Imbogo v Imbogo (Civil Appeal E030 of 2023)
[2023] KEHC 24707 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24707 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL E030 OF 2023

SC CHIRCHIR, J

OCTOBER 26, 2023

BETWEEN

MECHTILDA IMBOGO ..... APPELLANT

AND

CHRISTINE MAKOKHA IMBOGO ..... RESPONDENT

(Being an appeal from the Judgment of Hon R.S. Kip Ngeno, Butali Law courts in Butali Principal Magistrate's court case Number 210 of 2010 delivered on 3rd February, 2023)

A dispute on burial place of a deceased is determined based on the proximity of the disputing parties to the deceased.

The High Court addressed a burial dispute between two co-wives, each seeking the right to bury their husband at their respective homesteads. The trial court ruled in favor of the first wife under Luhya customary law, but the second wife appealed, relying on the deceased's alleged will. The High Court held that the deceased's proximity to the second wife in his final years, coupled with legal proximity, granted her the right to bury him. The appeal was allowed, setting aside the trial court's judgment.

Reported by John Ribia

Family Law *– burial of deceased – dispute between two wives on where to bury their husband – customary law vis-à-vis the in a dispute between two wives on where to bury their husband, who between the two parties had the right to bury the deceased – what was the doctrine of legal proximity - whether the wishes of the deceased on the manner, method and place they wanted to be buried were binding - whether old age was a reflection of expertise in the customs and practices of a tribe - whether a dispute of where a deceased person was to be buried would be determined based upon the proximity of the disputing parties to the deceased.*

Civil Practice and Procedure *– appeals – documents accompanying appeal – decree – failure to file decree - whether the legal consequence of filing of a judgment in an appeal was equivalent to filing a decree - whether an appeal could be held to be defective for failure to file the trial court's decree - Civil Procedure Act (Cap 21) section 2, 27, 34,79B, and 91; Civil Procedure Rules, 2010 (Cap 21 Subleg) order 42 rules 2; 13 (4) (f).*

Brief facts

The parties were co-wives and widows of the deceased. The respondent was the first wife, while the appellant was the second. They had a dispute on where to bury the deceased, with each wife preferring a different location. The respondent had based her right to bury the deceased on the customary law of the Kabras sub-tribe of the Luhya. The respondent argued, and quite correctly, that burial disputes have traditionally been governed by customary law. At the trial court, the court held that customary law would apply and the respondent, the first wife, was granted the liberty to bury the deceased at the location she preferred.

Aggrieved, the appellant filed the instant appeal. She preferred that the deceased had expressed his wish through a written will.

Issues

i. Whether the legal consequence of filing a judgment in an appeal was equivalent to filing a decree.
ii. Whether an appeal could be held to be defective for failure to file the trial court's decree.
iii. What was the doctrine of legal proximity?
iv. In a dispute between two wives on where to bury their husband, who between the two parties had the right to bury the deceased?
v. Whether the wishes of the deceased on the manner, method and place they wanted to be buried were binding?
vi. Whether old age was a reflection of expertise in the customs and practices of a tribe.
vii. Whether a dispute of where a deceased person was to be buried would be determined based upon the proximity of the disputing parties to the deceased.

Held

1. Order 42 rules 2 of the Civil Procedure Rules provided that where no certified copy of the decree or order appealed against was filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such a time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B until a copy was filed. A decree was defined under section 2 of the Civil Procedure Act as the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determined the rights of the parties with regard to all or any of the matters in controversy in the suit and would be either preliminary or final; it included the striking out of a plaint and the determination of any question within section 34 or section 91 but did not include any adjudication from which an appeal lay as an appeal from an order; or any order of dismissal for default; provided that, for the purposes of appeal, decree included judgment, and a judgment shall be appeal-able notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up.
2. The proviso to section 2 of the civil procedure Act was to the effect that for purposes of appeal a copy of the judgment was as good as a decree.
3. Order 42 rule 2 was by way of subsidiary legislation, which in no way could override the provisions of the statute. Further as clearly stated in the above definition a decree is "a narrowed – down" definition of a judgment. The purpose of a decree was to inform the appellate court of what the trial court decided, in the matter under appeal. The judgment did that, and more. It was unnecessary and drastic to strike out an appeal on the basis of lack of a document, whose contents or import was ascertainable from another document, available on record. There was no prejudice occasioned to the respondent by failure to file the decree. Striking out the appeal would simply be to punish the appellant for her indolence, and nothing more. That was not to downplay the place of procedural law, but where procedure come in the way of substantive justice and only did so for the sake of it, then procedure must give way. The Constitution, under article 159(2)(d) exhorted the courts to dispense justice without undue regard to technicalities. The court declined to strike out the appeal.

4. In Kenya, to resolve burial disputes, the courts had variously resorted to customary law, common law, marriage law, succession law, human rights law, land law and other areas of personal law.
5. Customary law was applied by dint of section 3(2) of the Judicature Act. The Constitution under article 11 recognized culture as the foundation of the Nation and as the cumulative civilization of the Kenyan people and Nation.
6. Burial disputes had traditionally been governed by customary law. However, it was not enough to plead custom, it must be proved. Customary law, unlike statute or case law, was treated as a fact rather than a law. It was not codified or was in written form. It had to be established through evidence.
7. An expert that was a person familiar or conversant with, the custom. It was 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 was not well versed in those customs and traditions. There was no evidence of an expert in Luhya customary law.
8. The expertise of the two witnesses was not established. A detailed account of their expertise in Luhya customs ought to have been laid before they could be presented to court as expert witnesses. Custom could not be assumed.
9. PW3 told the court he was 92 years old but he was never led in evidence to establish his expertise in Luhya customary law of burials. The age of a person was not necessarily a reflection of his expertise in the customs and practices of his people. The expertise of PW4 was not also established before giving evidence. The requirement that a Luhya man must be buried in his ancestral land was proved.
10. Where the deceased had left instructions on where to be buried and whether the will could allow for one to decide his burial place, there could be no property in a dead body. A person could not dispose of his body at will. After death the custody and possession of the body belonged to the executors until it was buried. If the deceased had left directions as to the disposal of his body, though those were not legally binding on his personal representative, effect should be given to his wishes as far as that was possible, the duty of disposing the body fell primarily on the executor.
11. There was no indication of when the wishes were expressed, for the court to determine whether the said declarations met the criteria of an oral will. The appellant tabled sufficient evidence, that proved the deceased's wishes on the preferred place of Burial.
12. The doctrine of legal proximity was based on the assumption that the decision as to the determination of the place of burial was based upon proof by the parties in the dispute of their proximity to the deceased. The right to bury a dead body could only be conferred to the person who was able to demonstrate the closest proximity to the deceased.
13. In the social context prevailing in Kenya, the person, who was in the first line of duty in relation to the burial of any deceased person, was the one who was closest to the deceased in legal terms. Generally, the marital union would be found to be the focus of the closest chain of relationships touching on the deceased. It was only natural that the one who could prove that fundamental proximity in law to the deceased, had the colour of right of burial, ahead of any other claimant.
14. The wife was the closest in proximity to the husband, and therefore had the right to bury the deceased husband. The fact that both parties were the wives of the deceased was not contested and therefore one could argue that in terms of legal proximity, both parties herein qualified as the most approximate people.
15. Customary law was dynamic. It was not codified, its application was left to the good sense of the courts that were called upon to apply it. There was ample evidence showing that at least for the last 8 years of his life, the deceased spent his time mostly with his second wife, the appellant. The fact that she was the one who took care of him during his last days in hospital was was not rebutted. The respondent's own son testified about the fact that the respondent never visited the deceased in hospital and this testimony was not contested.

16. The relationship of the deceased and the respondent was quite strained. Some feuds related to land made the deceased leave kabras and made his abode in Kitale. The respondent and the deceased had a land related dispute that was or was at some point going on in courts. The relationship was far from being cordial. Compared to the appellant, the respondent could not claim to have been the person at close proximity to the deceased at the time of his demise. The doctrine of legal proximity favoured the appellant.

Appeal allowed. The Judgment of the trial court was set aside and substituted with an order dismissing the plaintiff's suit, with costs.

Citations

Cases

Kenya

1. *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* Civil Application 166 of 2001; [2001] KECA 21 (KLR) - (Mentioned)
2. *Apeli v Buluku* Civil Appeal 12 of 1979; [1980] KECA 39 (KLR); [1985] 777 KLR - (Followed)
3. *In re Burial of Musa Magodo Keya (Deceased)* Civil Suit 11 of 2019; [2021] KEHC 5262 (KLR) - (Followed)
4. *Kimata, Martha Wanjiru & Another v Dorcas Wanjiru & Another* Civil Appeal 94 of 2014; [2015] KEHC 7090 (KLR) - (Mentioned)
5. *Mabeche, Eunice Moraa & another v Akinyi* High Court civil case No 2777 of 1994 [1994] eKLR - (Explained)
6. *Maingi v Maingi* Civil Appeal No 66 of 1984 - (Mentioned)
7. *Masai , Jacinta Nduku v Leonida Mueni Mutua & 4 others* Civil Appeal 139 of 2018; [2018] KEHC 1077 (KLR) - (Mentioned)
8. *Masaye, Lucas Otieno v Lucia Olewe Kidi* Civil Appeal 27 of 2020; [2022] KEELC 489 (KLR) - (Followed)
9. *Mumbo, Johnstone Kassim & 2 others v Mwinzi Muumbo & Another* Civil Appeal 7 of 2016; [2018] KEHC 4587 (KLR) - (Followed)
10. *Njoroge v Njoroge & another* Civil Case 330 of 2004 [2004] eKLR; [2004] KLR 611 - (Followed)
11. *Nyankomba, Nyariba v Mary Bonareri Munge* Civil Appeal 25 of 2010; [2010] KEHC 933 (KLR) - (Explained)
12. *Oduke & another v Wambi* Civil Case No 143 of 2009 [2010]eKLR; [2010] KLR 563 - (Explained)
13. *Ombajo, Edwin Otieno v Martin Odera Okumu* Civil Appeal 209 of 1996; [1996] KECA 158 (KLR) - (Explained)
14. *Otieno v Ougo & another* Civil Appeal 31 of 1987; [1987] KECA 63 (KLR);[1987] KLR 371 - (Mentioned)
15. *Rotich, Salina Soote v Caroline Cheptoo & 2 others* Civil Appeal 48 of 2010 [2010] eKLR - (Explained)
16. *SAN v GW* Civil Appeal 1 of 2020; [2020] KECA 46 (KLR) - (Explained)
17. *Wambi , Samuel Onindo v COO & another* Civil Appeal 13 of 2011 [2015] eKLR - (Followed)

Statutes

1. Civil Procedure Act (cap 21) sections 2, 27, 34, 79B, 91 — (Interpreted)
2. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 42 rules 2, 13(4)(f) — (Interpreted)
3. Constitution of Kenya, 2010 articles 11, 159 (2) — (Interpreted)
4. Judicature Act (cap 8) section 3(2) — (Interpreted)

Advocates

Mr. Wanyonyi for the appellant
Mr. Masinde for the respondent

JUDGMENT

1. This appealarises from the judgmentof Hon. Kipngeno Principal Magistrate Butali Law courts delivered on February 3, 2023in Butali civil case number 210 of 2010

2. The disputes revolves around the Burial site of Benjamin shammala Imbogo (Deceased) . The disputants are his two widows, Christine Makokha Imbogo (respondent) and Mechtilda Imbogo (appellant) .

3. The deceased died at a hospital in Eldoret and the appellantquickly arranged for his burial her matrimonial home in Kitale.

4. The respondent herein moved to the Trial court , accusing the co- wife of burying their husband outside his home , which according to the respondent, is his ancestral home which is located in kabras ,Tumbeni sub- location of Chemuche Location. She contended that the burial went against the dictates of Abaluya customary law, in particular, the Kabras sub- tribe of the Luyha. She consequently sought for the exhumation of the deceased body so that she could bury him in his ancestral home in Chemuche location, Tumbeni sub-location.

5. The trial court returned a verdict in favour of the respondent and ordered for exhumation of the body.

6. Aggrieved by the judgement, the appellantfiled this appealand timeously sought for stay of execution of the judgment. The judgmentwas stayed pending this appeal.

Grounds of Appeal

7. The appellanthas set out the following grounds:

    1. The learned trial magistrate erred in law and in fact in relying fully on customary law practices as being crucial and critical in determining the place of burial.

    2. The learned trial magistrate made a fatal error in holding the customary law was supreme over a written will.

    3. The learned trial magistrate erred in law and in fact in misconstruing the authorities of Ruth Anyolo amongst the authorities and going on to hold that the matter should be decided on the basis of the burial practices of the Abaluhya community.

    4. The learned trial magistrate erred in law and in fact in disregarding the undisputed fall- out between the deceased and the plaintiff/appellant which played supreme in determining the executing the wishes of the deceased which were made and expressed during his lifetime.

    5. That the learned trial magistrate erred in law and in fact in holding that the deceased being an educated man had failed to take steps to formally divorce the respondent yet evidence on record confirmed that being a customary/traditional marriage as it was the deceased had taken the requisite steps in line with Luhya (Kabras) Customary law on confirmation of Divorce and separation.

    6. The learned trial magistrate erred by demonstrating lack of fairness and objectivity in the proceedings by replicating and delivering judgment he had earlier delivered to which the learned trial magistrate conceded and admitted was done under pressure.

7. The learned trial magistrate failed to capture and address all the issues raised in the proceedings so as to arrive as a well-considered judgment.

8. The learned trial magistrate erred in failing to address the material contradictions in the evidence of the plaintiff and her witnesses

9. The learned trial magistrate erred in failing to follow the law and precedents that were binding

Appellant's Submissions

8. Firstly the appellant's submits that the trial court failed to address all the issues that had been raised and more particularly that the deceased and the respondenthad been living apart for a long time ; that the court ignored past decisions holding that there must be a compelling reason for not heeding the expressed wishes of the deceased. It is further submitted, while relying on the case of *Samuel Onindo & ano vs COO* [2015] eKLR that the deceased's burial wishes are akin to a will and that save for compelling reasons , they supersede customary law. The appellant has also relied on *SAN v GW* civil appeal number 1 of 2020 where it was stated that "the wishes of the deceased although not binding must be as much as possible be given effect so long as they are not contrary to the general law or policy".

9. The appellantfaults the trial court for accepting that there was a valid will , yet went on to fault the said will on the basis that it went against customary law. That the trial magistrate erred in holding that customary law superseded the wishes of the deceased.

10. The trial court is further faulted for ignoring the evidence which showed that the deceased had parted ways with the respondent.

11. The appellantfurther submits that having established the fact that the deceased was polygamous, the court was simply left with the duty to establish which of the wives enjoyed a closer relationship with the deceased. In this regard the appellanthas relied on the case of *Re- Burial of Musa Magodo Keya (Deceasd)* [2021] e KLR The appellant argues that she is the one who took care of the deceased in his last days and that the respondent and the deceased had not interacted for years.

12. The appellantfurther submits that the respondent's evidence was shallow and wanting and ought not to have been relied on in arriving at the decision.

13. Finally, the appellantfaults the trial court in awarding costs in a family dispute

Respondent's Submissions

14. By way of a preliminary, the respondenthas argued that the appeal is defective since the decree was not filed and while relying on the decision of *Lucas Otieno Masaye v Lucas Olewe kidi* [2022] makes a case for the striking off of the Appeal.

15. It is the respondent's submissions that burial disputes are governed by customary law. She has relied on the decisions of *SAN v GW* [2020] eKLR, *Martha Wanjiru Kimata & Another v Dorcas Wanjiru & Another* [2015] eKLR and *Jacinta Nduku Masai v Leonida Mueni Mutua & 4 others* [2018], which she submits, underscore the place of customary law in burial disputes.

16. It is the respondent's further submission that there was ample evidence showing that the respondent was the wife of the deceased and that there was no evidence indicating any breakdown of their marriage.

17. It is further submitted that the judgment of the trial court reflected the court's sound appreciation of the place of customary law in burial disputes and for that, the court should not be faulted. The respondent has relied on a number of Authorities in this regard which I have considered.

18. The respondent further contends that the 1st wife's right to bury her husband was in line with the provisions of article 11 of the *Constitution* which recognize culture as the foundation of a Nation.

19. Further, the respondent argues, there was no evidence tabled showing that the Luhya customary law, relating to the burial place of a polygamous man, was inconsistent with any written law or is repugnant to justice and morality.

20. On the place of a written will in burial disputes, the respondent insists that past decisions indicate that a deceased person's remains cannot be disposed of solely on the basis of a written will. It is further contended that there is no property in a deceased body and that the said will, in any event, was inconsistent with the customs of the deceased. It is further argued that the said will was not proved, as witnesses who could have testified to its validity were never called to testify.

21. On the issue of costs, the respondent relies on section 27 of the *Civil Procedure Act* and argues that costs are awarded at the discretion of the court and that there is no reason why the discretion of the trial court should be interfered with.

Summary of Evidence

22. PW1, was the respondentherein. She testified that both her and the defendant were married to the deceased and that her Residence was on land parcel No S/ Kabras/ Chemuche/3902 , belonging to the deceased.

23. On cross examination, she stated that the deceased was living in kitale prior to his death; that upon getting a report of his illness she went with other families in an attempt to visit him but they were denied access. She denied the suggestion that she had separated with the deceased. She claimed that she paid ksh 900,000 on hospital bill. She wanted the deceased buried in chemuche as that is where his father was buried.

24. PW2, told the court that she knew PW1 as her in- law and the wife to her brother Benjamin Imboga who was now deceased. She was not aware if the deceased left a written will and she did not attend his burial.

25. On cross examination, she stated that the deceased 's land in chemuche was an ancestral land given to him by their father. She knew that the deceased also had land in kitale. She was not aware if the deceased had distributed his properties or if he had a will.

26. She further told the court that she did not attend his marriage to the plaintiff; that traditionally, none of their family members had ever been buried outside their ancestral home.

27. She insisted that the deceased should be buried at the land given to him by his father. She however admitted that the land had some dispute.

28. PW3, told the court that he has been the chairman of the Basonje Tribe for the last 20 years. He was 92 years old. He testified that the Deceased was his nephew. He also knew the plaintiff; that the deceased had 4 wives, but only two were still surviving. The plaintiff was the first wife

29. In his written statement he stated that in Luyha culture it is an abomination to bury a person outside his ancestral home.

30. He was aware that the deceased had two parcels of land but he was supposed to be buried at Kabras, Malava at the home of his 1st wife. He did not attend the deceased's burial. He further stated that the defendant too lived in kabras for about 3 years. The kabras land was ancestral and he was aware that

the deceased had also purchased land in kitale. He admitted that the deceased had differences with his first wife and children. The said differences made the deceased to move away from his ancestral home.

31. PW4, told the court that the deceased was his son and that the plaintiff was the Deceased's wife. He claimed that he did not know the defendant. He testified that according to the Basonje tradition, the Kabras , the deceased was supposed to be buried by the 1st wife. In his written statement he stated that it was an abomination in luhya custom to bury deceased person outside his ancestral home. He claimed that the deceased was given a shield and a three-legged stool which meant he was the leader for the Kabras people. He wants his son to be buried in his home

32. On cross examination, he stated that the deceased was his son and uncle to Ben Imbogo (sic) . He could not recall the deceased's age at the time of his demise. He knew that the deceased had 4 wives but he did not know them. He did not know who was taking care of the deceased during his illness; He admitted that the deceased had differed with his children by the time of his demise. He did not know if the deceased had a will. He denied the suggestion that the deceased had moved away from his original home.

33. The plaintiff closed her case.

34. DW1 was the defendant and the Appellant herein. She stated that she knew the plaintiff; that she married the deceased in 1981 and they had 6 children who are all alive; That when the deceased was dividing land amongst his children, the plaintiff sued him. The deceased then went and stayed with her in transzoia

35. She testified that the deceased died on 12.1.2020 while at Chimoi referral hospital and that she stayed with him for 3 weeks taking care of him. She stated that when his health began deteriorating, he instructed her to call his advocate who had prepared his will. The will stated that he wanted to be buried at sabaot; that he had differed with his wife and sons and did not want to be buried in a land that had an on- going dispute.

36. She further told the court that the relationship between the plaintiff and the deceased was bad; that the deceased had gone and removed the 3 cooking stones in the plaintiff's house, which she claimed, signified divorce. She stated that the deceased had kept off the land in chemuche for 8 years prior to his death because of the dispute surrounding that land. She produced a copy of the will as evidence.

37. She refuted the suggestion that the plaintiff was not aware of the fact she was the 2nd wife of the deceased; that indeed the plaintiff's son stayed in her house. She told the court that she had a traditional marriage with the deceased and produced an affidavit in proof. She insisted that the deceased died while being a Resident of sabaot.

38. On cross-examination, she claimed that her father-- in law had instructed the deceased to sub-divide the ancestral land into 4 portions and the ongoing court dispute arose because of the said sub- division. She acknowledged that the plaintiff was also the wife of the deceased and that she was a 2nd wife; that despite the land disputes between the deceased and the plaintiff, they did not divorce. She stated that she came to know about the will after the burial; that the deceased had chosen his burial site. She insisted that the deceased was buried according to his wishes. She admitted that the burial was done in haste because there were people from kabras who wanted to take the body.

39. DW2 adopted his written statement. He testified that the defendant was his step mother. He stated that his Deceased father lived in Tumbeni within Kakoi with his wife and children until 2013 when a dispute arose regarding the sub- division of land. He claimed that his mother sued the deceased and that is when his father moved to kitale.

40. He further testified that the deceased did not want the plaintiff to participate in his burial and that the deceased had expressed his wish to be buried in kitale.

41. He stated that deceased never went back to his home in Tumbeni and that the deceased sent him to pick his documents and clothes from his 1st wife's home. He further told the court that the deceased nailed blanks of the timber across the kitchen door of his 1st wife's house, which act, according to the custom of the Wesonga clan, meant that the house could not be used until a certain ceremony is performed

42. He testified that there was an ongoing land case in kitale Law courts involving the deceased and the witness's siblings; that the land in kitale also belonged to his father. The witness further testified that his father had a will in which he indicated the place of his burial as being his farm in Kitale; that exhuming a body goes against their customs.

43. He claimed that his father suffered in his last days and none of his children or his 1st wife came to see him while he was admitted in hospital and that it was the deceased brother who helped in offsetting the hospital bill and the costs of the funeral.

44. On cross- examination, he stated that the plaintiff and the deceased are his biological parents. He did not know when they married but he was born in 1986. He stated that his father married the defendant in 1980s; that the marriage was not in church but his father paid dowry.

45. He admitted that that the existence of the will and the alleged burial site has been contested by his siblings.

46. Dw3 testified that he was from the Kabras sub-tribe of the Basonje clan. He stated that the deceased was his elder brother, he got ill and died and he was buried in Kitale. He told the court that his brother's attempt to sub- divide the land to his children led to the dispute between him and his 1st wife and children

47. He claimed that the deceased had a will which indicated his place of burial and that therefore he was buried according to his wishes.

Determination

48. This is a first Appeal and the duty of this court is to relook at the evidence tendered at the trial court, re- evaluate it and arrive at its own conclusion while paying attention to the decision of the trial court. (see *Abok Jamest/a JO dera & Associates vs John Patrick Machira t/a Machira & Co*.)

49. In my view the following issues lend themselves for determination :

    (a). whether the Appeal is defective

    (b). who has the right to bury the deceased

    (c). who should bear the costs

a. Whether the Appeal is defective ?

50. It is respondent's submission that the Appeal is defective as the appellant failed to file the decree emanating from the Judgment of the trial court.

51. Order 42 rule2 of the *Civil Procedure Rules* provide as follows: where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified

copy as soon as possible and in any event within such a time as the court may order , and the court need not consider whether to reject the Appeal summarily under section 79B until a copy is filed."

52. Order 42 rule13(4)(f) of the same *Rules* provides as follows- " (4) Before allowing the appeal to go for hearing the Judge shall be satisfied that the following documents are on the court Record , and such of them as are not 7in the possession of either party have been served on that party , that is to say :

(a) .....

(b) .....

(c) .....

(d) .....

(e) .....

(f) the judgment, order or decree appealed from, and , where appropriate , the order (if any) giving leave to appeal.

53. A decree is defined under section 2 of the *Civil Procedure Act*, as follows:

> " decree means the formal expression of an adjudication which, so far as regards the courtexpressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91 but does not include— (a) any adjudication from which an appeal lies as an appeal from an order; or (b) any order of dismissal for default:
>
> Provided that, for the purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;" (Emphasis added).

53. The proviso to section 2 of the *Civil Procedure Act* is self- explanatory. That is to say, for purposes of Appeal a copy of the judgment is as good as a decree. The appellant in this case filed a copy of the Judgment. I have taken note of the mandatory wording of *order 42 rule 2* but am also alive to the fact that *order 42 rule 2* is by way of subsidiary legislation, which in no way can override the provisions of the statute. Further as clearly stated in the above definition a decree is "a narrowed – down" definition of a judgment. It is my considered view that the purpose of a decree is to inform the appellate court of what the trial court decided, in the matter under Appeal. The judgment does that, and more. It is therefore unnecessary and drastic to strike out an Appeal on the basis of lack of a document, whose contents or import is ascertainable from another document, available on record. Further, there is no prejudice occasioned to the respondent by failure to file the decree. Striking out the Appeal would simply be to punish the Appellant for her indolence, and nothing more.

54. This is not to downplay the place of procedural law, but where procedure come in the way of substantive justice and only does so for the sake of it , then procedure must give way. Further, the *Constitution*, under article 159 (2) (d) exhorts the courts to dispense justice without undue regard to technicalities.

55. For the aforesaid reasons I decline to strike out this Appeal.

b. who has the right to bury the deceased

56. In Kenya, to resolve burial disputes, the courts have variously resorted to customary law, common law, marriage law, succession law, human rights law, land law and other areas of personal law.

57. In the present case the fact that the parties are co- wives and widows of the deceased was admitted by both parties. The respondent is the first wife, while the Appellant is the second. The only issue for determination therefore is who between the two parties has the right to bury the deceased.

58. In an attempt to answer this question, one has to deal with the two competing issues of customary law, and the wishes of the deceased. The court will also consider if there is another, nay, an alternative approach in determining the burial place of the deceased herein.

The place of Customary law

59. The respondenthas firmly based her right to bury the deceased on the Customary law of the kabras sub-tribe of the Luhya.

60. Customary law is applied by dint of section 3(2) of the *Judicature Act* which provides as follows:-"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."

61. Further the *Constitution* under article 11 " recognizes culture as the foundation of the Nation and as the cumulative civilization of the Kenyan people and Nation"

62. The Respondent argues, and quite correctly, that burial disputes have traditionally been governed by customary law. (see *Virginia Edith Otieno v Joash Achieng & Ano* [1987]e KLR and *Pauline NK Maingi*, Civil Appeal No 66 of 1984, among others) .

63. In the case of *Pauline Maingi* (*supra*) the court held: Before wishes of an African citizen of Kenya who has made a will directing where his mortal remains should be interred could be given effect, the executor of the will must prove that the African custom was repugnant to justice and morality and inconsistent with written law otherwise such wishes would not be given effect"

64. In *Salina Soote Rotich v Caroline Cheptoo & 2 others* [2010] eKLR the court,(Justice PM Mwilu (as she then was) also affirmed the central place of customary Law on burials . She held: "For the above reasons , I come to the conclusion that the deceased , Benard Kiprotich was a keiyo who subjected himself to the custom of his father and forefathers and who became incapable of being divesting himself from the customs of his people . He was for all practical purposes bound by these customs. I find that keiyo customs with regard to burial, are not repugnant to justice and Morality and they are not inconsistent with any written law."

65. However, it is not enough to plead custom, it must be proved. It is trite that customary law, unlike statute or case law, is treated as a fact rather than a law. It is not codified or is in written form. It has to be established through evidence. In the case of *Kimani v Gikanga* [1965] EA 735. It was observed that; "To summarize 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."

66. Its proof is through an expert that is a person familiar or conversant with, the custom. In the case of *Nyariba Nyankomba v Mary Bonareri Munge* [2010] eKLR the High Court held :

> " Time and again, it has been stated 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".

67. In the present case I did not see any evidence of "an expert" in Luhya customary law. Indeed, none of the witnesses presented himself as such or were led in evidence to ascertain their expertise in Luhya customary law of marriage. PW3 and PW4 in their written statement stated that it is an abomination to bury the deceased outside his ancestral land. The expertise of the these two witnesses in my view was not established. A detailed account of their expertise in Luhya customs ought to have been laid before they could be presented to court as expert witnesses. Custom as stated hereinbefore cannot be assumed. In the case of *Shah & Ano v Shah & others* [2003] 1 EA 290 the court while making reference an expert witness stated "However as a rule of practice, a witness should always be qualified in court, before giving his evidence and this is done by asking questions to determine , and failure to properly qualify an expert may result in the exclusion of his evidence....."

68. PW3 told the court he was 92 years old but he was never led in evidence to establish his expertise in Luhya customary law of burials. With tremendous respect, the age of a person is not necessarily a reflection of his expertise in the customs and practices of his people. The expertise of PW4 was not also established before giving evidence. Am not satisfied therefore that the requirement that a luhya man must be buried in his ancestral land was proved.

Wishes of the Deceased.

69. The appellant's case is that the deceased had expressed his wish through a written will. The will was produced in evidence and the appellant contends that the production was not objected to. The Appellant told the court that when the deceased's condition deteriorated, she told her to call his advocate who had the will. The will stated that the deceased wanted to be buried at sabaot. However, in cross- examination, she said that she became aware about the will after her husband's death. The pertinent question is: did she see the will before or after the husband's death? Further why would the husband be anxious to have the will opened and have the contents declared, when going by this particular witness's testimony, the deceased had taken care of his affairs, including the preferred burial ground. The contradiction casts doubt on the credibility of this piece of evidence.

70. Nevertheless, whether the deceased had left instructions on where to be buried and whether the will can allow for one to decide his burial place, the finding in the case of *Apeli and Enoka Olasi v Prisca Buluku*, Civil Appeal No 12 of 1979 (unreported), is worth considering. In the *Apeli case*(*supra*), deceased had left a wish on her preferred place of burial. The Court of Appeal considered the applicable law and, in his judgment, Sir Eric Law at p.6 stated thus: -

> " The English law on the subject is succinctly summarized at p.57 of Williams and Mortimer on Executors and Administrators and Probate (London, Stevens and sons), 1970) as follows:

> -There can be no property in a dead body. A person cannot dispose of his body at will. After death the custody and possession of the body belong to the executors until it is buried.....If the deceased has left directions as to the disposal of his body, though these are not legally binding on his personal representative, effect should be given to his wishes as far as this is possible.....the duty of disposing the body falls primarily on the executor."

71. In *Charles Onyango Oduke & Anor v Onindo Wambi* [2010] the High Court held that "courts ought to give effect to the wishes of the deceased as far as possible".

72. In the *ratio decidendi* in *Eunice Moraa Mabeche & Anor v Akinyi* [1994] the high court allowed the deceased's body to bury in a Muslim cemetery based on his wishes and rejected his mother's attempt to bury him in his Kisii ancestral home subject to Kisii customs.

73. In *Johnstone Kassim Mumbo & 2 Others v Mwinzi Muumbo & Another* the court held that: "Custom is not mandatory where the wishes of the deceased are clear."

74. I have expressed my reservation as to the appellant's forthrightness about the wishes of the deceased as contained in the alleged will. DW2 also talked of oral declarations made by the deceased about his burial arrangements and site , but there is no indication of when the wishes were expressed, for the court to determine whether the said declarations met the criteria of an oral will.

75. In short, am not also convinced that the appellant tabled sufficient evidence, that proved the deceased's wishes on the preferred place of burial.

An Alternative approach-Legal proximity concept-

76. In view of my conclusions I have arrived at on the two aspects of customary law and the alleged wishes of the deceased, I wish to consider another not- so- recent approach, the concept of legal proximity in burial disputes. The decision in *Ruth Wanjiru Njoroge v Njeri Njoroge & Anor* [2004] where the dispute was between the two widows of the deceased introduced this doctrine in burial disputes; The doctrine of legal proximity is based on the assumption that the decision as to the determination of the place of burial is based upon proof by the parties in the dispute of their proximity to the deceased. Accordingly, the right to bury a dead body can only be conferred to the person who is able to demonstrate the closest proximity to the deceased. In the aforesaid decision, Justice Ojwang noted "in social context prevailing in this country, the person, who is in the first line of duty in relation to the burial of any deceased person, is the one who is closest to the deceased in legal terms. Generally, the marital union will be found to be the focus of the closest chain of relationships touching on the deceased. And therefore, it is only natural that the one who can prove this fundamental proximity in law to the deceased, has the colour of right of burial, ahead of any other claimant.

77. Later in 2014 in the case of *Martha Wanjiru Kimata & anor v Wanjiru & anor* [2015] (hereafter *Wanjiru case*) the court held that the wife was the closest in proximity to the husband, and therefore had the right to bury the deceased husband.

78. The fact that both parties were the wives of the deceased is not contested and therefore one could argue that in terms of legal proximity, both parties herein qualify as the most approximate people.

79. However, one needs to go further and examine the relationship of each of the parties herein to the deceased. I derive guidance from the decision in the case of *Edwin Otieno Ombajo v Martin Odera Okumu* [1996] eKLR, where the court held:- "We wish to observe here that customary law, like all other laws, is dynamic. Because it is not codified, its application is left to the good sense of the judge or judges who are called upon to apply it. That is why, as we stated earlier, s 3(2), above, is worded the way it is to allow for the consideration of individual circumstances of each case. So the conduct

of the respondent and his attitude towards the deceased generally, were important considerations in determining the dispute between the parties here...."(Emphasis added)

80. There is ample evidence showing that at least for the last 8 years of his life, the deceased spent his time mostly with his 2nd wife , the appellant. The fact that she is the one who took care of him during his last days in hospital is was not rebutted. The respondent's own son testified about the fact that the respondent never visited the deceased in hospital and this testimony was not contested.

81. There is also sufficient evidence showing that the relationship of the deceased and the respondent was quite strained. Evidence from both sides show that some feuds related to land made the deceased leave kabras and made his abode in Kitale. It also came out clearly that the respondent and the deceased had a land related dispute that was or was at some point going on in courts. All these things can only mean that the relationship was far from being cordial. Compared to the appellant, the respondent cannot claim to have been the person at close proximity to the deceased at the time of his demise.

82. Am satisfied that the doctrine of legal proximity favours the appellant. I agree with the appellant that in arriving at his decision the trial magistrate ignored the fall- out between the respondent and the deceased.

c. Did the trial court erred in awarding costs?

83. Costs are at the discretion of the trial court , and unless it is demonstrated that the trial court erred in principle, I have no reason to interfere with the said finding.

84. The Appeal is merited and it is hereby allowed.

85. The judgment of the trial court is hereby set aside and substituted with an order dismissing the plaintiff's suit, with costs.

86. Each party will meet their own costs in this Appeal

DATED , SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 26TH DAY OF OCTOBER, 2023.

S. CHIRCHIR

JUDGE.

In the presence of :

E. Zalo- Court Assistant

Mr. Wanyonyi for the Appellant

Mr. Masinde for the Respondent.