



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**(MILIMANI LAW COURTS)**  
**CIVIL SUIT NO.61 OF 2012**

PATRICK ODERA ALILA.....1<sup>ST</sup> PLAINTIFF

NICHOLAS STEPHEN OTIENO NYASEME.....2<sup>ND</sup> PLAINTIFF

VERSUS

ROSE NYASEME.....1<sup>ST</sup> DEFENDANT

MOSES OUMA.....2<sup>TH</sup> DEFENDANT

**RULING**

The plaint No. 61 of 2012 dated 14/2/2012 was filed with one plaintiff against 7 defendants.

The plaintiff has now been amended to include 2<sup>nd</sup> plaintiff and leaving only first defendant and 7<sup>th</sup> defendant.

On 23/2/2012 the plaintiffs filed a notice of motion of the same date seeking orders restraining by temporary injunction removing, transporting or in any manner so dealing with the body of Joel Nyaseme Alila (deceased) now lying at Montezuma Funeral Home other than for burial at Bandani village Kisumu County and an order be issued that Nicholas Stephen Otieno Nyaseme be allowed to participate in any deliberations decisions and consultations regarding the manner and place of the burial of said Joel Nyasame Alila deceased and that order be made for the burial of Joel Nyaseme Alila (deceased) be done at no other place other than Bandani village within Kisumu County. On the grounds that:-

- (1) The applicant is the eldest son of Joel Nyaseme Alila deceased
- (2) The respondents have failed and or refused to involve his eldest son in the funeral arrangements of his deceased father.
- (3) The eldest son of deceased has an inherent obligation under the Luo Customary Law and practices to be involved in his father's rites.
- (4) The respondents are now attempting to inter the body at Karen within Nairobi against Luo Customary Law and practices.

The evidence is in the supporting affidavit and replying affidavit of the respondent.

The plaintiffs are Patrick Odera Alila brother of late Architect Joel Elija Nyaseme (deceased) 1<sup>st</sup> plaintiff and Nicholas Stephen Otieno Nyaseme eldest son of the deceased.

The defendants are named as Rose Nyaseme as 1<sup>st</sup> defendant and widow of deceased and Moses Ouma now 2<sup>nd</sup> defendant and a brother of 1<sup>st</sup> defendant.

The deceased is the husband of the 1<sup>st</sup> defendant and a brother in law of the 2<sup>nd</sup> defendant. The second defendant informed the court that he had gone to pay condolences only in the deceased home and had no other interest in this suit whatsoever.

This application is brought by the plaintiffs as an interlocutory matter seeking the orders stated above on the grounds that the deceased was the head of Alila family before his death. He was from a polygamous family of 4 wives and one husband. Deceased's mother was the first wife of the father who is now deceased. All the deceased in that family have been buried in that family land. The family wishes that the deceased be buried in that village.

The plaintiffs and defendants are all from Luo tribe and they practice Luo Customary law and practices. The deceased was born a Luo and he remained a member of Luo Community.

The deceased left no written will and it is not true that he left any oral instructions to anyone. He had no history of illness to warrant him to take such consideration at all.

On issue of law applicable, despite that there have been in recent past burial cases in our courts the new Constitution has not made any provisions about burial. However the Luos wish to exercise their wishes as Luos that the remains of deceased be buried in Bandani village Kisumu County.

The property is freehold and it is in the name of deceased. The new Constitution does not give any guidelines but the preamble talks of "we the people ..... proud of our culture" shows the commitment to tribal culture. Article 44 (1) states every person has the right to use the language and to participate in the cultural life of the persons choice. The plaintiffs have brought this case in that spirit.

Article 45 4(b) empowers parliament to make laws that support family and Section 2(4) states any law, including customary law that is inconsistent with this Constitution is void to the extent of such inconsistency....."

There is the judicature Act Cap.8 laws of Kenya which is not amended yet. It sets out under Section 3(1) mode of exercising the jurisdiction of the courts.

The High Court and Court of Appeal and all Subordinate Courts shall exercise jurisdiction in conformity with

(a).....

(b).....

(c).....

(2) shall be guided by African customary law in such cases in which one or more of the parties is subject to it so far as it is applicable and it is not repugnant to justice and morality or inconsistent with any written law and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.

That where the jurisdiction of African Customary Law is to be found. The parties have submitted list of authorities from each side and it is clear the courts have exercised the jurisdiction in customary and burial disputes.

This being an interlocutory matter the applicants seek orders to maintain status quo pending the hearing and determination of this suit.

The court is aware that a dead body is perishable and cannot be kept pending burial indefinitely.

In the circumstances the court has to examine if an injunction can be issued and the guidelines to be followed in issuing such order are to be found in the case of **Giella V. Cassman Brown** namely if the applicant has shown

- (1) a prima facie case with a probability of success
- (2) that he will suffer irreparable damage not to be remedied with payment of damages. There was no will left directing burial in Karen within Nairobi. The issue of unwritten instructions of the deceased has to be proved at trial.
- (3) Is the balance of convenience in favour of the applicants. The wish of the larger family other than the wife and her children wish the deceased to be buried in Bandani village in Kisumu.

It is to be noted that the authorities submitted on both sides are in favour of the plaintiff. The widow has authorized his son Franklin Eric Odhiambo Nyaseme to swear affidavit on her behalf.

He swears that his mother and father got married on 19/6/1971 in Kisumu under the Marriage Act Cap 151 Laws of Kenya. They settled in Karen about 1992 after constructing a home on plot No. LR 12882/30 where the family has resided throughout.

He swears that the decision to bury his father was the expressed wish by deceased prior to his death. This expressed wish was not written which decision is now supported by widow and her children. The deceased was never actively involved in clan affairs. His clan is known as Kanywour which has not objected to the burying of deceased at Karen.

Regarding politics the deceased sought elective seat for Gem Constituency in Siaya. He regarded Gem as his ancestral home although he had established Karen home. Franklin swears that at the time of deceased death of his father he himself was in United Kingdom resident of 18 Mortimer Road, Hove East Sussex BN3 5 FG.

The deceased was described as having died at home by a Karen Hospital on 4/2/2012.

The deponent refers himself as first born son. But there is evidence that 2<sup>nd</sup> plaintiff is first son. They were Christian family. The first plaintiff is not a brother of deceased but a step brother.

The mortuary expenses for preservation of the dead body at Montezuma Monalisa Funeral Home stand at Ksh.65,000 at the time of swearing affidavit and court do order plaintiff to deposit the said sum.

The plaintiffs have not established a prima facie case to warrant granting orders and the balance of convenience tilts in favour of not granting injunction. The plaintiffs have not demonstrated any legal injury they would suffer if the deceased was interred in Karen. Dismiss the application he said.

Franklin was born on 28/1/1975 and Nicholas on 29/5/1969 therefore Nicholas is the first born in that family. Also the said Franklin resides in U.K. therefore Nicholas is the one available for family matters. In looking at the list of authorities submitted by parties firstly there is the case of **Virginia Edith Wambui –vs-Ochieng Ougo & Another (1882 – 88) IKLR** it was held that

- (1) Under the customs of the Luos the decision as to the place and manner of burial of a deceased person is essentially taken by the head of family with the assistance of other responsible family members.
- (2) Both plaintiff and first defendant had the right under Luo Customary Law to bury the deceased and to

decide, where he is to be buried but in case of disagreement the justice of the case demanded that the court make a direction as to place of burial.

However in **Otieno –vs- Ougo and Another** (No.2) Court of Appeal said

(1) It was established rule that an injunction is granted to preserve the subject matter pending the hearing and determination of the action.

(2) The object of granting an injunction pending appeal is to safeguard the rights of appellants and to prevent the appeal if successful from being nugatory.

The case of **Kaittany –vs- Kaittany** was referred to. The case of **Kandie & 2 Others –vs- Cherogony** it was held that the custom of Tugen demanded that a man must be buried by his father and family at his ancestral home.

It was also held that the proper place to bury deceased was his ancestral home.

**Otieno Ombajo –vs- Martin Odera Okumu** was in respect of Luo Customs where the Court of Appeal was of the view that in case of a breakup in marriage the court ought to look beyond marriage.

The first defendant has cited both Constitutions of Kenya, Judicature Act Cap.8 Cap 149 Laws of Kenya Legitimacy Act.

1. Otieno –vs- Ougo case
2. Kibaki –vs- Moi case
3. Edwin Otieno Ombajo –vs- M.O. Okumu
4. Sakina S. Kaittany
5. Dr. Christopher Muthini Mbatha –vs- Dr. Florence Mukii Mukita
6. C. O. Oduke & Another –vs- Samuel O. Wambi
7. Rachael Wairimu Kasuku & 2 Others –vs- John Sankale & Another
8. Oliver Bonareri Omoi & 5 Others –vs- Joseph Basweti Orogo
9. Njoroge –vs- Njoroge
10. Local Government Act

I have examined the Constitution on both copies. On page 82 of old copy there is provision against discrimination and Section 83 in the Constitution prohibits derogation from fundamental rights and freedoms.

As for Constitution of 2010 (27) (1) confirms equality before law and (3) women and men have the right to equal treatment including cultural and social spheres. Section 43 gives economic and social rights to all.

I have already referred to Section 44 on language and culture. I have also referred to the Judicature Act Cap 8 which gives the mode of exercise of jurisdiction in customary laws in our country. There is the Births and Deaths registration Act which is applicable at the full hearing of suit. **Otieno –vs- Ougo** I have also referred to where it was held “his clan takes charge of his burial.” It was also held “a widow has no right to bury her husband and she has not become head of family upon her husband’s death”. “A man cannot change his tribal origins.

In **Edwin Otieno Ombajo** I have already referred to above whereby court gives reasons for judgment. The court said at page 86 “we wish to observe that customary law like all laws is dynamic because it is not codified. Its application is left to the good sense of the judges who are called to apply it. .... it is worded the way it is to allow the consideration of individual circumstances of each case. **Kaityany & Another –vs- Wamaitha** is also referred to.

In the case of **Dr. Mbatha –vs- Dr. Mukita** the case of **Giella –vs- Cassman Brown & Co. Ltd** was referred to, the issue of principles of granting an injunction was considered. “The matters of burial are subject to deceased personal law which in this case customary law. In this case the court said

**“it is unlikely in the normal course of events he would have contemplated death and express wishes to where he wished to be buried. That is a matter to be proved in this case where there is no written instructions. “customary laws are matters of fact and must await trial of action”.**

On issue of irreparable loss there can be no compensation. However there can be an order for exhumation and reburial elsewhere. This would be a very cumbersome and distressing event and would cause great suffering to the family. In this case parties have not suggested reburial elsewhere. In that case the judge was of the view that it would be undesirable that a body remains in the mortuary for unduly long while litigants fight as to where and who shall bury the body.

There is also the case of **C.O. Duke and Moses J. Oyola –vs- Samwel Omino Wambi** where full hearing was conducted. Also the case of Rachel **Wairimu Kariuki and others –vs- John Sankale & Another** was heard in full.

In the case of **Oliver B. Omoi & Others –vs- Joseph P. Orogo** there was an appeal against the judgment of Magistrate. The court found that over 30 years the deceased was separated from the respondent.

The court allowed the appeal and ordered the burial in accordance with deceased wishes.

The case of **Njoroge –vs- Njoroge**. In this case there was an application for interlocutory orders Ojwang J held.

**“In Social Context prevailing in this country the person who is first in line of duty in relation to the burial of any deceased person is the one who is closest to deceased in legal terms.”**

The last authority is the Local Government Act Cap.265 this would be canvassed at the full hearing.

This is an interlocutory application. The parties wished to be heard at this stage first. The body of deceased is preserved at Montezuma Monalisa Funeral Home since an interlocutory injunction was issued.

Both sides of the suit have interest in the suit. The applicants seek to enforce Luo Customary rights entrenched the Constitution and to give honour to their relative now departed. The larger family would no doubt participate in the burial. In the Bandani village.

The Constitution grants any party aggrieved to approach the court for remedy. There is no dispute that the applicants are son and brother of the deceased. It is my view that the plaintiff have demonstrated a prima facie case to warrant issue of an injunction. There is no probability of the remedy of compensation in damages the nature of the case being what it is. Also the balance of convenience favour them. They hope to take the body to Kisumu County while the defendant intends to inter the body within Nairobi far from Kisumu.

After considering all the material placed before the court it is my considered view that the applicants are entitled to the orders as sought and I allow the application and grant all orders as prayed.

The parties shall arrange for urgent hearing of this case to avoid long delay.

No orders as to costs are granted. Parties to meet their own costs.

Orders accordingly.

**Dated and delivered this 29<sup>th</sup> day of March, 2012.**

**J. N. KHAMINWA  
JUDGE**