
45. Out of the said 57 years, Lucia lived for 24 years in Lambwe, at a time when her husband was alive. In effect, Lucia had the authority of her husband to live at the home which he built for her in Lambwe.
46. Lucia buried at least 2 of her children at the home in Lambwe. The plaintiff and the other relatives of Lucia did not raise any objections to the burials of her sons in Lambwe. By their actions, the plaintiff and the clan to which he hails, led the deceased (Lucia) to believe that they had no objections to her actions which she carried out in Lambwe.
47. After the trial court dismissed the suit, the plaintiff sought to stop the burial of Lucia until the appeal was heard. The High Court granted a conditional order for stay of the burial. The plaintiff was required to enter into a contract with the morgue at which the body was being preserved, so that the morgue would look to the plaintiff for the morgue charges.
48. When the plaintiff failed to meet the pre-conditions for stay, the defendant and his siblings buried Lucia in Lambwe. In effect, the reliefs which the plaintiff had sought from the trial court have since been overtaken by events.
49. And although the appellant did amend the Memorandum of Appeal so as to incorporate a prayer for the exhumation of the body, I find that;
 - a. because the burial was effected due to the plaintiff's default; and
 - b. as the question of exhumation was not before the trial court, this court cannot make a first determination on it, at this stage.
50. Therefore, although I have held that the trial court erred in holding that Luo customary law was retrogressive or repugnant to justice; I decline to order that the body of Lucia be exhumed.
51. In order to calm the emotions between the various members of the family, I order each party to meet his own costs of the appeal.

DATED, SIGNED AND DELIVERED THIS 23RD DAY OF JANUARY, 2023.

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FRED A. OCHIENG
JUDGE

