



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
Civil Case 143 of 2009

1. C O O1ST PLAINTIFF

2. M J O2ND PLAINTIFF

VERSUS

S O WDEFENDANT

JUDGMENT

A. Pleadings:

On the 22nd of September 2009, the plaintiffs filed a plaint wherein they described themselves as the brother and adopted son of the deceased **V J A Wi** (hereinafter referred to as “**Veronica**”), Veronica’s burial is the subject matter of this suit. The plaintiffs’ sued S O Wi, who is Veronica’s father in-law. Simultaneous with the plaint was filed a chamber summons seeking for a temporary injunction, restraining the defendant, his servants and/or agents from interring the remains of Veronica pending hearing and determination of this suit.

The court granted temporary order of injunction on the 23rd of September, 2009. The defendant filed his statement of defence on the 28th of September, 2009 followed by an amended defence and a counter-claim on the 17th of November, 2009. The plaintiffs filed a reply to the amended defence and a defence to the counter-claim on 2nd of December, 2009.

What ensued thereafter is a protracted case between the plaintiffs and the defendant on the other hand.

The plaintiffs’ were represented by Mr. K’opot and Mr. Amos O. Oyuko while the defendant was represented by Mr. Otieno C. O. Oyayo. The plaintiffs called a total of 5 witnesses and the defendant 3 witnesses.

B. Issues for determination:

Having considered the pleadings, the statement by various witnesses, the evidence placed before court, submissions by learned counsel for the rival parties and the authorities cited the court summarized the issues for determination as follows:

1. **Whether or not Veronica left a wish as to her place of burial.**
2. **If the answer is in the affirmative, the effect of the said wish vis a vis. Luo customary law on burial in regard to a married woman?**
3. **In the circumstances of this case, if, indeed Veronica left a wish to be buried away from her husband’s home, whether this offend Luo customary law?**
4. **Does the defendant have a duty to bury Veronica on his own account or that of his son?**
5. **Did the parties submit to arbitration? If so what is the effect of the arbitration award.**
6. **Who meets the mortuary and other burial costs.**
7. **Who pays the costs of the suit?**

C. Plaintiffs’ evidence

It is the plaintiffs’ case that Veronica was married to the defendant’s son **D O W** (hereinafter referred to as “**Denish**”) in 1990. The two were blessed with two sons, Fredrick (Fred) and Samuel (Sam), who are both deceased. The two children were born with a strange disease which the 1st plaintiff described as Cerebral palsy, autism and polio. The plaintiffs claim that the defendant and his family blamed Veronica for the condition of the two children. That since the birth of the two children Denish and Veronica’s relationship deteriorated as Denish left Veronica the burden of taking care of the children. Denish was involved in an accident in 1997. He was hospitalized in Aga Khan Hospital Kisumu and transferred to Kenyatta National Hospital in Nairobi, where Veronica stayed with him for a number of months. On being discharged Denish joined and lived with Veronica and the Children in Kakamega, where Veronica worked and resided. However, without consulting Veronica and in her absence the defendant took Denish away from the family home in Kakamega to Rongo and has since stayed with him keeping him away from his family and barring Veronica from visiting or taking care of him. The plaintiffs also claim that in the year 2001 and 2005 respectively when the couple’s children passed away, the defendant and his family did not assist Veronica with preparation for the burial of the children and in particular in 2005 at the burial of the second child, the defendant made derogatory remark about Veronica making it clear that Veronica was no longer welcomed and had no place in his home.

It is their case that the defendant and his family abused, looked down upon, ostracized and banished Veronica from the family home and as a result of the mistreatment, Veronica established a home in Kakamega and on many occasions made it know to

her family and friends of her wish to be interred on the said piece of land in Kakamega, in the event of her death. Veronica passed on following a road accident on the 10th of September, 2009. Although acknowledging Veronica was Luo by tribe and thus subject to Luo customary law, the plaintiffs contend that the marriage between Denish and Veronica was technically terminated and the defendant's attitude does not accord him the customary law right to bury Veronica and she ought to be interred according to her wish on her piece of land in Kakamega in accordance with the Catholic Church burial rituals.

The plaintiffs called **PW1 William Odera Ayila**, a free lance journalist who specializes in electronic media. **PW1** covered a function, where Veronica was feted by her friends upon her promotion to the position of a District Commissioner. The function took place on or about the 1st of August, 2009. The witness recorded the function and produced CDs and DVDs covering the same, at the request of a Mrs Margaret Odongo, the chair lady of Kakamega Women's Association. He played and produced one of the CD's in evidence. He testified that he heard and recorded Veronica's speech where in part she stated that in the event of her death if there is no other place to bury her, she should be buried in Kakamega and she should not be taken to Kamagambo (also referred to as Rongo).

PW2 Andrea Ngila Amolo chairman of funeral committee in Kisumu described himself as Veronica's friend. He testified that Veronica had told him that her mother in-law had stopped her from visiting Rongo and threatened that if she did, she would be killed. The witness attended the second child's funeral at Rongo. On the day of the funeral, he saw Veronica go to change clothes behind the house. He also heard the defendant use obscene language at the funeral and was ashamed by the same. He testified further that Veronica collapsed while speaking at her second son's funeral.

PW3 Wilfrida Odhiambo Osodo, an advocate of the High Court described herself as having been a close friend and a legal advisor to Veronica. She had known Veronica for close to a decade and as friends they visited each other both in town and in their rural homes. She did not attend the funeral of Veronica's first child but attended the second child's funeral. She testified that Veronica's relationship with her in-laws was bad and had deteriorated after they took her husband away. Veronica confided in her that her in-laws were cold to her as they blamed her for the fate of the children. She also stated that when Veronica's children died none of her husband's relatives, not even the defendant assisted in the preparation of the funeral and that, Veronica had contemplated burying the second child in a cemetery but the witness and other friends prevailed upon her to take the child to Kamagambo. The witness also testified that Veronica had at one point wanted to divorce her husband but the witness counseled her against filing a divorce suit due to Denish's medical condition. She saw Veronica collapse at the funeral of her second child. The witness took Veronica to hospital where Veronica would remain for a month. As a friend and legal advisor, Veronica had asked her in the event of her death to ensure that her remains are interred in Kakamega and not Kamagambo. She heard Veronica at the thanksgiving function in Kakamega repeat to her friends, including this witness, her wish to have her remains buried in Kakamega and expressly asked this witness to reduce the wish into writing, which the witness had not done at the time of Veronica's death. Veronica died 40 days thereafter.

PW4 C K Veronica's house help for several years, testified that the defendant took Denis from Kakamega while Veronica was away at work. She testified further that the defendant spoke badly at the funeral of the second child and did not visit Veronica while she was incapacitated in hospital immediately after the second burial. She also confirmed that Veronica had contemplated burying the second child at a cemetery but was prevailed upon not to. She stated that when Denish stayed with Veronica in Kakamega, two boys were employed to take care of him whilst he was there and when Veronica resumed work, one of the boys slept in the same room with Denish whereas Veronica moved to share PW4's and the children's room. The witness stated that Veronica was like a parent to her and they talked many things, including where Veronica would like to be buried. She stated that Veronica had told her that in the event of her death, she should be buried in Kakamega and at one point, Veronica pointed to her the exact place for her interment under a tree. The witness heard Veronica repeat the wish as to her burial place at the function in Kakamega, on the 1st of August, 2009.

PW5 Father C O O, the 1st plaintiff stated that he and Veronica shared a father but were born of different mothers. He informed the court that he was close to Veronica and they shared a lot. When Veronica gave birth to the first child who turned out to have a "strange" disease, she confided in him that her in-laws blamed her for the child's condition. He advised Veronica to try a second child which she did, however, when the second child was born, he too, had the same condition as the first child, which condition the witness described as cerebral palsy, autism and polio. He said that the relationship between Denish and Veronica thereafter got worse. The witness produced two letters & translated version of the same as Plaintiffs Exhibit 6 (a) & (b) and 7 (a) & (b), which letters had been written by Veronica to Denish, where she lamented of cruelty and neglect. He also testified that when Denish was removed from Veronica's care in Kakamega after the accident, Veronica was distraught and this removal marked the effective separation of the two. Having missed to attend the burial of the first child, on his next visit to Kenya for his normal vacation in 2001 **PW5** visited the grave of the said child in the company of Veronica. While at Rongo, he had a discussion with the defendant and was surprised by the defendant's attitude and utterances towards Veronica especially when the defendant remarked:

"... so it is true Veronica is a child of an adulterous relationship."

He stated further that Veronica told on 2 different occasions of her wish to be buried in Kakamega, and the mass the witness would celebrate at her burial ceremony. When he inquired why the burial would be at Kakamega, Veronica shared with him, her thoughts and feeling of having been shamed and demonized by the defendant and his family and the fact that her in-laws had taken Denish away from her and fought her over properties she acquired jointly with him.

When challenged in cross examination about his participation in the arbitration proceedings the witness confirmed having subjected himself to the same but stated that by participating in the arbitration proceedings he did not cede his right to prefer this matter to court.

In their submissions Counsel for the plaintiffs contended that the defendant's claim to bury the remains of Veronica is not borne out of a genuine concern for Luo customary law but a broader goal to administer Veronica's estate, for purposes of pursuing a claim arising from the fatal accident and to obtain her dues from the government since Denish is mentally insane. That to give the remains of Veronica to the defendant will be in total disregard to the wishes of Veronica and this will allow the defendant an opportunity to show spite to her even in her death.

Counsel for the plaintiffs further contended that Veronica's wish was exhibited by way of oral and electronic evidence. That the said wish was expressed to various people and was unequivocal, and to accord the deceased her wish, would amount to upholding her inalienable Constitutional right under S. 79 (1) of the Constitution. In this regard, counsel relied on **Apeli versus Buluku (1985) KLR, 777, Otieno versus Ougo & Another (1987) KLR 371, Peres O. Odero versus Elida Obonyo Odero & 4 Others, Kisumu HCCC Civil Appeal NO. 98 OF 2008.**

The plaintiffs' counsel admitting that the deceased was Luo and subjected to Luo customary law submitted that the wish made by Veronica was not in breach of the said customary law. They argued that indeed no evidence was adduced to show that the wish goes against Luo custom. Counsel relied on **Kimani Versus Gikanga (1965) E. A at 735.** Further that the defendant had expressly stated that if the Veronica had expressed such a wish he would abide by the same as he was not likely to suffer on account of custom, being a Seventh day Adventist

The plaintiffs' counsel also submitted that the relationship between Veronica and Denish was very tense unlike the picture created by the defendant that the two were a loving couple, as Denish did not give Veronica support in regard to their two sick children and when the defendant took Denish away in 1997 after the accident, while Veronica nursed him, this act, broke off the already strained relationship.

It was thus urged that, the court ought to consider the marriage between Veronica and Denish to have been a statutory marriage as no customary rituals were performed, and as such there is no customary duty to bury on the part of the defendant, secondly that the relationship between Veronica and Denish, the defendant, and his family was strained and due to their conduct and attitude, they did not deserve to bury the remains of Veronica and in this regard counsel relied on the following cases:- **Oganja Vesus Onyango and Another (1987) KLR at 628, Edwin Otieno Ombajo Versus Martin Odera Okumu – Civil Appeal NO.209 of 1996, Mary S. Awino Ayoki & Another Versus Hellen Akello and 2 Others – HCCC NO. 61 of 2008 and Kiplagat Korir VERSUS Dennis Kipngeno Mutai Kericho – HCCA NO. 52 OF 2005.**

Counsel further argued that S. 3(2) of the Judicature Act confers upon the court the discretion to apply customary law upon consideration of several factors, and that the application of customary law is not automatic.

The plaintiff's counsel further contended that since Denish was declared mentally insane and the court having not appointed a guardian to act on his behalf, his personal interest cannot find audience in court.

Lastly, counsel distinguished the case before court from all previous cases, this being a case where a female Luo chose her burial site to be on a piece of land registered in her name, rejecting burial at her husband's family home.

C. Defence evidence

The defendant claims that as Veronica's father-in-law he had a customary right to decide Veronica's burial place and he desires to bury her at Kamagambo in Rongo District, which is the family home, where Veronica and his son Denish established a home and where their two children are buried. The defendant's claim under Luo customary law is that, a married wife who has not been divorced is buried by the husband's family. The defendant defended the suit and filed a counter-claim as the head of the family. It is his case that the claim by the plaintiffs' cannot stand as they have no right or duty under the said law to bury Veronica. Although admitting that Veronica and Denish were separated for 12 years, the defendant maintained that the two loved each other and that despite his son's health, Denish would like his wife buried at home. The defendant denied the allegation that he mistreated Veronica during her life time or barred her from visiting the family home. He maintained that Veronica stayed away because of her busy schedule at work.

The defence case is that the Veronica up to the time of her death remained married to Denish, who is still alive, and the two were never divorced. Further that the law governing the parties is Luo customary law and the defendant claims the right to bury, under the said customary law. In his counter-claim the defendant also claimed damages and costs of this suit.

DW1: Japheth Angila Atinga, is a businessman in Rongo and a cousin to the defendant. He also described himself as the family spokesperson. He is 70 years old. He testifies that under Luo customary law, the defendant is the one to decide where Veronica is to be buried. The witness attended Veronica and Denish's wedding in Nairobi in 1990. He said that dowry was paid in accordance with Luo customary law. He described Denish as being on a wheelchair, as he cannot walk or stand and talks very little, but that Denish knew his wife was deceased. He also said that upon receiving news of Veronica's death the family began preparations for the burial. A sum of Ksh 208,400/= was raised, part of which was spent after the defendant won the arbitration. He gave a list of expenditure which included Kshs 100,000/= spent on the trips made to court by the family. On cross examination the witnesses stated that Denish talks loosely, is mad and even insults his father. The witness was not aware

that Denish had been removed from Veronica's home in Kakamega. His wish as a family member is to bury Veronica in Rongo under Seventh Day Adventist rituals. He stated in cross examination that even if there is a wish left by Veronica for her burial elsewhere other than Rongo, he would not change the place of burial.

DW2: Tom Onyango Onindo, is the son of the defendant. He is a High School Teacher. He knew Veronica since 1990. He informed the court that Denish was a Civil Servant, who worked in Iten for several years and immediately prior to the accident had been transferred to Nairobi. At the time of Denish's accident Veronica was a D. O. in Kakamega. The witness gave account of his brother's treatment in Nairobi and South Africa. On cross examination the witness confirmed that the family used his vehicle to court but not for free, as he had hired the same to the family. He was not aware whether his brother was compensated due to the accident. He did not participate in the funeral arrangement of the first child but said that he received the body when it arrived at home. He also confirmed that he did not participate in the funeral of the second child but was at home for the burial. He saw Veronica faint at the funeral of the second child, however he did not thereafter visit her in hospital. He was not aware that Veronica had expressed a wish of where to be buried. Of his brother Denish he described him as being totally insane, an invalid and may not know what was going on around him. He stated in evidence that if Veronica had a wish, as to her place of burial he would honour the same.

DW3: S O W - the defendant, is the father of Denish and Veronica's father-in-law. He informed the court that the two celebrated their marriage at the St. Paul's church in Nairobi; he also took cattle to Veronica's home in fulfillment of Luo customary marriage. He produced two receipts as Defence Exhibits 8(a) and (b) issued when he purchased the cattle for dowry. His Wish is to bury Veronica next to her children in Rongo, in accordance with Luo customary law. He has to call elders so that he can pick a site for the burial. He did that for his grandchildren and wanted to do the same for Veronica. He did not know of Veronica's wish to be buried in Kakamega He claims to represent the interest of his son who is sick and his own as the head of the Wambi family. As proof of Denish's condition he produced a medical report issued to him by a doctor in South Africa where he accompanied Denish for treatment. The report is marked as **Defence Exhibit 7(c)**. He also produced another report by a Doctor Mr. Martin which was produced as **defence Exhibit 7(d)**

On seeing the C.D of the function held in honour of Veronica on 1st August, 2009 he said that he understood Veronica to say that if there was no other place she could be buried in Kakamega, but since there was a burial place to bury Veronica in Rongo then she could not be buried in Kakamega. He admitted having had a disagreement with Veronica about Denish's treatment while Denish lived in Kakamega. However, he stated that the issue was resolved. He insisted that he had a good relationship with Veronica, they were close and she confided in him. Although he knew Veronica was taken ill after the burial of her second child, he did not visit her. In cross examination the defendant said that he is a Seventh Day Adventist and does not believe in spirits or curses or that the dead can come to haunt. Asked why Veronica did not visit his home, he said it was because she was busy. He denied that he wanted Veronica's body in order to gain financially as Denish's keeper.

In his submission, the defence counsel contended that prior to the filing of the suit, the 1st plaintiff together with the defendant and others not party to the suit, submitted to arbitration and were bound by the arbitration award. That it was not possible to set aside the arbitration award, unless all parties to the same consented which was not the case here. Further that no demand notice was issued to the defendant before the suit filed.

Counsel further submitted that the deceased's wish was not categorical and unequivocal, as there was a pre-condition to the said wish. And that Veronica was bound by Luo customary law and even if there was such a wish, the same was contrary to Luo customary law and as such the same ought not to be considered. That a Luo married woman is buried by the husband and his kin. In support of this assertion the defence relied on **Otieno V Ougo & Another in HCCC No. 4873 of 1987, Njoroge V Njoroge 330 of 2004 and Maagu V Mathew HCCC NO. 3534 of 1982.**

D. Analysis, findings and conclusion

Veronica was born on 2nd July 1961 and lived part of her early life in Nairobi. She attended St. Ann's Primary School and Arya Girls both in Nairobi. After her secondary education, she was employed by the Teacher Service Commission (TSC) as a teacher in Narok at Ilimitiok Primary School. There after she proceeded to India for further studies at Harbury Women's College where she did her undergraduate. She then proceeded to Marajinada University where she pursued a master's degree in economics. She returned to Kenya in 1989 and was employed in the office of the President, where she worked raising through the ranks. She worked as a D. O. in Kakamega for 14 years in different divisions and was later transferred to Kisumu, Winam and Nyando as D. O. On the 2nd of June, 2009 Veronica was promoted to the position of a District Commissioner. She met her untimely death on the 19th of September, 2009.

On the 31st of March, 1990 Veronica married Denish at the St. Paul's Catholic Church in Nairobi. Veronica was a Catholic and Denish a Seventh Day Adventist. Six months after the wedding their first child, a boy named Fredrick (Fred) was born. In 1994 they got their second child, named Samuel (Sam). Both their children were sick with what **PW5** described as cerebral palsy, autism and polio. In 1997, Denish was involved in an accident that left him physically and mentally incapacitated. It was the evidence of **PW3 & PW5** that the marriage between Veronica and Denish had problems. **PW3** an advocate of the High Court of Kenya, who described herself as a close friend and legal advisor to Veronica had this to say of Veronica's marriage:

“She had normal wear and tear of marriage.”

PW5 on his part stated:

“Upto the time Fred had not been diagnosed with the strange disease all was well. When Fredrick was diagnosed with the strange disease, the attitude of Denish changed, it was very negative. I also felt unwelcome. My sister kept saying that they blamed her for the child's condition. They were saying she was possessed with evil spirit.”

Veronica's in laws seem to blame her for the condition of the children. So did Denish. When she got a second child with a condition similar to the first child this worsened her relationship with Denish. He rarely spent nights at home and left the burden of bringing up the children to Veronica. The two children were taken to Germany for treatment but doctors there advised that the children's condition was irreversible; this information made the relationship between Denish and Veronica worsen further. Plaintiffs' Exhibit 6 (a), (b), 7(a) & (b), letters written by Veronica to Denish dated 2nd May, 1995 and 2nd May, 1996 are a clear indication of a strained marriage. The 1997 road accident was serious it left Denish mentally and physically impaired. Veronica attended to him while he was hospitalized at Kenyatta National Hospital for many months. Upon being discharged, he joined Veronica and the children in Kakamega, where Veronica worked and resided. In 1997, the defendant in the company of **DW2 Tom Onyango Onindo**, removed Denish from the care of Veronica and took him to Rongo where he has been ever since. It is evident that since then if there was any semblance of a relationship between Veronica, Denish, the defendant and his family, this was completely severed. Veronica led a life of her own, so did Denish, under the care of his father. Fred and Sam died in 2001 and 2005 respectively. They were both buried at the defendant's home.

The defendant and other relatives from his side did not join Veronica in the preparation of the children's burial before their remains arrived in Rongo. At the second child's burial, while addressing mourners, the defendant used derogatory words against Veronica, who was affected and while addressing mourners she fell and collapsed on admission in hospital she was found to have gotten a stroke and was hospitalized for a month at Florence Hospital in Kisumu. Neither the defendant nor his family visited Veronica at the hospital or at all thereafter.

Veronica purchased a piece of land in Kakamega; being **Butsoso/Shikoti/5889** which she registered in her name. In it she built a house where she is said to have lived whenever not at her place of work, in the last 8 years of her life. It is the plaintiffs' case that Veronica settled in Kakamega, where she built a home and where she wished to be interred in the event of her death. She also asked that in the event of her death for the 1st plaintiff to perform burial rites of the Catholic Church which she belonged to. She had expressed to the 1st plaintiff, the homely he was to conduct at her burial ceremony. **PW1, PW3, PW4** and the 1st plaintiff all bore testimony to the said wish. **PW1** produced a C.D and played it as part of the plaintiffs' evidence of Veronica's speech during the thanks giving party that her friends hosted on the 1st of August, 2009, where she repeated the wish to have her remains interred in Kakamega and not Kamagambo.

The defendant on the other hand denies that Veronica had left a wish to be buried at Kakamega and contends that if there was such a wish, it was not unequivocal as indeed there is place to bury her other than Kakamega. That to bury her in Rongo would be in accordance with the personal law of the deceased which is Luo customary law. The defendant claims that customarily the right to bury Veronica rests on him and does not lie with the plaintiffs. It is the defendant's case that Veronica and Denish remained married up to the time of Veronica's death and it is his wish therefore to bury Veronica at home next to her children. The parties are in agreement that Veronica was a Luo by tribe and bound by Luo customary law. They also agree that she remained married to Denish. The parties are also in agreement that Veronica and Denish were separated for the 12 years preceding her death. Denish stayed with his parents at Rongo, while Veronica stayed at various places where her job as an administrator in the government took her including Kakamega, Kisumu, Nyando and Rachuonyo. The parties are also in agreement that there were arbitration proceedings prior to the filing of this suit where the 1st plaintiff and the defendant were a party.

The parties, however have different understanding as regards the Luo customary law on burial in relation to a married woman who stayed away from her husband's home for a period of 12 years preceding her death. The parties are also not in agreement as to whether Veronica established another home in Kakamega away from Rongo where Denish and his people lived. The parties do not agree either as to whether Veronica left an unequivocal wish as to her place of burial.

The 1st plaintiff and the defendant alongside other parties submitted to arbitration. The parties in the arbitration were:- claimants, **S O W, W O W, D O A** and **J A A**. The respondents were:-**Edwin Argwings Onginjo, Charles Onyango Oduke, Matthews Odhiambo Asuna and James Odhiambo Oduke**. It is to be observed that only the 1st plaintiff and the defendant among the said persons are parties to this suit. Most of the witnesses in the arbitration proceeding gave evidence for the rival parties in this suit. On the 13th of November, 2009, the advocates for the parties, that is ; **K'opot & Co. Advocates** for the plaintiffs and **Otieno C. O. Ayayo & Co. Advocates** for the defendant, filed a consent letter requesting the contents of the said letter be recorded as orders of the court. Paragraph III of the consent letter read in part as follows:

“That the plaintiffs' application dated 6th October, 2009 be and is hereby settled in the following terms:

(a) That the parties agreed to set aside the arbitration award dated the 20th September, 2009 and the terms of the agreement for reference to Arbitration dated the 18th of September, 2009 are accordingly varied in so far as it made the award final.”

The contents of the above mentioned consent letter were adopted as orders of the court on the same day the 13th of November, 2009. Subsequently, parties appeared before Mwera J on the 27th of November, 2009 and 30th November, 2009 where both counsels confirmed that the arbitration award had been set aside through filing of the said consent letter. The court however, varied one aspect of the consent letter requiring evidence of witnesses be taken a fresh. The parties were in agreement with the variation.

In his submissions the defence counsel has made an attempt to discredit the consent letter on two points, firstly, that not all the eight parties to the arbitration are party to the current suit. Secondly, the plaintiffs did not disclose that the agreement signed by the parties prior to the arbitration was binding.

The consent letter was signed by both lawyers on record for the parties. It set aside the award and varied the agreement signed

prior to the arbitration to the effect that the award was not final. In the presence of counsels on the 27th November, 2009 this court directed that the matter do proceed for hearing and witnesses do give evidence afresh. The defence counsel raised no objection at that stage.

The court views the prime movers of the proceedings before it now and indeed the arbitration as the first plaintiff and the defendant, the others appear to be their supporters. The defence counsel cannot now be heard to rely on the arbitration proceedings that he was a party to setting aside and an agreement he varied. The court therefore inevitably, finds that, by consent of the parties, this court on the 13th of November, 2009 set aside the arbitration award and the same is therefore of no consequence to these proceedings.

The plaintiffs through **PW1 William Odero Agita**, produced by way of evidence a C. D. & a DVD covering a thanks giving party in honour of the deceased held at Situange hotel in Kakamega on or around the 1st of August, 2009. The C.D was played in court , it covered the speech made by Veronica on the said day. The said CD was also transcribed and the transcription availed as evidence.

The plaintiff's case is that Veronica left a wish as to her place of burial and they relied on the CD and other testimonies in support of the assertion. The CD covered Veronica's speech where she stated in part as follows:-

“-- within here there are learned friends but one learned friend has left. But I want you to write a will and I will sign it. Stating very well that should a time come when God calls me to rest, if I will not have any land anywhere, peleka mimi pale KK and I believe, I want to say that what you are doing to me today, make sure it is worth till I go to the grave if you are still alive. Hapana peleka mimi Kamagambo. You saw what I went through --“(emphasize mine)

PW3 – Wilfrida Adhiambo Osodo, an advocate, a legal advisor and a friend of Veronica's stated in evidence that Veronica told her that she had left the home of her in-laws for good and in the event of her death; her friend should ensure that she is buried in Kakamega. **PW4** a house help of Veronica for several years on her part also stated the same, that the deceased did not want to be buried in Rongo. She was also at the thanks giving party where she heard Veronica repeat the same. **PW4** went further to state that Veronica had pointed to her the exact place of her interment , under a tree, on the said land in Kakamega. The 1st plaintiff on his part also testified that Veronica had expressed to him the wish to be buried in Kakamega severally. He stated that Veronica first talked to him of her wish on 5th April, 2008 while he had come to bury one of their sisters – Lucy Atieno Odhiambo. The second time she spoke of her death and place of burial was on the 27th of June, 2009 during the memorial and unveiling of the cross of the said Lucy Atieno Odhiambo. He stated that on both occasion she asked him to preside over her funeral and if he will not be available to send the homely (preaching text).

Based on the evidence above, the plaintiffs urged the court to accord the last wish of the deceased. It is their case to accord the wish will serve the ends of justice, more particularly as the defendant and members of his family had **“ostracized, despised, rejected, abused and separated the deceased from her husband.”**

According to the defendant the is not aware that the deceased left a wish stating where she ought to be buried. In reference to the speech in Kakamega referred to by the plaintiffs, it is defendant's submission that the wish was ambiguous, not categorical and/or unequivocal.

DW1, J A A the secretary of the Wambi family said that the family was not aware of the wish by Veronica and even if he knew of the same, he would still go with the wish of the family to bury the Veronica in Rongo. **DW2 – Tom Onyango Onindo** stated that he was not aware of the wish by the deceased but were it to turn out that there was such a wish, he would abide by it. The defendant on his part stated that the deceased did not express to him her wish to be buried in Kakamega and that Veronica knew that in the event of her death she would be buried in Rongo. He denied that Veronica had in her speech at the function of the 1st of August, 2009 had said that she should not be buried in Rongo in the event of her death. The defendant maintained that his wish and that of his family was to bury Veronica in Rongo and being the father in-law he had the right to bury her as his son Denish is sick.

The courts have held that, wishes of a deceased person, although not binding, must as far as possible be given effect to. That as it may, this court has a duty first to establish whether or not Veronica left a wish,

The **PW1, PW3, PW4** and **PW5** all attested to Veronica's wish. The court finds them to be truthful witnesses and has no reason to doubt their testimonies. **PW1** went further and produced a CD of the function where Veronica expressly stated that she wished to be buried in Kakamega, if God called her to rest in the event that there was no other place to bury her. In the same speech she stated **“Apana peleka mimi Kamagambo”** loosely to be translated do not bury me in Kamagambo. Witnesses have referred to Kamagambo and Rongo interchangeably to refer to the defendant's home. The court therefore finds that Veronica indeed left an unequivocal wish to be interred on her piece of land in Kakamega in the event of her death.

Having established that Veronica left a wish the court will considered the local and recent position taken by our courts vis a vis the dying wish of a deceased. In this regard the court will consider the common law and customary law positions taking into account the peculiar circumstances of this case.

It is undisputed that for 12 years Veronica did not live with her husband. She did not visit the home where she was married in Kamagambo, save when she returned in difficult circumstances in 2001 and 2005 to bury her children, and once or twice over the years. In **Edwin Otieno Ombajo and Martin Odera Okumu – Civil Appeal No. 209 of 1996**. The Court of Appeal stated that the right to bury the body of a married woman under Luo customary law ordinarily rests with her husband although the said right is not absolute. The court was also of the view that S. 3(2) of the Judicature Act allows the court discretion to decide when to apply customary law. S. 3(2) of the Judicature Act stipulates:-

“ The High court, the Court of Appeal and all subordinate courts shall be guided by African Customary Law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law and shall decide all such cases according to substantive justice without undue regard to technicalities of procedure and without undue delay.”

The above section requires that while applying customary law, the court must ensure that the same is not repugnant to justice and morality, the court is also requires to decide the case based on substantive justice.

The defendant strongly contended that as Denish is sick, as the head of Wambi family, the right to bury Veronica rests on him. It is not disputed that Denish is sick both mentally and physically. Doctors **Patrick Akuku Okoth** and **Chamaine Gordon** each prepared a medical report clearly setting out Denish's medical condition. The reports were produced as defence exhibit 7(b) & (c) respectively.

Dr. Akuku in his report dated 15th March, 2000 described the permanent disability suffered by Denish as:-

1. **Slow mental reaction**
2. **Irritable**
3. **Lack of concentration**
4. **Recurrent epilepsy**
5. **Weakness of both lower limbs**

Mr. Chamaine Gordon gave a neuro psychomedical report dated 20th May, 2003 and had this to say in part:

“Mr. Onindo's concentration is defective --

Mr. Onindo scored below the average on all these tests --- according to Lezak (1995) this is an indication of brain damage.”

The condition as above assessed was confirmed by people close to Denish. The defendant stated:-

“Denish is in a wheel chair. He had a brain injury.”

DW2 Tom Onyango Onindo:-

“My brother is totally insane; he is invalid, totally mad. He does not know what is going on.”

From the pleadings on record the defendant has defended this suit and filed a counter-claim on his own behalf. His claim that he is seeking to bury on behalf of his son must therefore of necessity fail. Firstly, because, the defendant was sued in his personal capacity and has likewise defended the suit and filed a counter-claim. Secondly if the defendant had intentions of representing his son's interest Order XXX1 rule 15 of the civil procedure code would have come into play which is not the case here.

It is noteworthy that the defendant did not adduce any evidence under Luo customary law to prove the right he claims. That as it may, the court will, however, consider the wish of Veronica vis a vis the right of the defendant and Denish under Luo customary law to bury her remains.

In **Apeli versus Buluku (1985) KLR at 77**, the Court of Appeal held.

“Though the parties in this case were generally subject to African customary law and the court was enjoined by Section 3(2) of that Judicature Act (Cap 8) to be guided by that law, the English law on the subject could be applied to this case subject to such qualifications as the circumstances of Kenya rendered necessary.

2. **In cases such as this one, the most important rule is that the wishes of the deceased person, though not binding, must so far as possible be given effect to. On the evidence in this case, it was clear that the intention of the deceased was to be buried in Bungoma District.**

3. **Where the wishes of the deceased are not contrary to custom nor the General law or public policy or safety, as it was in this case, the High Court has a general discretion to order the removal of the remains of the deceased from one place to another subject, however, to the grant of a permit by the Minister in-charge of Health.”**

Guided by the above authority, it is safe to say that the courts ought to give effect to the wishes of the deceased as far as possible unless for good reasons for example if the wishes are contrary to custom. The question for consideration by this court therefore is whether Veronica's wish is contrary to Luo custom.

The right to bury as held in **Edwin Otieno Ombajo & Martin Odera Okumu (supra)** vests in the husband but not absolutely. In the said case the Court of Appeal considered whether the right under customary law may be impugned by unbecoming conduct on the part of the person on whom it rests. In this regard, the court stated in part:-

“We wish to observe here that customary law, like all other law, is dynamic. Because it is not codified, its application is left to the good sense of the judge or judges who are called upon to apply it. That is why, as its stated earlier S. 3(2), above, is worded the way it is to allow for the consideration of individual circumstances of each case. So the conduct of the respondent and his attitude towards the deceased generally, were important considerations in determining the dispute between the parties here.

The matters the appellant raised against the respondent should not have been viewed as intended to show that no marriage existed between the deceased and the respondent, but to show that although he was the deceased's husband, he was undeserving to bury her.”

It is undisputed that the deceased and her husband were separated for 12 years prior to her death. The separation was largely attributed to the defendant's act of taking his son away. Neither the defendant nor his family attempted to reconcile with Veronica during her life time; they kept away. Evidence before court indicates that even at the death of her two sons the defendant and his family did not play a major role in organizing for the funeral. The defendant's action and utterances at the funeral of the second child were clear that Veronica was unwanted in his home. The defendant's action affected the deceased who collapsed at the funeral and was hospitalized due to a stroke which incapacitated her for close to a year. On the part of Denish it was stated in evidence that before his accident he and indeed his family blamed Veronica for the condition of their two sons. Denish left the burden of bringing up the children to Veronica; he neglected her and the children. Plaintiffs' exhibits 6(a) & 7(a), letters Veronica wrote to Denish give a clear account of Denish's attitude towards Veronica then.

Plaintiff's exhibit 6(a) dated 2nd May, 1995 reads in part:-

“Even if you have come to feel or realize that I am the wrong woman for you there is still away out for you but do not subject me the way you are doing as if I am an object.

- **What percentage of your income do we spend**
- **In this country, are there others with**

kids like Fred and Sam.

- I have already left you the way you wanted so that your head is not bothered again ---“

In plaintiffs' exhibit 7(a), Veronica wrote in part:-

“Since you married me it's now about six years, but to my sorrow it's that your attitude towards me is strange not like that one of people who live together --- (sic).

“--- anyway, to give you peace and joy, I am ready to go. I cannot force what is impossible ---“

“ --- my life with you is full of misery, while you do get light moments in your working place ---- mine is only engrossed with thoughts, hesitation and fear and self sacrifice.”

From the two letters it is evident that prior to Denish being involved in the tragic accident all was not well in the marriage. Veronica lived a miserable life, in the letters she addressed to Denish, she lamented about the neglect and cruelty she suffered in his hands. She was ready to leave, which she eventually did.

It is clear that relationship between the deceased and Denish was strained. Veronica was subjected to a life of pain and sorrow. The defendant despised and shamed her, he took away her husband whom she wanted to nurse in his sickness and separated the two for double the number of years they lived as husband and wife. During the life of Veronica neither the defendant nor his family sought to bring her back, no reconciliation was attempted. Veronica built a separate home, adopted a different family and planned her resting place.

Considering all the circumstances of this case and borrowing from the case of **Edwin Otieno Ombajo & Martin Odera Okumu**. (Supra) The court finds the conduct and attitude of the defendant; Denish and the family to be such that they are undeserving to bury the remains of Veronica and they cannot therefore be heard to claim a customary right.

In **Apeli versus Buluku** (supra) the court studied at length the English law, which they found applicable in Kenya. The court quoted two authorities with approval, which this court is inclined to adopt, namely:- **T. Williams and Mortimer on executors, Administrators and Probate (London, Stevens and Sons, 1970)** the relevant part to this case reads as follows:-

“Directions as in Burial

If the deceased has left direction as to the disposal of his body, though these are not legally binding on his representatives, effect should be given to his wishes as far as that is possible. If the deceased has left no testamentary or clear directions as to his body, it is entitled to Christian burial. The duty of disposing of the body falls primarily on the executor.” (Emphasize mine)

And **Re Matheson (1958) All E. R. 202** in considering the wish of a deceased in an application made by her son. The Liverpool consistory court presided over by Mr. Chancellor Steel stated in part:-

“Having reached the conclusion that there is no legal obstacle on the way of the Faculty being granted, I now come to the difficult task of deciding whether, as a matter of discretion, it would be granted. As I have said, the primary function of the court is to keep faith the dead. When a man nears his end and contemplates Christian burial, he may reasonably hope that his remains will remain undisturbed and the court should ensure that, if possible this assumed wish will be respected---“ (emphasize mine)

Having found as above what more can a court of law do, than to accord the deceased her last wish. In the **circumstances of this case substantial justice will only be achieved if the wish of Veronica is respected.**

Based on the findings above, I direct as follows: -

That the body of Veronica be interred on her piece of land known as **BUTSOTSO/SHIKOTI/5889** in Kakamega.

Although as I found above that the defendant is undeserving to bury Veronica, his wish to bury her may be an attempt by him and the rest of the family to make amends with the dead. As Veronica did not expressly bar the defendant and his people from participating in her burial, I direct further that the body of the deceased be released to the 1st plaintiff and the defendant or anyone of them for interment in the Kakamega property in accordance with Catholic rituals as the deceased had directed. I further direct that the parties do share mortuary costs.

In the circumstances of the case, I order that each party bears their costs of this suit.

In conclusion, the court would like to express appreciation to the learned counsel, **Mr. K'opot and Mr. Oyuko** for the plaintiff together with their colleague **Mr. C. Ayayo**, for the long hours they put in this matter bearing in mind the odd hours the court insisted to proceed with the hearing. I thank them for the research they undertook. The authorities and submissions were of great assistance to the court.

Judgment dated and delivered on 9th April, 2010.

ALI-ARONI

JUDGE

In the presence of:

Mr. S. K'opot and Mr. A. Oyuko Counsels for plaintiffs

Mr. C. Ayayo Counsel for defendant.

AAA/hao