REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 82 OF 2017

1. K O

2. J O.....APPELLANTS

-versus-

J O .....RESPONDENT

(Being an appeal arising from the judgment and decree by Hon. E. M. Nyaga, Principal Magistrate in Migori Chief Magistrate's Civil Case No. 40 of 2017 delivered on 05/09/2017)

JUDGMENT

Introduction: -

1. This appeal is on a burial dispute between the family of one **H A O** formerly known as **H A O** who died on 10/04/2017 while undergoing treatment at Akidiva Memorial Hospital in Migori town (hereinafter referred to as '**the deceased'**) on one part and one **J O,** the Respondent herein, on the other part. The family of the deceased is represented by **K O** and **J O**, the Appellants herein.

2. It is the Respondent's contention that the deceased was his wife and as such he is entitled to bury her remains a position which is vehemently and strenuously opposed to by the Appellants. The dispute was fully heard before the magistracy and judgment rendered for the Respondent herein thereby prompting this appeal.

Background: -

3. The Respondent filed **Migori Chief Magistrate's Civil Case No. 40 of 2017** (hereinafter referred to as **'the suit'**) against the Appellants on 02/05/2017 contemporaneously with a Notice of Motion under certificate of urgency seeking *inter alia* injunctive orders against the Appellants from interring the remains of the deceased as was then scheduled and to return the body of the deceased to Migori Level Four Hospital Mortuary for preservation pending *inter partes* hearing. Interim orders were issued but appeared to have been overtaken by events given that the deceased had been laid to rest before service of the orders.

4. The Respondent then moved the lower court by a Notice of Motion dated 08/05/2017 seeking the exhumation of the remains of the deceased and preservation thereof at Migori Level Four Hospital Mortuary pending determination of the suit. The application was heard *inter partes* and allowed by a ruling delivered on 22/06/2017.

5. Aggrieved by the ruling, the Appellants, then Defendants, filed **Migori High Court Civil Appeal No. 67 of 2017** alongside an application for stay of execution of the ruling. The application was heard and allowed on condition that the Appellants do file undertakings not to interfere with the grave where the body of the deceased was buried and to further undertake to take all necessary measures to ensure that the grave is not interfered with in any way by any one whatsoever. That was the ruling delivered on 30/06/2017.

6. In the said ruling I urged Counsels to consider the possibility of approaching the matter in a manner that the substantive issues would be finally determined. Upon concurrence of Counsels, the **Migori High Court Civil Appeal No. 67 of 2017** was compromised and the suit proceeded for full hearing before the lower court culminating with the judgment subject of this appeal.

The Appeal: -

7. Judgment in the suit was delivered on 05/09/2017 and it was decreed that on account of the marriage between the deceased and the Respondent the body of the deceased be exhumed from where it had been interred at Ndhiwa in Homa Bay County for burial at Migori. Being dissatisfied with the whole of the decision, the Appellants filed this appeal together with an application under certificate of urgency seeking a stay of execution of the judgment in the suit. That was on 06/09/2017. The application was certified urgent and an interim stay

order issued. The appeal raised the following three grounds: -

> ***1. That the learned Magistrate erred in law and / or in fact by finding that there existed a legal marriage between the respondent and the deceased when no sufficient supporting evidence was tabled before it by the respondent.***
>
> ***2. That the learned Magistrate erred in law and / or fact by ignoring the Appellants' evidence and/or submissions and treating them superficially.***
>
> ***3. That the learned Magistrate erred in law and/or fact by failing to evaluate the entire evidence on record and make a finding that the Respondent had demonstrated sufficient reasons to have the orders sought granted.***

8. Determined to deal with the main issues in the appeal, Counsels informed the Court that they had agreed to instead deal with the main appeal and as such appropriate directions were given. Upon compliance in filing the Record of Appeal and the submissions, the appeal was set for judgment.

Analysis and Determinations: -

9. As the first appellate Court, my role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga& Another (1988) KLR 348).**

10. I have keenly read and understood the contents of the Memorandum of Appeal, the suit, the parties' submissions and the respective decisions tendered in support of each of the parties' cases and to me there is only one main issue for determination which is whether the trial court erred in finding that there existed a valid marriage between the deceased and the Respondent; which issue I will endeavor to deal with hereunder.

11. Given that the Respondent pleaded in the suit that he married the deceased after the dissolution of her first marriage with one **P O O** (hereinafter refer to as '**P**') and since the Appellants denied the averment, it then becomes imperative that I first satisfy myself on the issue.

12. There is concurrence that the deceased was initially married to P in accordance with the Luo customs. It is the Respondent's position that the marriage between Phillip and the deceased did not work out and the deceased filed **Migori Magistrate Court's Divorce Cause No. 6 of 1996** (hereinafter refer to as '**the divorce suit'**) against Phillip which culminated with the dissolution of the marriage after which the Respondent married the deceased. In support of the averment the Respondent availed the *'pleadings and proceedings'* in the divorce suit. As said the averment was denied.

13. **K O,** the first Appellant herein who was the first Defendant in the suit testified as **DW1.** He is the eldest among the children in their family. The deceased was his younger sister. He denied any knowledge of the divorce suit and contended that the marriage between Phillip and the deceased was not dissolved by court and that the family of the deceased has never been asked to refund the dowry paid by P as a consequence of the said dissolution. To him, the deceased never divorced P until P death sometimes in August 1998 and contended that he only came to know of the Respondent on the institution of the suit.

14. The mother to P testified as **DW4**. She is **T M A**. She also denied knowledge of any divorce proceedings and contended that her son's marriage to the deceased was not dissolved as alleged.

15. Since the issue of the dissolution of the marriage between P and the deceased revolved around the divorce suit, I have severally perused the record in the suit and before this Court to fully address my legal mind on the issue. In proof of the dissolution of the marriage, the Respondent annexed what he indicated in his List of Documents which he filed together with the Plaint to be the '*proceedings'* in the divorce suit. They are faint copies of a Petition dated 14/02/1995 between the deceased and P and an accompanying affidavit of the deceased evenly sworn on 14/02/1995. There is also another affidavit sworn by the deceased on 08/01/1993 and a copy of a Request for Judgment in the divorce suit dated 22/03/1996.

16. During the hearing of the suit, the Respondent produced documents as Exhibit 1. They are a copy of a typed letter by P addressed to the District Commissioner for Suna-Migori touching on the divorce suit and copies of hand-written proceedings allegedly part of the proceedings in the divorce suit. The file on the divorce suit was not produced in evidence even though both the suit and the divorce suit were matters filed in the same court. No reason for such was tendered. The alleged proceedings cannot be said to be a true reflection of the divorce suit. **First**, even though not typed they are not certified as true copies of the court record. **Second**, they do not bear the case number. **Third**, there are no corams and the judicial officer who allegedly handled the matter remain unknown. **Fourth**, the names of the parties are not indicated. **Fifth**, the judgment does not bear the case number, is not dated, has no name of the judicial officer and visibly bears a signature which is different from the previous ones. **Sixth**, the proceedings are not properly paginated.

17. I have resisted the urge to call for the divorce suit file from the magistracy for two reasons. That, the file was not produced as an exhibit and that even the trial magistrate did not indicate to have perused it. With such, coupled with the fact that no copies of *decree nisi* or absolute were produced, I find it most difficult to accept the invitation by the Respondent for a finding that the marriage between the deceased and P was dissolved vide the divorce suit. I therefore find that there is no sufficient evidence to prove the dissolution of the marriage between the deceased and Phillip.

18. Having so found, it then goes that the marriage between the deceased and P subsisted until August 1998 when P passed on.

19. But the Respondent alleges to have married the deceased under the Luo customs in late 1996. In that case therefore what is to be first ascertained is whether the Luo customs allow for the practice of polyandry; a form of polygamy where a woman is married to more than one husband at the same time. If that is proved in the affirmative, then the that custom will have to be subjected to the test in **Article 2(4)** of the **Constitution** to the extent of its inconsistence with and/or contravention of the Constitution as well as the test laid in **Section 3(2)** of the **Judicature Act**, Chapter 8 of the Laws of Kenya to the extent of its repugnancy to justice and morality and any inconsistency with any written law. It is only after the custom passes the twin tests when it qualifies and becomes an applicable Luo customary law in Kenya.

20. **Sections 107, 108** and **109** of the **Evidence Act,** Chapter 80 of the Laws of Kenya places the incidence of burden of proof of any fact on the one who wishes the Court to believe in the existence of that fact. The Court of Appeal in dealing with the issue of a party relying on customs expressed itself in the case of **Njoki -vs- Muteru (1985) KLR 874** in the following manner: -

> ***"The existence of a custom must be established by the party who intends to rely on it..."***

21. In this case therefore it is the Respondent who is to prove the existence of such a custom among the Luo people in Kenya. From the Respondent's pleadings in the suit and evidence there is no where he relied on the said custom. The Respondent was all along contending that he married the deceased upon the dissolution of the marriage between P and the deceased. That being so the existence of a polyandry custom among the Luo is not proved in this case. The allegation that the Respondent married the deceased in late 1996, when the marriage between the deceased and P subsisted, is hence rejected.

22. That therefore takes me to a look at the status of the deceased and the Respondent after the death of P. According to **DW1** and **DW4** the deceased remained as part of the family of P even after the death of P. In the words of **DW4,** the two children the deceased got after the death of Phillip are deemed to be the children of P. On the other side the Respondent contends that she married the deceased under the Luo customs. Before looking at whether there was a valid marriage between the deceased and the Respondent after the death of P it is paramount that I deal with the issue as to whet @her the deceased could re-marry upon the death of her husband P.

23. There seems to be no contestation on that issue. The Luo customs certainly do not prohibit re-marrying upon the death of a spouse. That is in line with **Section 15** of the **Marriage Act No. 4** of **2014** which came into operation on 20/05/2014 which expressly provides for such a right. It is also in line with **Article 27 (Equality and Freedom from discrimination), Article 28 (Human Dignity), Article 39 (Freedom of movement and residence)** and **Article 45** (**Family**) of the **Constitution**. For clarity purposes, **Article 45(2)** and **(3)** of the **Constitution** provides that: -

> ***"(2) Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.***
>
> ***(3) Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage."***

24. That being the position, the question which now arises is whether the deceased re-married the Respondent. In this discussion I will deem the Respondent's evidence on his marriage to the deceased as acts which took place after the death of P. The Respondent clearly testified that his marriage to the deceased was in accordance with the Luo customs and that he paid dowry **(Ayie)** which was in monetary form of Kshs. 25,000/= to the parents of the deceased who were then dead at the hearing of the suit. Since the parents of the deceased were the best placed persons to confirm receipt of the dowry and having died, it is **DW1** who comes next.

25. However, **DW1** denies such an occurrence at all and contends that if at all it happened there was no way he could not have known together with the rest of the family members. **DW1** further stated that he only met the Respondent for the first time in court during the hearing of the suit. **DW4** also denied having at least been informed that her daughter-in-law (the deceased) had been re-married and testified that the deceased continued visiting her matrimonial home at their family home in Ndhiwa, Homa Bay County until her death and that the deceased had expressed her desire to construct a house at the matrimonial home but for the illness that led her to death.

26. The Respondent did not avail any other evidence that the marriage took place in accordance with the Luo customs. He did not even avail any person from his family to corroborate the allegation that indeed the '***Ayie***' was paid. There was equally no evidence that the sum of Kshs. 25,000/- was paid to the parents of the deceased. There is also the unsettled issue of who was to be paid the dowry: Was it the parents of the deceased (who had already received dowry from P) or was it the family of P in which the deceased had become part of upon her marriage to P. What do the Luo customs provide for in such cases? And, the questions are unending.

27. The upshot is that the Respondent did not prove by way of evidence that he married the deceased in accordance with the Luo customs. The matter however does not end there. A Court of law in such a situation must endeavor to consider whether the prevailing circumstances of the case when taken into consideration can be a basis of presuming a marriage under the common law doctrine of **presumption of marriage**. In this position I take refuge in the Court of Appeal decision in **Beth Nyandwa Kimani vrs Joyce Nyakinywa Kimani & others (2006) eKLR** where the Court held as follows: -

> ***"For it matters not whether statutory or customary marriage requirements are strictly proved in marriage. The Court must go further and consider whether, on the facts and circumstances available on record, the principles of presumption of marriage was applicable in the appellant's favour. Such was the situation following the predecessor of this Court in Hortenesiah Wanjiku Yaweh vrs Public Trustee, Civil Appeal No. 13 of 1976 where Mustafa J.A in his leading judgment stated:***
>
> *"I agree with the trial Judge that the onus of proving that she was married to the deceased was on the appellant. But in*

assessing the evidence on the issue, the trial Judge omitted to take into consideration a very important factor. Long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant. Only congent evidence to the contrary can rebut such a presumption."

28. The doctrine of presumption of marriage has its genesis in **Section 119** of the **Evidence Act**, Cap. 80 of the Laws of Kenya which states that: -

> "***The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case".***

29. Adding its voice on the doctrine, the former Court of Appeal for Eastern Africa in the case of **Hortensiah Wanjiku Yawe -versus- The Public Trustee, Civil Appeal No. 13 of 1976** (*unreported*) stated as follows: -

> ***"The presumption does not depend on the law or a system of marriage. The presumption is simply is an assumption based on very long cohabitation and repute that the parties are husband and wife."***

30. More recently, the Court of Appeal in the case of **Joseph Gitau Githongo -vs- Victoria Mwihaki (2014) eKLR** stated as follows: -

> ***"It (presumption of marriage) is a concept born from an appreciation of the needs of the realities of life when a man and woman cohabit for a long period without solemnizing that union by going through a recognized form of marriage, then a presumption of marriage arises. If the woman is left stranded either by cast away by the "husband", or otherwise he dies, occurrence which do happen, the law subject to the requisite proof, bestows the status of "wife" upon the woman to enable her to qualify for maintenance or a share in the estate of her deceased "husband".***

31. Again the Court of Appeal at Nyeri in the case of **Joseis Wanjiru -vrs- Kabui Ndegwa & Ano. (2014) eKLR** expressed itself thus: -

> ***"14. The existence or absence of a marriage is a question of fact. Likewise whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except where by reason of a written law it is excluded. For instance a marriage can't be presumed in favour of any party in a relationship in which one of them is married under a statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by a long cohabitation or other circumstances evinced an intention of living together as husband and wife...."***

32. In this case the Respondent contends that he cohabited with the deceased and were blessed with two children. Could that cohabitation, if any, have resulted into a marriage? Since there are many other considerations to be made in the application of the doctrine of presumption of marriage there is no doubt that the issue of cohabitation takes a central stage.

33. **What is cohabitation?** The **Black's Law Dictionary**, 9th Edition at page 296 defines '*cohabitation*' as follows: -

> ***"The fact or state of living together, esp. as partners in life, usu. with the suggestion of sexual relations."***

34. The **Marriage Act** defines to '*cohabit*' in **Section 2** as follows:

> "***means to live in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage."***

35. Cohabitation therefore entails the long-term continuous living together of a couple holding themselves out as a husband and wife but in the absence of any formal marriage.

36. On the nature and length of the cohabitation, there is no doubt that the period of cohabitation should be long enough, continuous and not a sojourn, a habit of visiting or waiting for a time. The Respondent stated that he stayed with the deceased from November 1996 until her demise on a parcel of land he could not recall its number and during his tenure as the area Assistant Chief. It was during that time that they were blessed with their two children **B W O** and **C K N (DW3)**.

37. **PW2** was the Respondent's first wife married in 1986. She testified that the deceased was married in 1996 as the Respondent's second wife and the Respondent built her a home. She further stated that since then she knew the deceased as such, loved and lived well with her and even took part in the burial arrangements of the parents of the deceased.

38. The position was however the opposite on the part of the Appellants. **DW1** stated that the deceased lived as a single parent upon the death of P and built her own house at Wuoth Ogik in Migori town. That, the deceased only lived with her three children. That, he used to visit the deceased at her home and did not meet the Respondent even for once. That, the deceased struggled with and raised her children alone and that even during her ailment he was the one who took care of her together with the children.

39. **DW2** was the eldest of the three children of the deceased whose father was P. He was aged 27 years old at the hearing of the suit. He stated that since 2005 he lived with the deceased at their home which the deceased built on a parcel of land known as **Suna/Wasweta 1/[particulars withheld]**. That, the home of the deceased was within the area where the Respondent was the Area Chief and that he only met the Respondent in 2009 when he was pursuing his National Identity Card and that the Respondent was supposed to sign some of the attendant documents. He denied ever seeing the Respondent in her mother's house during her mother's lifetime including during the period

of her illness. He was aware that the deceased intended to build a house at her matrimonial home in Ndhiwa and wished to be buried there.

40. **DW3** was aged 19 years old at the hearing of the suit and was a First-Year student at [particulars withheld] University undertaking a Bachelor of Human Resource Management. She stated that she had all along stayed with her mother at their home in Wuoth Ogik together with her Aunt M and her siblings. That, she had never met the Respondent at their home and that she never received any assistance from him or at all as the deceased used to single-handedly take care of them. While admitting that her Health Card bore the name 'J O' she stated that she never knew who her father was or where the deceased got the name 'O' from. That the deceased had shared her intention with her to build a house at her matrimonial home in Ndhiwa and that she also wished to be buried there.

41. **DW4** stated that the deceased used to visit her as her daughter-in-law at her home in Ndhiwa where the deceased had a home and that she never knew if she lived with another man after the death of her son P. She was however aware that the deceased had built a home at Wuoth Ogik and that she intended to build another house at Ndhiwa but for the illness.

42. The foregone is the evidence on the aspect of cohabitation. The Respondent did not deny that the deceased stayed with her children at her home at Wuoth Ogik. **DW1, DW2** and **DW3** were categoric that the Respondent did not stay with the deceased either as alleged or at all. The Respondent despite not remembering where he built a home for the deceased was also polygamous; married to two other wives and did not state whether he lived with all of them within the same compound or otherwise. **PW2** did not however state where the home for the deceased was allegedly built by the Respondent. There was no independent evidence to the effect that the Respondent and the deceased lived together rather than the fact that the Respondent was the Area Chief of the place were the deceased lived. Since the Respondent was well known and a public figure I believe it was not an uphill task for him to adduce evidence on his alleged cohabitation with the deceased more so having alleged that he indeed married her. His evidence is now confronted by the combined evidence of **DW1, DW2 DW3** and **DW4** which is corroborative and consistent.

43. On a balance of probability, this Court therefore finds it difficult to believe the evidence tendered by the Respondent. I therefore find and hold that cohabitation was not proved in this case.

44. Closely related to the issue of cohabitation is the issue of the Respondent's support to the family. I have carefully considered to twin Statements of the Respondent filed in the suit alongside the evidence tendered before court. The Respondent apart from claiming parentage of the two children did not tender any evidence of how he supported the children and the deceased even in the face of the adverse evidence of **DW1, DW2** and **DW3**. There is no doubt that the Respondent knew where the two children went to various schools and institutions of higher learning. Even with such knowledge no evidence of any support or parental responsibility was tendered. That was the case even in respect to the deceased. The Respondent did not prove that it was him who built the home for the deceased at Wuoth Ogik. There was equally no proof of taking care of the family and the provision of its upkeep. Even in the times of illness the Respondent only states that he took the deceased to Akidiva Memorial Hospital where the bills were paid by NHIF. And, that was all. He makes of no mention of the treatment the deceased received at the Moi Teaching and Referral Hospital under the care of **DW1** and her children.

45. It is equally important to note that none of the other members of the Respondent's polygamous family ever too part in at least showing solidarity with an ailing family member. None of them at least visited the deceased either in hospital or at home. The Respondent only states in one of his filed statements that ***'I wish to have custody of my two children herein and take care of their basic needs.'*** Was that not a request made too late in the day? Where was the Respondent when the children were growing up? No wonder both children contend that the Respondent was not their father since his conduct was not commensurate with that of a loving and caring father. I therefore find and hold that based on the evidence before Court the Respondent did not prove giving any support to the deceased or the two children.

46. The Respondent while cross-examined by the Counsel for the Appellants before the trial court stated that the deceased and himself jointly bought parcels of land. However, no such evidence was adduced. The Respondent seems to have placed a lot of premium on the fact that the deceased assumed his name in her National Identity Card and that his name appears in the hospital records for **DW3** as well as in the Certificate of Birth for **B O W**. I must state that those are very important issues in such a matter which cannot be just wished away. However, such issues must be taken in totality with the other evidence on record and not in isolation.

47. The doctrine of presumption of marriage rests on the cumulative effect of the entire body of evidence and whether the parties while cohabiting together presented themselves as a wife and husband, ordered their lives together, and appeared as married to the public. It is only when those issues are settled in favour of a relationship when the society conceives that relationship as a married state. That is when the doctrine of presumption of marriage settles in favour of the parties. In the words of **Bosire J.A**., as he then was, in the unreported case of **Mary Wanjiku Githatu vs. Esther Wanjiru Kiarie, Civil Appeal No. 20 of 2009 Court of Appeal at Eldoret** the Learned Judge correctly stated that *'in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties, by long cohabitation or other circumstances, evinced an intention of living together as husband and wife..'*

48. Marriage must be distinguished from a sexual relationship which results into siring of children. Whereas such a sexual relationship raises fundamental legal issues, the presumption of marriage transcends such boundaries. Considering the facts as pleaded and the evidence as tendered in this matter, I return a finding that this is not one of the safe instances where a Court can rightly presume a marriage. I therefore hold that there was no marriage between the deceased and the Respondent whether by way of statute, customs or operation of the doctrine of the presumption of marriage. I must respectfully find, which I hereby do, that the learned trial magistrate erred in finding that there was a valid marriage between the deceased and the Respondent.

49. Having so held may I clarify that this judgment is not an attempt to settle the parentage of the two children which the Respondent contends he had with the deceased. That issue was not determined by the trial court and neither was it an issue before this Court.

50. In light of the foregone, I find no justification in interfering with the burial of the deceased. Needless to say, there is evidence that the deceased wished to be buried at her matrimonial home in Ndhiwa and that is what exactly happened. As stated by the Court of Appeal in **Apeli vs. Buluku (2008) 1 KLR (G & F) 873** *'…there is nothing in the wishes of the deceased person herein that can be said to be illegal, offensive or unenforceable. Neither were they contrary to custom, or to the general law or to public policy…'*

51. I now make the following final orders: -

(a) The appeal be and is hereby allowed.

(b) The judgment and the resultant decree and orders in Migori Chief Magistrates Court Civil Suit No. 40 of 2017 be and are hereby set-aside and the suit is accordingly dismissed. For clarity purposes the body of *H A O* formerly known as *H A O* shall not be exhumed or in any way interfered with from the place it was interred in Ndhiwa within Homa Bay County.

(c) The Respondent shall bear the costs of both the suit and this appeal.

Those are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of February 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Humphrey Obach instructed by H. Obach & Partners for the Appellants.

Mr. Cephas Agure Odero instructed by Agure Odero & Company Advocates for Respondent.

Miss Nyauke – Court Assistant