



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 75 OF 2019**

**DIANA SEGERO.....APPELLANT**

**VERSUS**

**SAMWEL MULAVU SEGERO.....1<sup>ST</sup> RESPONDENT**

**BOYD SEGERO.....2<sup>ND</sup> RESPONDENT**

**JACKSON LYANGA SEGERO.....3<sup>RD</sup> RESPONDENT**

**BEATRICE SAKASE.....4<sup>TH</sup> RESPOENDENT**

**REYAN SEGERO.....5<sup>TH</sup> RESPONDENT**

***(An appeal arising from the judgment and decree of the Hon. Eric Malesi,***

***Senior Resident Magistrate (SRM), in Kakamega CMCCC No. 130 of 2019 delivered on 4<sup>th</sup> July 2019)***

**RULING**

1. The dispute herein pits the appellant, on the one hand, and her child and grandchildren, on the other. The conflict is over the remains of Timina Nasimiyu Segero, who I shall hereafter refer to as the deceased. She was a daughter of the appellant, Diana Segero, and a sister of the 1<sup>st</sup> respondent, Samwel Mulavu Segero. She was the mother of the rest of the respondents.

2. Upon the demise of the deceased, a dispute erupted as to where her remains were to be interred and by whom. The appellant wanted to bury her at her home, on grounds that the deceased was unmarried and, therefore, under customary law, she argued, her remains were for disposal at her father's or parents' home. The respondents took the view that the deceased had established a home at a piece of land bought by one of her sons, and registered under the name of her brother. They argued that the customs of her community were not averse to her remains being buried on her own home.

3. The dispute was disposed of by way of *viva voce* evidence, after which the court found that according to the Bakusi Clan of the Isukha people, the community to which the deceased belonged, an unmarried woman should be buried on her parents' land, with the exception that if she had established her own separate home, she was to be buried in that separate home. It was held that the deceased had set up such a home, and, therefore, she could be buried there. It was also held that it was the clan that was customarily responsible for burials. The Bakusi clan was accordingly authorized to bury the remains of the deceased at her home on Isukha/Mukhonje/1569.

4. The appellant was unhappy with that outcome, hence she lodged the appeal herein. She raised several grounds, such as that the trial court erred in holding that it had no jurisdiction to handle a burial dispute, the clan and the children of the deceased took precedence over the mother of a deceased person with respect to disposal of remains, the deceased could only establish a home if and when married, and considering extraneous matters.

5. Simultaneous with the appeal, the appellant filed a Motion dated 11<sup>th</sup> July 2019 seeking stay of execution of the decree of the trial court, on grounds that the respondents were set to remove the body on 11<sup>th</sup> July 2019 for disposal. The matter was placed before me the same day under certificate of urgency. I granted interim orders and fixed the application for *inter partes* hearing on 16<sup>th</sup> July 2019.

6. It transpired that the temporary orders I granted on 11<sup>th</sup> July 2019 were made too late in the day for burial had proceeded. Whereupon the appellant amended her Motion on 15<sup>th</sup> July 2019, without leave of court. I entertain serious doubts as to the whether an interlocutory application can be amended in that manner. Be that as it may, the amendment entailed the insertion of a new prayer for exhumation of the

remains of the deceased for preservation at the Kakamega County General Hospital pending hearing and determination of the appeal. The appellant alleged that the body was interred at night, without a burial permit and without a church service being conducted. She contended that the burial did not amount to a decent sendoff befitting of a Christian.

7. The response to the application was through an affidavit that the 1<sup>st</sup> respondent swore on 15<sup>th</sup> July 2019. He averred that following the orders of 4<sup>th</sup> July 2019, they extracted the same on 11<sup>th</sup> July 2019, removed the body the same day and interred it the same day as it was in a bad state of decomposition.

8. The application was argued on 26<sup>th</sup> July 2019. The gist of the appellant's case was that she wanted to bury her daughter, the deceased. She claimed that the burial conducted by the respondent was rushed and secretive, which denied her the opportunity to participate in the proceedings. The respondents countered by arguing that the stay sought had been overtaken by events and that exhumation of the body would be a drastic act that should only be allowed in compelling cases.

9. I have considered the matter, the facts, the arguments advanced and the decisions cited to me by the parties. I agree that exhumation of remains is drastic and should only be permitted in exceptional cases. No exceptional circumstances have been brought out in this matter to warrant that drastic step. Failure to order exhumation of the body, would not, in my view, render the appeal herein nugatory. The matter of exhumation can be addressed within the appeal, and it is one of the possible orders that the appellate court may make should it find that the trial court fell into error.

10. I have not found any merit in the amended Motion dated 15<sup>th</sup> July 2019, and I hereby dismiss the same. Costs shall abide the outcome of the appeal.

**DATED, SIGNED and DELIVERED at KAKAMEGA this 15<sup>th</sup> DAY OF August, 2019**

**W. MUSYOKA**

**JUDGE**