



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CIVIL APPEAL NO. 44 OF 2015**

**GLORIA NELIMA.....1ST APPELLANT**

**MILDRED NALIKA.....2ND APPELLANT**

**WYCLIFFE W. SILOMELO..... 3RD APPELLANT**

**VERSUS**

**WINROSE N. SILOMELO..... RESPONDENT**

**J U D G M E N T**

1. This was a burial dispute. The deceased Bilih Namuliza Silomelo was the mother to the appellants as well as the Respondent. She died on 2<sup>nd</sup> July 2015 at Kitale District hospital. Apparently at the time of her demise she was under the hands of the Appellants.
2. The Respondent did file a suit at the trial court seeking interalia orders stopping the appellants from burying the deceased remains at Kamukuywa instead of Nabeki where she had been residing and where her late husband was buried.
3. After full trial the court allowed the Respondents suit and permitted them to burry their mother at Nabeki instead of Kamukuywa. The court equally allowed the family members including the appellants to participate in the burial proceedings.
4. Subsequently, they filed this appeal which essentially is based on the grounds that the evidences adduced by PW2 and PW3 was faulty and that the trial court did not have jurisdiction.
5. When this matter came up for hearing I did order the same to be disposed by way of written submissions. The Respondent did file theirs and I was not able to see those of the Appellants.
6. Without reproducing the proceedings at the trial court, what is evidently clear is that the deceased died intestate. She did not give much regarding her place of burial.
7. Secondly, the deceased was a Bukusu by tribe and equally married under the tenets and customs of Bukusu customary law.
8. Thirdly prior to her death she came and stayed with the 1<sup>st</sup> appellant while undergoing treatment. It appears that her stay with the appellant did not exceed 6 months before her demise.
9. Prior to this she had been staying at her husband's land at Nabeki and specifically parcel No. Malakisi Central Namwela/200 where her husband was burried.
10. Evidence was led by the appellants to suggest that the aforestated parcel of Land was divided between her 2 sons Wycliffe and Gilbert. Wycliffe then sold his portion to Geoffrey Chemiati Barasa vide a Sale Agreement dated 29<sup>th</sup> April 2015.
11. I t appears that the sons of Gilbert were staying in their father's portion.
12. Wycliffe PW2, after selling his portion wanted to demolish his mother's house so that he could build for her a house at Kamukuywa.
13. The Appellants according to the Respondent spiritedly took away the deceased and even concealed her demise. It took DW1 intervention several days to discover that her body was lying at the mortuary.

## **Analysis and Determination**

14. The factual issues stated above are uncontroverted. The parties are related. The suit land belonged to their deceased father who was polygamous with 3 wives including the deceased. The portion due to the deceased was divided between her 2 sons. There was production of a search which showed that the same was still registered under their deceased father.

15. No succession proceedings had been undertaken. Consequently, pursuant to the provisions of the Succession Act Cap 160, PW2 did not have the capacity to sell the land unless he obtained the grant or the consent from the court.

16. Even then, as clearly deduced by the trial court, the deceased cannot be said that her real home was Kamukuywa. It appears that she only left her matrimonial home either by coercion or by virtue of ill health. Her house as confirmed by PW2 was intact. Her husband was buried on that land. The title deed had not changed. All that happened was that the land was divided between Wycliffe and the late Gilbert. Whichever perspective one takes, that was her matrimonial home.

17. According to Bukusu customs which the deceased subscribed to, she was to be buried next to her husband. PW2 and PW3 who testified stated as much. No evidence was adduced to the contrary.

18. It has always been held that since there are no legal regimes governing burial disputes in our judicial system, the only logical and best approach is to rely on the deceased's customs. Nothing in this case was shown to the contrary. It was not as per the Bukusu customs to have the daughter in this case the appellant bury the deceased as she desired as she had her matrimonial home. More importantly her brother PW2 was still alive. Although PW2 wanted her buried at Kamukuywa, the same was not tenable as the deceased still had her land intact.

19. Regarding the issue of jurisdiction, I find the same a moot question. The provisions of Section 3(2) of Judicature Act Cap 8 States that

***“ the High court , Court of Appeal and all the 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-----”***

20. In my view the trial court was seized with the jurisdiction.

21. The upshot of this is that the trial court arrived at a well reasoned judgment. All that motivated the appellant in my view was siblings rivalry. The deceased though old, frail and sickly cannot be said to have abandoned her matrimonial home. Neither did she subscribe to any customs except the Bukusu. The same was clearly demonstrated by the two elders who testified.

22. In the premises this appeal is disallowed with no order as to costs.

**Delivered, signed and dated at Kitale this 22nd day of January 2019.**

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**H.K. CHEMITEI**

**JUDGE**

**22/1/19**

**In the presence of:**

**Kipruto holding brief for Murgor for Respondent**

**Bungei for Khakula for the Appellant.**

**Court Assistant – Kirong**

**Judgment read in open court.**