



REPUBLIC OF KENYA



KENYA LAW
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**Ndomo v Ndomo & another (Civil Appeal E001 of 2022)
[2023] KEHC 18360 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 18360 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E001 OF 2022
MS SHARIFF, J
APRIL 28, 2023**

BETWEEN

BETTY ATIENO NDOMO APPELLANT

AND

ELVIS ONYANGO NDOMO 1ST RESPONDENT

MONICA AGOLA NDOMO 2ND RESPONDENT

JUDGMENT

Case Background

1. On 20th November 2021, one Charles Ndomo (deceased) Oriedo, a Luo man passed on in Accra Ghana where he had been undergoing treatment. Subsequent thereto, a dispute arose between the Appellant and the Respondents specifically on the location of the grave and whereas arrangements had been made for the interment of the deceased body on 13th December 2021. The burial never took place as the Appellant and three (3) of her sisters unilaterally decided to return the deceased body to Lee Funeral Home despite the fact that it had already been released.
2. The aforesaid events thus informed the filing of the main case before the Principal Magistrate Court at Nyando by the Respondent wherein they sought the following orders:-
 - i. A declaration that the Plaintiffs are the lawfully entitled persons to decide on the place of burial of the deceased.
 - ii. An order to be issued to allow the Plaintiffs to take the remains of the deceased being preserved at Lee Funeral Home in Nairobi and inter the same at the place decided upon and identified by the Plaintiffs within the deceased homestead in land parcel number South Nyakach/East Koguta/694.



7. This appeal was canvassed by way of written submissions.

Evidence

8. The Respondents testified and called two witnesses. PW 1, the 1st Respondent stated that upon receiving news of the death of the deceased in Accra Ghana where he had gone for treatment, his paternal uncle one Dickson and two other paternal uncles went to the deceased homestead and identified the burial site. He stated that a family meeting held on 11th December 2021, which he did not attend identified yet another site without according the deceased widow (PW 2) the opportunity to air her views on the said choice of burial site wherefore she was displeased with the choice made during that meeting.
9. PW 1 maintained that the burial site 'Kachiena' means backwards and that the site picked by his uncles led by Dickson was at the back right side of the house facing the gate.
10. PW 2 Monica Agola Nomo the widow of the deceased stated that on 4th December 2021 her brother-in-law Dickson Okiro, and two other brother in-laws from the step mother in law side went and identified a burial site at the back right side of the house facing the gate however, a second meeting held on 11th December 2021 picked a different site. The second site was in front of the home near the gate. PW 1 disagreed with that choice. She said that at the time of trial, a grave had already been excavated on the first site. It was her evidence that the Appellant had threatened to cremate the body of the deceased. She maintained that the church is never involved in choice of a burial site. She maintained that digging two graves is an abomination.
11. PW 3 Mercy Aketch Ndomo a daughter of the deceased said that she was agreeable to the burial of her father in the site chosen by her uncle Dickson Okiro. She said that the site had never been a dumping site.
12. PW 4 John William Waga Oiko a Luo elder aged 87 years and 8 months testified as an expert witness. He said that as per Luo ancient customs, a deceased patriarch was ordinarily buried inside his bedroom in a grass thatched house but that practice was abandoned with the advent of Christianity and the practice changed to place the burial site in front of the main gate in shallow graves without caskets. He said that the latter practice was later on abandoned as wild animals kept exhuming the dead bodies and a practice emerged of burying the patriarch to the right rear side of the house where the deceased used to reside in, while facing the gate. This witness maintained that the burial site identified by Dickson Okiro and the two others was properly situated as he had gone to the deceased homestead and had seen the grave. This witness said that the burial place of a Luo patriarch is known as Kachiena which means the bedroom. He maintained on cross-examination that the 'kachiena' must be located on the right hand side near the bedroom towards but not at the back. He stated that during burial the deceased head must face the main gate. This witness further stated that the brothers and uncles of a deceased choose the burial site in consultation with the widow.
13. DW 1 Atieno Ndomo Betty the Appellant stated that the deceased died under her care in Accra Ghana and that she flew the body of the deceased back to Kenya and had it preserved at Lee Funeral Home. She stated that the site chosen by her uncle Dickson was not suitable for burial of the deceased who deserved a decent burial; she said that the site was a dumpsite near the fence and was close to a chicken coop and a goat's pen. Further that it was prone to water logging. She said that she preferred the second burial site that was picked on 11th December 2021. She stated that whereas she had already picked the deceased body in readiness for burial on 12th December 2021 at 6.00am, she returned it back to the mortuary after consulting three of her sisters. She said that she did not know whether under Luo customs an eldest girl known as 'migogo' had a role to play in the choice of her deceased father's burial



- site, save for footing the funeral costs. This witness said that she had met all the treatment and funeral costs when PW 1 distanced himself from shouldering that responsibility.
14. DW 2 Joseph Obuya Denda aged 82 years said he was a Luo elder and resides in Kisauni Mombasa. He stated that a Luo patriarch ought to be buried on the front right side facing the gate. He said that where a grave is excavated at a wrong site, another one is ordinarily dug at the right site and the old one is left as a dump site. This witness said that he had not visited the deceased home but was flown in from Mombasa to testify.
 15. DW 4 stated that he was aware that the burial site had been identified on 4th December 2021 by his paternal uncle, 2 step uncles and his mother, the 2nd Respondent. He said that four of his sisters objected to the said burial site. He conceded that he was not aware of the role of ‘Migogo’ daughters in the choice of burial sites in the Luo customs. He states that the burial site is picked by uncles, and sons in consultation with the widow. DW 4 said that a suitable burial site was picked on 11th December 2021 but the next day a different site was blessed by the church pastor. He maintains that whereas he was not well versed with Luo customs, he believed that his father ought to be buried at the front right hand side facing the main gate.
 16. This appeal was canvassed by way of written submissions. The Appellant submitted that the trial court erred in not basing its judgment on the evidence despite its finding that the 2nd Respondent had unilaterally changed the burial site. She further faults the trial court for ruling on the legal proximity of the Respondent to the deceased instead of ruling on the location of the burial site which she maintains was the issue. She moves that her appeal be allowed and the deceased body be exhumed.
 17. The Respondents maintain that this appeal is but an academic exercise as the deceased has long been buried. They pray that he be let to rest in peace. In any event they submit that party is bound by his pleadings and the Appellant had never filed any counter claim. Further that the judgment was a negative judgement wherefore there are no tenable orders that this court can issue. They maintain that the chosen site was proper as the deceased brothers picked in the consultation with the widow who is the person who is residing in the compound and will be tending to the grave and not the Appellant who resides in Ghana.

Analysis and Determination

18. This being the first appellate court, is enjoined to re-evaluate, re-analyze and scrutinize the evidence adduced before the trial court in an exercise akin to a retrial and arrive at its own conclusion while taking into account the fact that it does not have the benefit enjoyed by the trial court of seeing and hearing the witnesses testify.
19. The burial of an African is guided by his/her customary law. Section 3(2) of the *Judicature Act* vests this court with the jurisdiction to apply customary law in deserving cases.
20. The preamble of our constitution and Article 11 of *the Constitution* also make provision for the application of customary law.
21. I have re-evaluated, re-analyzed and scrutinized the evidence tendered before the trial court and I find that the issue that was presented for determination was who has the priority to bury the deceased as between the Appellant and the Respondents. The choice of the burial site arose obiter during the proceedings as having being the reason upon which the Appellant returned the deceased body to Lee Funeral Home on the burial date of 12th December 2021.
22. The Appellant is bound by her pleadings and I noted that she did not raise any counter claim. In any event I find the identification of the first burial was in accordance with Luo customs as it was the



deceased brother and step brother who pick it in consultation with the widow. (See [*Virginia Wambui Okeno vs Joash Ochieng Ougo*](#) (1987) eKLR.

23. The evidence of the two expert witnesses was conflicting and this court finds that Philip Wanga Oiko, the eldest expert witness who went and viewed the grave was credible. On the other hand, DW 2 ordinarily resides in Mombasa and may have lost touch with the Luo customs. He also conceded that he had not visited the deceased homestead wherefore he had no factual basis for stating that the burial site picked on 11th December 2021 was Luo customs compliant.
24. The role of 'Migogo' eldest daughter in the choice of a burial site of a patriarch is unknown in Luo customs. The legal proximity of the 2nd Respondent to the deceased cannot be overemphasized.
25. On the balance, I find that this appeal is without merit and I hereby dismiss it with cost to the Respondents.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF APRIL 2023

MWANAISHA S. SHARIFF

JUDGE

