



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**FAMILY DIVISION**  
**CIVIL SUIT NO 11 OF 2015**

**MARTIN LUTHER OCHIENG'OTIENO.....1<sup>ST</sup> PLAINTIFF**

**MILDRED ACHIENG'ODHIAMBO.....2<sup>ND</sup> PLAINTIFF**

***VERSUS***

**DANSTON MUTSOTSO.....DEFENDANT**

**RULING**

The Applicants through their advocate filed an application under certificate of urgency dated 12<sup>th</sup> August, 2015 seeking orders on grounds;

1. An order was issued by the Court directing the Plaintiff's inter the remains of Gladys Akoth Otieno.
2. The Defendant with full knowledge of the existence of the order went ahead to process a burial permit for the interment of Gladys Akoth Otieno.
3. The Defendant refused to release the original burial permit to the Plaintiffs despite several requests further showing his disobedience to the Court order.
4. The Plaintiffs cannot proceed with the burial as ordered by the Court without the original burial permit in the Defendant's possession.
5. The Defendant will continue disobeying the Court unless this application is certified urgent and heard on a priority basis.

The Applicants through their advocate Mr. Odhiambo informed the Court that following the consent signed by all parties on 31<sup>st</sup> July, 2015, the Respondent/defendent did not release the Burial Permits for burial of the deceaseds **GLADYS AKOTH OTIENO** and **ROSEMARY LYNN AUMA**.

The defendant is alleged to be a stranger to the deceased. They lived together for only one (1) year, 2009 and after that the Respondent went to another wife and came back on learning the deceased died to live in her house

They did not formalize their union in any form of marriage under any legal system. The Applicants sought the burial permits from the Respondent as per the consent of 31<sup>st</sup> July, 2015. The Applicants sought the Court to order him to pay mortuary fees as he took the deceaseds to Kenyatta University Mortuary without involving the family of the deceaseds.

The Respondent/Defendant responded that he lived with the deceased from 2003 up to the time of her

death. They went and swore an affidavit at a lawyer's office but did not formalize their union under any system of marriage. He did not go to her family at home except he met her brother and sister. They did not have children but he took care of her late daughter Rosemary Lynn Auma. He stated he took the deceaseds to hospital when they were critically ill.

On their death he made a decision to take them to the nearest mortuary. On contacting the relatives instead of assisting; the sister came and collected the deceased's belongings from the house.

Since they recorded the consent on 31<sup>st</sup> July, 2015 the family of the deceased isolated him. He has not refused to hand over the burial permits. He produced both permits in Court. He asked the Court to reimburse him for all payments he made towards the deceaseds medical and other expenses.

The Courts finds that the deceased and the Respondent were not married under any system of law. The Court would presume marriage as their union was before the advent of **Marriage Act 2014** and the **Constitution 2010** but in the instant case, there is contest as to whether they actually lived together and for how long? They did not have children and therefore the presumption of marriage will not apply.

In the circumstance the Court makes the following orders;

- a. **The burial of the deceaseds GLADYS AKOTH OTIENO and ROSEMARY LYNN AUMA shall be by the Applicants at ALEGO SIAYA COUNTY.**
- b. **The Respondent shall forthwith release the burial permits of the deceaseds to the Applicants.**
- c. **The Respondent is at liberty to attend and participate in the burial of the deceaseds in Alego Siaya County.**
- d. **The Applicants shall settle the mortuary fees and burial expenses as they are solely incharge of all the deceased's belongings.**
- e. **The Applicants to be facilitated by Kenyatta University Funeral Home to obtain the bodies of the deceaseds upon payment for burial.**
- f. **Issues of terminal dues, payments etc shall be dealt with in another forum and/or after the burial/funeral of the deceaseds.**

**READ AND SIGNED IN OPEN COURT AT NAIROBI THIS 17<sup>TH</sup> DAY OF AUGUST, 2015**

**M. MUIGAI**

**JUDGE**

***In the presence of***

***Applicants and Respondents***