



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO.3 OF 2014**

**JACOB BLASTO OKUMU.....1ST APPELLANT**

**ROSELYNE ABUYA OKUMU.....2ND APPELLANT**

**MANASES OBONYO ADONGO .....3RD APPELLANT**

**DAVID KABILO .....4TH APPELLANT**

**JANE OKELLO NYAMUNGA .....5TH APPELLANT**

**VERSUS**

**CLARIS AUMA .....RESPONDENT**

**[Being an appeal from the Original Judgement and decree from Principal Magistrate's Court  
Winam by J. SALA (R.M.)**

**in PMCC No.109 of 2013.)**

**\*\*\*\*\***

**J U D G M E N T**

The deceased Lameck Kenneth Okumu Ngwara died on 6/10/13 and the remains are at Star Children's Hospital mortuary. The suit was filed at the Principal Magistrate's Court at Winam by the respondent sought a permanent injunction to restraint the appellants from removing and burying the remains, and an order that she be allowed to remove and bury the remains on a piece of land at Osiri Sub-Location of South West Kisumu Location in Kisumu West District. The appellants defended the suit on the basis that, although the deceased had married the respondent under Luo customary law in 1965 and got four children she had in the mid 1970's left and remarried and got other children and therefore could not be allowed to bury the remains. Their case was that she had subsequently set a home without the participation of the deceased, and that even when the deceased was unwell she had not taken care of him. Lastly, that the deceased had, in any case, expressed the wish to be buried next to the grave of the late Hilda Atieno Okumu whom he had married following the departure of the respondent.

The learned Resident Magistrate received the evidence of the respondent who called three witnesses and the 1st appellant (through whom the appellants testified) who called five witnesses. The evidence was considered, as were the submissions by counsel, following which there was determination in faovur of the respondent. The appellants were aggrieved and filed this appeal.

This court is entitled to re-assess and re-evaluate the evidence that was tendered before the trial court to

be able to reach its own conclusions. In the case of **PETERS .V. SUNDAY POST LTD [1958] E.A.424** it was observed that, while the appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial court should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, if it is shown that the trial court has failed to appreciate the weight or bearing of the circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate to so decide.

It should be noted that the appeal was prosecuted by Mr. D. Otieno for the appellants and defended by Mr. Odhiambo for the respondent. Each side filed written submissions on which the court was addressed.

There was no dispute that the deceased married the respondent in 1965 under Luo customary law. The deceased gave 13 cows in brideprice to her parents. He set up a home for her at Osiri. In 1970 the two separated following a misunderstanding. The respondent went to stay in Nanyuki. The deceased took another wife (the late Hilda) and set up a home for her. At the time of the separation, the deceased and the respondent had four children (including their fourth born Tony Ochieng Okumu (DW6) who is one of the appellants). During the separation she got six other children. It was her case that they were got with the deceased but the appellants' case was that the deceased did not father them.

The respondent's case was that she returned to Osiri in 1999 (after 29 years) and reconciled with the deceased who set up a home for her. This is where she wishes to bury him. The appellants' case was that she returned from Nanyuki in 2006 following the death of one Bob Britton who had remarried her following the separation. She then bought a piece of land on which she settled without the participation of the deceased. They denied that there was any reconciliation.

The deceased's second wife (Hilda) died in 1999 and was buried by the deceased on his piece of land where he had settled her. The appellants produced a document (Dexh.3) which they said was written by the deceased indicating that he wished to be buried next to Hilda's grave. In the document, the deceased indicated that he could not be buried in the home that the respondent had set up as that would go against tradition. This was because the respondent (and her daughter) had bought the land and that no rites had been performed to enable his going there, let alone being buried there. Both sides agreed that the document, although not dated or witnessed, was in the handwriting of the deceased. It was admitted in evidence without objection. It was produced by the 1st appellant Jacob Blasto Okumu (DW1). He is the son of the deceased by Hilda. This is how the trial court dealt with this document:

**“The defendants gave /produced defence Exhibit 3, a document in which details how the deceased wishes to be buried.**

**The plaintiff did not oppose production of the same; and even admitted that the document bears the handwriting and signature of the deceased Lameck Okumu.**

**However, Defence exhibit 3 bears no date and has no witnesses to it. The court was informed that the deceased left the document in the hands of a certain church pastor. The said church pastor was however not called as a witness or to shed more light on the document.**

**No one has appeared before the court to give evidence that they were present when the deceased wrote the document.**

**In the absence of the above the court shall not consider the undated and unwitnessed document as a will or last wishes of the deceased.”**

I agree with Mr. Otieno that once the respondent admitted that the document was in the deceased's handwriting and signature, it was not necessary to call the said pastor or witnesses to prove either its fact or the contents. In the document, the deceased expressed the wish to be buried next to Hilda, and indicated that he did not wish to be buried on the land bought by the respondent. The trial court should have taken the document as supporting the testimonies of DW2 (Migi Ondiek), DW3 (Samuel Odara Aloka) and DW6 that the deceased had declared to each separately that he wished to be buried next to

Hilda. In the Court of Appeal decision in **EDWIN OTIENO OMBAJO .V. MARTIN ODERA OKUMU, Civil Appeal No.209 of 1996 at Nairobi**, it was observed that when a dispute arises as to whether the plaintiff should bury the deceased, the court must look beyond the fact of marriage. The court must look at the circumstances of the case, the conduct and attitude of the plaintiff towards the deceased and see whether she/he then deserves the orders she/he seeks. This decision is important because the only reason why the trial court in the instant case allowed the respondent to bury the deceased's remains was that the two were still legally married and had not divorced.

In **APELI .V. BULUKU [2008] 1 KLR (G&F) 873** the Court of Appeal was dealing with a burial dispute under customary law when it held as follows:

**“In cases such as this, the most important rule is that the wishes of the deceased person, though not binding, must, so far as possible, be given effect to.”**

The only time that a court will not enforce the wishes of the deceased is where such wishes are clearly offensive, illegal or unenforceable. The trial court refused to rely on the document by the deceased because it did not amount to a will. However, as was stated by the Court of Appeal in the decision above, there is no property in a dead body that can be the subject of succession proceedings. It is in such proceedings that a will can be an issue.

What was the respondent doing in Nanyuki for the 29 years (according to her) or 36 (according to the appellants) that she was away from the deceased? The evidence of DW6 was that when his parents separated his mother (the respondent) left him and the other three children with the deceased and in the care of the stepmother (Hilda). When he (DW6) later went to Nanyuki to visit her, he found she was staying with Bob Britton, a white man. She had six children who had each a black complexion but they referred to Bob as “Daddy.” When the respondent testified, she stated that Bob was her business partner who was “also her friend.” She stated that they stayed separately but that he was to marry her. When he died in 1999 there was an announcement in the Daily Nation (Exhibit 2) which indicated him as the husband of the respondent and father of the 6 children. The respondent testified that the advert was not by her but by friends. It would appear that the friends knew the respondent and Bob to be married.

It was not in dispute that when the respondent took an identification card in 1996 she did not take the deceased's (Lameck's) name. She used her maiden names in the card.

The respondent testified that she helped take care of the deceased's hospitalisation and paid his bills. When he died, she said, she took the body to the mortuary. This evidence was cross-examined. It led to her admission that she had no hospital or mortuary document, invoice or receipt to support the testimony. The 1st appellant and DW6 denied that she played any role in these activities. The 1st appellant produced in evidence hospital documents, invoices and receipts to show that he was responsible for the treatment and hospitalisation of the deceased. He produced receipts to show that he was the one who had taken the deceased's body to the mortuary upon his death. There is no dispute that the respondent is a businesswoman and a person with means. There was sufficient evidence to show that she did not at all take care of the deceased.

If the respondent did not care of the deceased's hospitalisation or treatment, was there any reconciliation between her and him? Is it true, as she alleged, that when she returned from Nanyuki she reconciled with the deceased? Did the deceased accept her back and build her the home where she wishes to bury his remains?

There is no dispute that the deceased had the land on which he buried Hilda but also several other parcels. The land on which the respondent seeks to bury the deceased did not belong to him, and neither was it given to her by him. It is a parcel she bought from another person. She has a sale agreement but the seller has not yet formally transferred it to her. The land where the deceased wished to be buried was in his name. The appellants wondered why, if there was reconciliation, the deceased had not given the respondent land, or bought one for her.

Further, the respondent stated that the reconciliation involved only the two of them: her and the deceased. She stated that no elders or parents were involved. However, her witnesses (PW2 Nashon Oguma Okumu and PW3 Isaya Adhaya Ogul) each testified that he was involved in the reconciliation which was an elaborate ceremony. There is a material contradiction between the respondent's evidence and that of her witnesses on this point. But more important, the document declaring the deceased's wish as to burial place denounced the respondent's land. It declared that the deceased wanted nothing to do with that land or the home she had built on it without his participation or the performance of customary rituals. In short, the evidence tendered did not support any form of reconciliation between the two.

Looking at all the evidence, it was clear that as between the deceased and the respondent there was no marriage left. For all purposes and intents, each party had moved on by the time the deceased died. The respondent had following their disagreement and separation gone to marry another man and got 6 children away from the deceased. After her man died she returned to Osiri, but not to the deceased. She bought her own land on which she put up a home. When the deceased was unwell she did not take care of him. Her conduct and general attitude towards the deceased would not support the orders that she was seeking before the subordinate court. In other words, the court did not have any evidential basis to grant her the prayers that she sought and got.

These are the reasons why I allow the appeal with costs. The judgment and decree of the lower court are hereby set aside and in their place there shall be an order dismissing the suit with costs.

For the avoidance of doubt, the appellants, and in particular the 1st appellant and DW6, shall bury the remains of the deceased next to the late Hilda's grave.

**Dated, signed and delivered this 18th day of February, 2014.**

**A. O. MUCHELULE**

**J U D G E**