



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 81 OF 2019

SYPROSE AWINO NYANGWARAAPPELLANT

VERSUS

GLADYS WERE.....RESPONDENT

[Being an Appeal from the Judgment of Hon. W. K. Onkunya SRM given at Kisumu on the 11th June 2019 in Kisumu Chief Magistrate's Court Civil Suit No. 29 of 2019]

JUDGMENT

The appeal before me was brought by **SYPROSE AWINO NYANGWARA** to challenge the dismissal of the suit which she had filed against **GLADYS WERE**.

1. The learned trial magistrate had held that the Appellant was not entitled to a declaration that she was legally entitled to inter/bury the remains of **SILVANUS NYANGWARA**, at their matrimonial home which was situate at **GOT OWAK, NYALENDA "B"** within **KISUMU COUNTY**.
2. The Appellant was a wife to Silvanus Nyangwara.
3. The Appellant acknowledged that the Respondent was also a wife to Silvanus Nyangwara.
4. Following the demise of Silvanus, the Respondent transferred his remains from the **KENYATTA NATIONAL HOSPITAL** to the **BUNGOMA SUB-COUNTY HOSPITAL**, from where the Respondent intended to have the body laid on the parcel of land **L.R. NO. E. BUKUSU/S. KANDUYI/8917**.
5. It was the Appellant's case that by virtue of the fact she was the first wife of the deceased, and because her matrimonial home was established in accordance with Luo custom, the deceased ought to be buried at her home in Nyalenda, Kisumu.
6. As far as the Appellant was concerned, the home of the Respondent had not been established in accordance with Luo custom.
7. When canvassing the appeal. Mr. Otieno D, the learned advocate for the Appellant, submitted that the trial court had recognized the fact that the Respondent's matrimonial home, in Bungoma was not established in accordance with Luo custom.
8. I gave careful given consideration to the contents of Page 146 of the record of the proceedings, which counsel drew my attention to, and I found that that part of the record contained the trial court's summary of the Appellant's case. In other words, the court did not, at that page, express its recognition of the manner in which the home at Bungoma had been established.
9. The Appellant submitted that the trial court had ignored her evidence, especially what was recorded at pages 179 and 181 of the record of appeal.
10. Essentially, at those 2 pages the Appellant had testified that although the deceased had established a home for the Respondent, in Bungoma, that home had not been established in accordance with the Luo Customary Law.
11. One aspect of the said custom, which was allegedly not complied with is that the father of the deceased never stepped on the land in Bungoma.
12. In contrast, the Appellant pointed out that when her home in Nyalenda was being established, there was full compliance with customary law of the Luo.

13. In the light of that evidence, the Appellant submitted that the trial court ought to have reached the conclusion that the home in Bungoma had not been established in accordance with Luo custom.
14. Her further submission was that the Respondent was the only witness who testified that the Bungoma home was established in accordance with Luo custom.
15. Nevertheless, the Appellant reasoned that the Respondent did not understand the Luo custom, considering that she hails from amongst the Bakhayo.
16. Another criticism that was levelled against the judgment was that although the trial court appears to have been convinced that the applicable law should be in line with the Luo custom, the court failed to carry out an investigation to determine what the said customs entailed.
17. Instead, the trial court was said to have applied a quotation made in the case of **RUTH WANJIRU NJOROGE V JEREMIAH NJEU NJOROGE [2004] eKLR**, in which the parties were not Luos.
18. In that case the court had held that;
- “..... 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.”***
19. The Appellant submitted that by the use of the element of closeness, the trial court shifted from the issue about “where” the deceased should be buried, to the issue of “who” should bury him.
20. It was the Appellant’s conviction that if the court had made the correct inquiry, it would have realized that the issue of closeness was irrelevant.
21. Whilst pointing out that all her witnesses had testified that the deceased should be buried at the home he set up at Nyalenda, the Appellant submitted that all the witnesses for the Respondent had personal problems with the Appellant.
22. And whilst acknowledging that she had live apart from the deceased, it is the submissions of the Appellant that her reasons for doing so had been explained.
23. Finally, the trial court was said to have mis-understood the wishes of the deceased.
24. According to the Appellant, nobody can will what ought to happen to his body, because there is no property in a dead body.
25. Therefore, the Appellant submitted that if a person expressed a wish that was not consistent with tradition, the court should ignore such a wish, if it is in relation to the place of burial of the said person.
26. In answer to the appeal, Mr. Makokha, the learned advocate for the Respondent, submitted that the first point to be noted is that parties are bound by their own pleadings.
27. Therefore, considering that the Appellant had never challenged the manner in which the Respondent’s home had been established in Bungoma, it was not an issue that had arisen for determination.
28. In any event, as far as the Respondent was concerned, all the evidence available before the court, clearly demonstrated that the Bungoma home had been established in accordance with Luo traditions and custom.
29. On the other hand, the Respondent pointed out that the Appellant had not lived with the deceased for over 26 years. During that whole period, the deceased lived with the Respondent.
30. Furthermore, added the Respondent, when the deceased was ailing, he expressly made known his wish about the place where he should be buried.
31. This court was asked not to disregard the wishes of the deceased.
32. The Respondent also submitted that there had not really been a dispute concerning the place for burial, as the mother of the deceased, his clansmen and his children were all in agreement that he be buried in Bungoma.
33. Citing the Case of **OUGO & ANOTHER Vs WAMBUI OTIENO [1987] KLR 364**, the Respondent submitted that the court ought to take into account the views expressed by the clan, whilst also bearing in mind the wishes of the deceased.
34. In this case, the Respondent emphasized the fact that the deceased had pin-pointed the exact spot where he wished to be buried, in Bungoma.
35. As regards the Luo Custom, the Respondent submitted that there was no specific requirement that a polygamous man must be buried at

the home of the first wife.

36. The Respondent cited the case of **MARY S. AWINO AYOKI & ANOTHER Vs HELLEN AKELLO & 2 OTHERS, CIVIL APPEAL NO. 61 OF 2008**, in which Mwera J. (as he then was) upheld the wishes of the deceased, who was a polygamist.

37. The learned Judge noted that the deceased had pointed out to his son and other people, the place where he wished to be buried, which was at the home of his second wife.

38. One striking resemblance between this case and that authority is that Hellen (the first wife) had been away from her matrimonial home for 28 years.

39. Similarly, the Appellant did testify that the deceased had “deserted” her for 28 years.

40. When determining the deceased should not be buried outside the house of the first wife, Mwera J. noted that that rule could not apply when the said house had been built by a stranger.

41. From my reading of the decision of Mwera J., it appears that the learned Judge was persuaded, from the evidence tendered by

“so-called experts (PW1 Samba, and PW3, Oguma)..... (that) in normal situations, where a polygamist falls dead and it is clear that he will be buried by the house of the first wife.”

42. Does that decision establish that in Luo custom a polygamist will ordinarily be buried near the house of his first wife?

43. In this very case, **DW4 (Consolata Obonyo Njoga)** is a sister of the deceased.

44. She testified that their father, **BARACK OLONDE**, was buried at the home of the younger wife.

45. It is also noted that **PW5, (Salvery Abuto Abuye)** testified that according to Luo Customary Law, a man has to be buried in the home of his eldest wife.

46. However, during cross-examination, **PW5** said;

“If the deceased expressed his wishes on where he was to be buried, he expressed his wishes while he was alive. Now that he is dead, it is for the community to give an indication on where they want to have the deceased buried.”

47. That testimony confirms that there is no hard and fast Luo custom, which requires a polygamist to be buried outside the house of his first wife. I so find because if that were the clear and precise custom, there would be no need to have the community consulted about the choice of place where the deceased should be buried.

48. Being the first appellate court, I have re-evaluated all the evidence on record.

49. I have found that the deceased established a home for the Appellant at Nyalenda, Kisumu.

50. I also find that the deceased established a home, for the Respondent, at Bungoma.

51. I find that both the Appellant and the Respondent have given particulars of what they believe to constitute the customary requirements for the establishment of a Luo home.

52. The Appellant said;

“There is evidence that his father stepped in the land in Nyalenda. William Okumu and George Nyamita; and we observed the Luo custom in its entirety.

We carried a cock, an axe and a panga when establishing the home in Nyalenda.”

53. The Appellant did not specify the rules or regulations which the deceased flouted when he was establishing the home for the Respondent.

54. There was just a blanket statement that;

“In putting up the Bungoma home, the customary law was not fully followed. Some rules and regulations were flouted.”

55. When the Respondent testified about how the deceased established the Bungoma Home, she said;

“It was established in accordance with Luo customary law. He called his uncle, George Nyamita, the late, and his elder wife

Eleder Akoth. He also called the two sisters, Consolata Obonyo and Julita Anyango.

I saw Nyangwara carrying a panga and a hoe. His elder son, Nimrod Mwanja, carried an axe and I was told to follow as the uncle witnessed.”

56. The details of how the Appellant’s home was established are almost a replica of how the Respondent’s home was established.

57. Therefore, I find that both the home in Nyalenda and the home in Bungoma were established in accordance with Luo custom.

58. I also hold that the deceased gave clear and precise instructions concerning his place for burial: he was to be buried a few metres from the mango tree, at his home in Bungoma.

59. It is well settled that there is no property in a dead body, as the Court of Appeal pronounced in the case of **JAMES APELI & ENOKA OLASI Vs PRISCILLA BULUKU, CIVIL APPEAL NO. 12 OF 1979**. The learned Judges of Appeal held as follows;

“There is no property in a dead body. A person cannot dispose of his body by a will. After death the custody and possession of the body belongs to the executors until it is buried.....

If the deceased 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 that is possible.”

60. I find that the wish of the deceased, to be interred at his home in Bungoma is not contrary to the general law or to the policies applicable in Kenya generally and also applicable to persons who subscribe to Luo customary law.

61. There is a precedent that had already been set even within the family of the deceased.

62. In a nutshell, I find that the judgment rendered by the trial court was properly founded upon a sound analysis of both the evidence on record and also on the applicable law. Therefore, the appeal fails and is dismissed.

63. The Appellant will pay to the Respondent, the costs of the appeal.

DATED, SIGNED and DELIVERED at KISUMU This 19th day of December 2019

FRED A. OCHIENG

JUDGE