



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO.14 OF 2017**

**DINAH ADHIAMBO OYIER.....APPELLANT**

**VERSUS**

**HELLEN ACHIENG.....1ST RESPONDENT**

**GEORGE OTIENO OGONGO.....2ND RESPONDENT**

**JUDITH SANDE.....3RD RESPONDENT**

**KEVIN ODHIAMBO.....4TH RESPONDENT**

**(Being an Appeal from the Judgment of Hon. A.M. Agutu R.M in Kisumu CMCC No.18 of 2014 delivered on 24th January 2017)**

**JUDGMENT**

Dinah Adhiambo Oyier (*hereinafter referred to as appellant*) sued Hellen Achieng and 3 others (*hereinafter referred to as respondents*) in the lower court praying for an order to restrain them from interfering with the burial of her late husband **Alex Odhiambo Oyieyo (deceased)** at Ojola sub-location.

The defendants/respondents filed a statement of Defence and denied the claim and urged the court to dismiss the respondent/plaintiff's claim with costs.

**The evidence**

The background of this case is that the appellant and the 1st respondent are the 2nd and 4th wives of **Alex Odhiambo Oyieyo (deceased)**. The 1st and 3rd wives were deceased. The 2nd, 3rd and 4th respondents are deceased's cousin, half-sister and son of 1st wife respectively. The appellant testified that upon her marriage to the deceased in 1983; they cohabited at Dago Nyalenda but deceased later bought land in Ojola Land parcel No. Kisumu/Ojola/4869 which he registered in her name and established a home where he lived until he died. She said they were blessed with 7 children and further stated that the deceased had in a will expressed his wish to be buried at Ojola. PW2 and PW3 stated that the deceased had established a home at Ojola and further that they were witnesses to the deceased's will in which he expressed his wish to be buried at Ojola. PW4 Amos Okungu Advocate confirmed that the deceased wrote a will in his presence and that it was executed by the deceased and witnessed by PW2 and PW3. The will in Dholuo and its English translation were produced as PEXH. 13 and PEXH. 14 respectively.

The 1st respondent testified that she married the deceased in 2000 and that they cohabited in Dago. She confirmed that the petitioner lived in Ojola and that the deceased operated between Ojola and Dago. DW2 the deceased's uncle testified that he wanted deceased buried at Dago where he had established a home

for his 1st wife and where the 1st wife was buried.

In a judgment delivered on 24th January 2014, the learned trial Magistrate dismissed the appellant's case and ordered that the deceased be interred by his clan at Dago Nyalenda.

### **The Appeal**

The Appellant being dissatisfied with the lower court's decision preferred this appeal and filed the Memorandum of Appeal dated 7th February 2017 which set out 6 grounds which can be summarized into 4 grounds that:-

**The Learned trial Magistrate erred in law and in fact when she completely disregarded the clear evidence of the plaintiff and her witnesses thereby arriving at a wrong decision**

- 1. The Learned trial Magistrate erred in law and in fact by not taking into consideration the fact that the deceased had long left the abode of the 1st respondent and moved to his home at Ojola with his family**
- 2. The Learned trial Magistrate erred in law and in fact by ignoring the clear intentions of the deceased as expressly indicated in his will thereby arriving at a wrong decision**
- 3. The Learned trial Magistrate erred in law and in fact by ignoring the customs protecting one's family as narrated in the evidence of the appellant and her witnesses thereby arriving at a wrong decision**

### **SUBMISSIONS BY THE PARTIES**

#### **Appellant's submissions**

The appellants submitted that she was wholly relying on the memorandum of appeal and her evidence and submissions before the trial court in which she urged the court to give effect to deceased's wishes to be buried at Ojulo.

#### **Respondent's submissions**

The respondent's counsel Mr. Indimuli submitted that the trial court's judgment was rendered on sound legal principles and should therefore not be interfered with.

#### **Analysis and Determination**

This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of seeing and hearing the witnesses as they testified.

This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA 123** where **Sir Clement De Lestang** stated that:

***"This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammad Sarif v Ali Mohammed Solan (1955, 22 EACA 270)."***

In **Makube v Nyamuro (1983) KLR 403**, the Court of Appeal reiterated that

***“a Court on Appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion”.***

I have perused the entire record of appeal and considered the submissions. As stated herein above, the deceased had 4 wives. The 1st and 3rd are deceased and the appellant is the second and older wife of the deceased while the 1st respondent is the 4th wife.

Article 27 of the Constitution gives both women and men the right to equal opportunities in cultural and social spheres and also provides that there should be no discrimination directly or indirectly against any person on any ground. Both the appellant and the 1st respondent have equal rights and they are the persons who are first in line of duty in relations to the burial of the deceased being closest in terms of marriage. In *Njoroge –vs- Njoroge*, the court ruled that:

***The marital status was more relevant to burial and that ‘it was the marriage regime rather than the succession regime that should prevail in determining questions of burial.’***

The appellant’s right to fulfill the wishes of the deceased is therefore not far-fetched.

The first issue for determination is the validity of the deceased’s will regarding his burial site. It is not disputed that the deceased made a Will in which he expressed his wish to be buried at Ojulo. The learned trial magistrate disregarded the Will on the ground that it did not make adequate provision for some of the beneficiaries. With due respect; the dispute before the court is a burial dispute and not a Succession Cause. From the foregoing, I find that the learned trial magistrate clearly misapprehended the evidence and acted on wrong principles in reaching her conclusion disregarding the Will.

The second issue for determination is whether the Will supersedes Luo Customary Law. The position regarding wills as to burial sites was developed in the case of *Eunice Mora Mabeche and Another v Grace Akinyi (High Court civil case No. 2777 of 1994)*. In this case, the court validated the wishes of the deceased and underlined the right of an individual to make a will. The dispute involved the widow to the deceased and some members who had agreed that the deceased be buried at a Muslim cemetery in conformity with Islamic rights. The deceased’s mother on the other hand insisted that he be buried in Kisii as a Christian and insisted that the deceased had never converted to Islam.

In the absence of a will regarding preferred burial site, courts have upheld the traditional customs so long as these were not repugnant to justice and morality or to a written law. This was the case in *Kandie and 2 others vs Cherogony [2002] 2 KLR*, whereby the court seemingly applied the ruling in *S.M Otieno case* and upheld the Tugen customary law provision that a man had to be buried by his father and family members at his ancestral home. The court stated that there was no evidence that such custom was inconsistent with any written law.

Similarly, in the case of *Charles Onyango Oduke & another v Samuel Onindo Wambi [2010] eKLR* the Court accorded the wish of a deceased woman to be buried at a place of her choice. The court was guided by the earlier case of *James Apeli and Enoka Olasi v. Prisca Buluka (Civil Appeal No. 12 of 1979)* where the court had allowed the widow’s wishes to bury the body of the deceased in accordance with the deceased’s oral will. In his judgment, S.Eric Law had stated in part:-

***“...if the deceased has left directions as to the disposal of his body, though these are not legally binding on his personal representatives, effect should be given to his wishes as far as this is possible...The duty of disposing of the body falls primarily on the executor...”***

From the cases cited above, it is apparent that the right of an individual to make a will is valid and the court should as much as possible give effect to those wishes if they are workable and not in conflict with the personal law of the deceased.

No evidence was led to show which how the deceased’s will regarding his burial site conflicted with his

personal law. Contrary to the trial court's finding; there was evidence from PW1 and PW3 that the deceased had established a home at Ojolo where he wished to be buried.

The upshot of the above analysis and evaluation is that the learned trial magistrate was in error. There is material before the court which supports the case for giving effect to the deceased's will regarding his burial site. The appeal herein is therefore allowed; the judgment of the trial court is set aside and substituted with an order that the deceased's body be interred at Ojolo on land parcel Kisumu/Ojola/4886. Each party shall bear its costs of this appeal.

**DATED AND DELIVERED THIS 28th DAY OF April 2017**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Clerk Felix

Appellant N/A

Respondents Mr. Indimuli