



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
Civil Appeal 61 of 2008
MARY S. AWINO AYOKI & ANR APPELLANTS
-VERSUS-
HELLEN AKELLO & 2 OTHERS RESPONDENTS
JUDGMENT

Coram:

Mwera J.

Mwamu for the appellants

Nyawiri for the respondents

Raymond CC.

The decision about to follow is rooted in the lower court judgment at Winam delivered on 1.7.2008. The present appellants were the defendants there. They were described as the wife and son of one deceased called Tobias Ayoki who died on 21.11.2007 at Star Hospital – Kisumu. The present 3 respondents were the plaintiffs in the lower court. It was heard that they too were wives of the deceased Tobias. The tussle that brought these family members to court was where to bury Tobias. He is said to have had a home at a place called Okela village in Uyoma and another at a place called Goibei (or Gobei, Kobei) at Rakoro village in a place called Sakwa. After hearing evidence, submissions e.t.c the learned trial magistrate directed that the deceased Tobias be buried at Okela village as per the prayers of the plaintiff/respondents. There were two cases before the learned trial magistrate – SRM CC 675/07 and 533/07 which were consolidated and determined together. Each side to the case had strenuously argued that the late Tobias should be buried at either this or that village according to Luo customs or his wishes or other. So with each side represented, as was the case here, and calling as much evidence as was possible, it took the learned trial magistrate some considerable effort, attention and analysis to arrive at the decision now appealed against. The pleadings having focused only on where to bury Tobias – at Okela or Rakoro (Goibei), not much need be reproduced here. But the evidence must be reviewed by this court to decide the appeal presented by Mr. Mwamu and opposed by Mr. Nyawiri.

There were eleven (11) grounds which Mr. Mwamu condensed into three (3) broad ones and argued. He began by setting out the family and other relevant background material which was not much in dispute in the following manner: The deceased married the 1st respondent (Hellen) in 1957. In 1961 she left his

home. In 1963 the deceased married the 1st appellant (Mary) with whom they registered their marriage in 1971 – a civil marriage ceremony. In 1975 he married the 2nd respondent (Rosemary) and in 1983 the deceased took on the 3rd respondent (Phoebe) as his 4th wife.

In 1964 the deceased established a home at the said Okela village with the 1st appellant. In 1979 he bought land at Gobei (Goibei, Kobei) in Sakwa and in 1980 he built homes there for his 3 wives – the 1st appellant, the 2nd and 3rd respondents. In 1989, after some 28 years of absence, the 1st respondent (Hellen) resurfaced at Okela and according to Mr. Mwamu the church built a house for her. It was not said on whose land but quite probably on the deceased's land. Now from this point the respective party's stands begin to part. Mr. Nyawiri's point was that the deceased built a house at Okela for Hellen and the church blessed it. However, the other 3 wives continued to live and they live at Goibei up to date. When the deceased fell sick, he was at Goibei. He was taken to Star Hospital where he passed on – hence the present saga i.e. while the respondents posit that the deceased ought to be buried at Okela where the 1st respondent lives as decided by the learned trial magistrate, the appellants are bent on Goibei.

Mr. Mwamu urged this court to overturn the lower court decision and he drew the court's attention to the evidence as follows: When Hellen left Tobias she went on to marry one Obanda Oburu (See DW5) and when she returned the church built a house for her – not the deceased. It would have been a taboo for Tobias to build for her in such circumstances. That the deceased pointed to a spot at Goibei to his eldest son John Ombok Ayoki (the 2nd appellant) where he wished to be laid to rest. And that Tobias had shown other relatives and close friends the same spot and/or expressed his intention to be buried at Goibei (DW1, DW2, DW6, DW7).

The court heard that before Tobias' death, he held a big family meeting at Goibei on 18.4.2003, whereat he gave some directions, including telling the 2nd appellant to take responsibility over the home after his death. Emphasis was here laid on the fact that that meeting was not held at Okela and the 1st appellant (Hellen) was not present/invited. Thus Tobias did not recognize her and four years later he died. So with all this, that going by the deceased's wishes, the same could not or did not have to be faulted on one ground or another. They should be honoured. The case of Apeli VS Buluku [1985] KLR 777 was cited in this regard. May the deceased be buried at Goibei as per his wishes.

Mr. Nyawiri's position was the opposite. He had instructions to deny that Hellen ever married one Obanda Oburu for 28 years or any period thereof after she left the home of Tobias. Instead she lived and worked for a local authority in Kisumu. She lived in the employer's house and the deceased used to visit her there. There was no evidence that the two went through a customary divorce by Tobias receiving his dowry back and so Hellen remained his wife all the time. She left the matrimonial home in the 1960's because she was on bad terms with the 1st appellant. It was Tobias who built a house for her on her return in 1989. Counsel added that the wishes of the wives (of Tobias) must override those of the 2nd appellant (the eldest son). He was told only to take responsibilities over the home of Tobias, when he passed on but not to direct matters like burial of his father. This appellant in fact refused to move and build at Okela. The respondent's side maintained that all the wives had houses/homes at Okela while the plot at Goibei was only commercial. When Hellen returned Tobias built for her a house away from those of other wives as per the custom. In her many years of absence Hellen nonetheless used to visit Okela. Some of Tobias' children died and they were buried here. He should also be buried there as per the Luo customs – being buried by the 1st wife in her compound. Now the review of the evidence.

Dickson Osiyo Ochola (PW1) aged about 85 years and the deceased's paternal uncle showed the deceased nephew where to build at Okela as per custom. He built a house for the elder wife and for the 3 younger ones there. Presently only the elder wife lives at Okela (Uyoma) while the other 3 live at Sakwa. None of them divorced. Two of the deceased's children died and they were buried at Okela. He should also be buried at Okela where his own father rests and at the house of the eldest wife – as per traditions. In cross-examination PW1 who worked in Uganda (1950 – 1964) went to work in Tanzania in 1971 then moved to Mbita. He did not know if Tobias divorced the first wife (Hellen) or not:

“1st wife’s house was built in 1989. I found her at home. I built the house. Anglican Church did it.”

To avoid any oversight later, may it be noted here that even as Mr. Nyawiri submitted that on her return to Okela village, the deceased built a house for Hellen, PW1 said that he built it or the church built it – not Tobias. Going back to PW1’s evidence, the lower court heard that the deceased used to live at Sakwa but he would visit Uyoma. When he fell sick he was at Sakwa (Gobei) where his 3 wives have houses. The houses they left at Uyoma (Okela) were falling. PW1 ended by repeating:

“ I put up a gate for the first wife when the Anglican Church erected a house for her.”

In re-examination PW1, who had firmly told the learned trial magistrate that he showed Tobias where to erect a home, and he also appointed masons to do the job and they did it in his presence and direction, answered:

“ I was not present when Tobias built his first home.”

Peter Aete Samba (PW2) also of Okela village, a retired senior enrolled nurse, and a chairman of a local elders’ mediation council, who also teaches Luo culture testified before the learned trial magistrate as an expert on that culture. He went through the burial of a polygamous man who should be buried on the right side of his first wife’s house – and nowhere else. The spot would be where his uncle showed him.

PW2 who knew Tobias said that his 3 wives who had homes in Uyoma (Okela) lived in Sakwa, while Hellen (1st respondent) lived at Okela. She was childless. Dowry was paid for her and so the marriage was forever. If the wife was rejected part of the dowry was returned. Two of Tobias’ children died; they were buried at Uyoma. He should also be buried there. PW2 was not aware that Hellen married another man and he did not know how the deceased’s houses were established at Gobei where he bought land. However the first man to pay dowry for a woman becomes her rightful husband and when he dies he:

“--- must be buried beside his first wife --- on right side of his first wife’s house with head facing the gate.”

Next was Joash Dan Oguma (PW3) a retired chief aged 77 years. He too testified as one knowledgeable in Luo customs. He described the rites, ceremonies and procedures performed/adhered to when a Luo man leaves his father’s compound to set up his own home. Tobias married Hellen under Luo customs; dowry was paid. All four wives of the deceased had houses at Okela in 2 compounds – one house (for Hellen) in one and three others in the other. The 1st appellant (Mary) established a “house” while Hellen was away in Kisumu. The two had disagreed. She came back in 1989 but the separation did not mean termination of the marriage between Hellen and the deceased. The deceased welcomed her back and ate in her house with PW3 – a neighbour and a cousin’s son. His permanent home is at Okela and Tobias should be buried there. It is worth noting as the evidence unfolds, that none of the experts heard so far, has testified on where a man is to be buried when his first wife goes away, for a long time and on her return, the husband does not build a house for her because it is taboo, but he has one built for her by a brother-in-law or other relative (PW2) or another body e.g. a church, as evidence has it here.

Evidence of this witness became rather confusing when he said in cross – examination that the deceased moved out of (the father’s compound or Okela) in 1971 after the 1st appellant was married and that Hellen (1st respondent) left before the home was established in 1960’s. Mary and Hellen disagreed and the later went to work in Kisumu. So Tobias established a home with Mary (the 1st appellant) minus the first wife (Hellen).

“ Mary’s homestead became the biggest. That is why Hellen could not come in --- (and that) made Mary first wife.”

Biggest could be read to mean the senior-most in the compound of Tobias. Hellen lives at Okela and as

per local custom Tobias should be buried near her house in a separate compound from where other wives' houses are. But all the time as wives Hellen ranked first over Mary.

Joaness Otieno Angela (PW4), a minister in the Anglican Church Sakwa North knew the deceased – a member of his church. He said that one Jacob Weda, a friend of the deceased, handed an envelope to PW4's secretary on 9.9.2003. When the witness met the deceased in 2007 on the way to hospital, the latter told the former to safely keep the document in the envelope. It was his will, and he should follow the instructions therein (Exh. P1). The document remained sealed. Tobias had 4 wives.

In cross – examination, PW4 said that he did not know whether Tobias cancelled the will but as one whose first wife was married under customary law, on converting to Christianity, PW4's church allowed him to celebrate a second marriage and have the same duly registered. The church however did not allow polygamy. The deceased's four wives were members of his church, though the court was left wondering, in the sense that if PW4's church did bar him from burying polygamists what then was the status of Tobias with four wives? PW4 would however officiate at his burial if it was convenient! PW4 was stood down to allow Jacob Weda he had spoken of to produce a note dated 9.9.2003 that he, Weda, gave PW4.

Charles Yumo Ayo (PW5) an assistant chief in East Uyoma Location knew the deceased. He had two compounds at Okela. One had Hellen's house while the other contained houses for the 3 other wives – all whom the witness knew. The deceased bought land at Sakwa (Bondo) and developed it.

Hellen Akelo (PW6), resident of Okela village (the 1st respondent) said that she married Tobias in 1957 under Luo customs and dowry was paid. He built a house for him in 1989 at Okela. Her 3 co-wives also have homes at Okela. In the 1960's her co-wife Mary Awino (1st appellant) burnt down Hellen's house. She went to Kisumu to do business then later a local county council employed her. She did not divorce Tobias. He bought land at Gobei. He built houses, a hospital and a hotel there. He used to visit her while she attended funerals at Okela. When 2 of her co-wives lost their children they were buried at Okela. As a first wife, and with agreement of other co-wives except the 1st appellant, she should bury Tobias as per custom otherwise:

“ If buried elsewhere, it is not good.”

His home is in Uyoma. Tobias should be buried there.

According to Samba (PW2) “Chira” was feared. He added something about laying claim over the land where one is buried.

In cross – examination, PW6 said that she married Tobias in 1957. In 1963 when she was away he married the 1st appellant. Then Mary burnt PW6's simba in the father-in-law's compound. Again for the sake of not losing salient points Joash Oyuma (PW3) told the learned trial magistrate that Hellen and Mary disagreed. Mary burnt Hellen's house. She went away to Kisumu. Now here Hellen herself is saying that she went away in 1963 when Tobias married Mary. Mary burnt her house. Did she go away because the deceased had married Mary or because she burnt her house? Again that is just as at this point. The court heard that the deceased built house(s) at Gobei (or Goibei) when Hellen was at Kisumu. She assented to that. Hellen knew one Jacob Obanda Oburu when she was in Kisumu but they had no relationship at all. He was staff at a hospital and PW6 used to visit him for treatment. The two used to visit each other but she never visited his home at a place called Nyawida sub-location or lived with him there at all. The 2nd appellant (the deceased's eldest son) declined to go and built at Uyoma (Okela). PW6 was an Anglican, yet Tobias secretly married Mary in church without telling her. She was not away. That the deceased last visited Hellen at Okela in 2003.

“ The deceased and my church members erected my house in 1989. We lived together ----- The Anglicans prayed in my house.”

Then in re – examination:

“ My husband built my house. Anglicans only came to pray.”

PW6 retired from Kisumu county council in 1990.

The said Jacob Weda Misiko (PW7, see PW4) testified next. A lay reader at Gobei ACK, said that the late Tobias gave him a will in 2003 to hand over to their bishop, Joanes Angela (PW4). The will was in a sealed envelope and on failing to find PW4, PW7 left it with his secretary. The court directed that the sealed envelope containing the will (Exh. P1) be opened by Angela (PW4) which he had kept well since his secretary gave it to him. The sealed envelope contained minutes of a meeting held on 18.4.2003 at the Rakoro (Gobei), home of the late Tobias; a file copy of a document labeled a will signed but with no name except identity card no. 4053514 plus further copies of the will for each of the deceased's four (4) wives, dated 21.11.95.

Rosemary Akeyo Ayoki (PW8), the 2nd respondent testified that she lived at Okela village Uyoma. She referred to her 3 co-wives, saying that they, except the 1st appellant, lived at Okela. There were two compounds – one for the 1st respondent (Hellen) and another for the 3 other wives. The deceased gave Hellen that home when she returned from Kisumu. She was always their co-wife. Tobias moved to live in rental houses at Sakwa; he did not migrate. The 1st appellant lived there because she was not at peace with the deceased. Both Thomas Ayoki, and John Ombok (sons of Tobias and Mary) declined to go and live at Uyoma. They built at Sakwa. Looking at the signed minutes (Exh.P1 (B)) PW8 said that she attended the meeting of 18.4.2003. The deceased said that he would be buried at Uyoma. The first appellant (Mary), who was a teacher, did not like to teach in local schools in Uyoma and she together with her sons did not want to move and live there. PW8 herself was married under custom in 1975 and she was not aware that the deceased and Mary went through a church wedding. The deceased ought to be buried at Okela where his 1st wife has a house and even his children were buried there.

In cross – examination PW8 said that when she and the 3rd respondent (Phoebe) were married, Mary had a house at Okela and theirs were built close to hers. There was no other house. She produced photographs of the houses at Okela, including Mary's which the witness claimed was deserted in 1986. She had also a house at Gobei. The 3rd respondent (Phoebe) lived at Okela until 1989. To her, the family lived at Sakwa (Gobei) as a place of business. Only the 3 wives and their children attended the meeting of 18.4.2003. Hellen was absent. PW8's choices were Sakwa and Uyoma (for homes). The deceased allowed the 2nd appellant to build at Sakwa and Mary was to live at Gobei (Rakoro) for good. When PW8 lost her two children one was buried at Sakwa and the other at Uyoma. On her marriage to Tobias PW8 did not see a house erected for Hellen.

Phoebe Atieno Ayoki (PW9, the 3rd respondent) married the deceased under the Luo customary law in late 1980. Her wish was/is that Tobias be buried at Okela. It was his wish and according to the customs, where his first wife (Hellen) lives. Deceased built for her there. She herself lived at Okela in a house near that of Mary. Mary established the home when Hellen was working at Kisumu. On her return she moved to a different homestead. The 1st appellant's (Mary) son Thomas died and was buried at Okela. So were other children. If the deceased is not buried at Okela;

“ We shall be haunted. We need to do rituals --- in Uyoma --- at the home of the eldest wife. She can't enter the homes of the young wife or wives.”

It was repeated that houses at Gobei were for business and PW9 herself was allocated one. The witness signed the minutes of 18.4.2003. And that the deceased advised his son to build for Mary at Uyoma. She came from her Sakwa house to attend court. When Tobias was ailing he should have been taken to Hellen's house. That did not happen.

John Okello Otieno (PW 10) opened his testimony by protesting that he ought not to have been sued in this burial dispute which only concerned the wives of the deceased. However, he went on to say in cross – examination that the deceased ought to be buried at Uyoma. That closed the respondents' case. It was the turn for the appellants.

John Ongaro Ngega (DW1) a farmer at Rakoro in Sakwa knew the deceased who worked with him at Nyamira Secondary school in 1975. DW1 assisted the deceased to find and buy 8 acres of land. The deceased built on it in 1979, with Mary's house facing the gate. Two other wives were added (Rosemary and Phoebe) and houses were built for them. The witness and Tobias were friends to the extent that the latter showed the former a spot of his eventual burial – between the houses of Mary (1st appellant) and Rosemary (2nd respondent). The 3 wives farmed and lived at Rakoro.

Then Jacob Amollo Opiyo (DW2), a former teacher was a friend of Tobias and he got him to marry Mary – his sister, while at Okela. Hellen had no children and that caused strains in the home. She went to Kisumu and married one Jacob. When Jacob died Hellen returned to the deceased but she could not join Mary in a common compound. So the Anglican Church built a house for her and DW2 was among the church people doing the job. The learned trial magistrate heard that when Hellen ran away and returned, Tobias could not build a house for her. It was a taboo and if broken Tobias would die. Tobias established a home, not rental premises, with his 3 wives at Rakoro – with Mary as the 1st wife with other houses being customarily arranged. The deceased pointed to his burial place in the presence of 4 people and according to Luo customs a man cannot be buried in a deserted home. DW2 knew Tobias since childhood and they came from the same Katwenga clan in Uyoma. He settled in Sakwa and he should be buried there:

“Nobody should allow him (to be) buried in (sic) Hellen's house. He did not built (sic) there.”

Emily Awino Odumo (DW3), assistant chief Ajiko sub-location, Bondo, knew Tobias from the 1970's. DW3 went to school with the deceased's daughter, Margaret. He lived in Rakoro with his wives Mary, Phoebe and Rosemary (respondents). Once Mary (1st appellant) reported to DW3 that some family documents had been stolen and she took the report.

On her part Hilda Atieno Ouma (DW4), a retired teacher knew the deceased since 1968 at a teacher's college. He wedded the 1st appellant in 1971 and the witness signed the marriage certificate. Therein Tobias described himself as a bachelor while Mary was a spinster. The two lived at Rakoro since 1979, having initially lived in Uyoma. DW4 once attended a burial of Mary's son, Ochieng, at Okela.

John Obure (DW5), senior assistant chief Nyawida sub-location, Bondo knew Hellen (1st appellant) in 1980. She was married to his cousin John Nyabanda Oburu. They lived in Lumumba Estate in Kisumu. The two had a homestead at Bwoyo village, Nyawida. Jacob died in 1988 and Hellen moved away.

John Ombok Ayoki (DW6, 2nd appellant) traded in spare parts. He lived in Sakwa – son of the 1st appellant (Mary) and the deceased. After moving up and down with his parents (teachers) in the course of their postings, they last got to be in Kisumu. Then in 1979 – 1980 his parents moved to live at Rakoro (Sakwa). His mother and step – mothers (Rosemary, Phoebe) also have houses there, so do his siblings. The deceased showed his son (DW6) where to build. He told the court how the houses were arranged at Rakoro and said that on his father's death the witness took over his father's position as the eldest son and thus he makes decisions for the family. He was given that authority at the family meeting of 18.4.2003 and his mothers were in agreement. The deceased should be buried at Sakwa not Uyoma where his house was demolished. It is deserted. The deceased showed the witness where to be buried – between Mary's and Rosemary's houses. This was done at Rakoro in presence of an elder and the person who sold the land to him. Deceased was then sick and in a wheel-chair. When his death was announced, funeral rituals were performed in Mary's house at Rakoro. DW6 spoke of his siblings who died and were buried at Uyoma. The witness added that there was no house for his mother at Uyoma and so the deceased ought to be buried at Sakwa. He considered his mother (Mary) as the eldest wife – to bury his father. DW6 then took over other family matters e.g. marriages of his sisters etc.

Mary Silvia Awino Ayoki (DW7, 1st appellant) told the lower court that she married the deceased in 1965 [NOTE: The year quite probably is 1963 looking at the following sequence]. Her brother in-law who schooled with Tobias (Jacob Opiyo DW2) introduced the two in 1961. Dowry was paid in 1962. When Tobias with Mary visited his parents she saw an empty house in the homestead. She learnt that it

belonged to a wife of Tobias who deserted. Tobias went for further studies. When he returned and the couple visited Uyoma, they learnt that his house (simba) there had been accidentally burnt down. A house was built for Mary by KANU youth wingers in 1971 when the couple moved out of the deceased's father's compound and was shown where to build. A gate was marked with posts. Then there was a civil wedding at the local DC's office on 4.9.71. That was crowned by an ACK ceremony in 1972. The witness took the court through their educational journey, training and posting. They bought land at Rakoro and built there in 1979. When the deceased married his second wife, she had first a house at Uyoma but she had one built for her at Rakoro to the right side of DW7's house. The 3rd wife (Phoebe) was also married and Mary welcomed her at Rakoro. Mary's house in Uyoma was demolished. The building material from it was used to build Phoebe's house at Rakoro. She has no house at Okela. When Tobias died the wives were at Rakoro. Mourning started in her house there – not Uyoma. Deceased wanted to be buried at Sakwa. Hellen (1st respondent) did not visit the home at Sakwa and DW7 was not aware that she was deceased's wife. When she deserted, Mary became the 1st wife. Then the meeting of April 2003 was referred to. There was no mention of Hellen there. The deceased showed his sons with Mary where to build at Rakoro. DW7's own son, Thomas, died. He was buried at Uyoma because Rosemary was by that time occupying Mary's house. The deceased ought to be buried at Gobei. She told DW7 so 6 times and pointed to a spot between her house and that of Rosemary. All the 3 wives lived and attended court from Gobei. Their houses are not commercial premises. He should be buried where his family members live – at Rakoro.

In cross – examination it transpired that Rosemary (2nd respondent) occupied DW7's house at Rakoro when she was posted to a school called Nyangoma, quite probably some considerable distance away. The witness had not been to Uyoma since 1993. Only Rosemary had a house there. DW7 married the late Tobias in 1963. That closed the trial. Each side submitted and the learned trial magistrate penned the judgment – subject of this appeal.

The lower court decision was based on evidence *inter alia*; that the “expert” witnesses on Luo customary law said that a man is buried where his first wife lives. The deceased Tobias should be buried at Okela where Hellen lived on ancestral land other than on the land he bought at Rakoro. And more, that three of the deceased's four wives favoured a burial at Okela. The learned trial magistrate also found that the deceased welcomed Hellen back to Okela and the Anglican Church built a house for her there. Their marriage was never dissolved, despite the long separation because, dowry was never returned. The learned trial magistrate went out of his way, this may be so observed, when he declared that the deceased's marriage under the Marriage Act (Cap. 150) to Mary was invalid because prior to it, he had a customary law wife – Hellen. With respect, the lower court was not asked to determine the validity or otherwise of the deceased's marriages. But be that as it may.

In this court's view of the evidence on record, it is not in dispute that the deceased once married Hellen (1st appellant) under Luo customary law in 1957. She left his home in or about 1961 because that is when Mary was introduced to the deceased. And when they visited his home Mary was shown an empty house of a wife who deserted Tobias. Then she married the deceased.

The court also garnered from the recorded evidence that in the 1960's Hellen (PW6) was doing business in Kisumu where she was later employed. She said that the co-wives were married then. From the sequence of events, this court was not left with the impression that Hellen and Mary at some point both lived in the deceased's father's home at Okela. It was her “simba” that was burnt down when she had gone to her parent's home. Hellen claimed that Mary burnt that hut down. Mary told the learned trial that when she with the deceased returned from Kisumu, they learnt that a woman frying fish caused the fire. Be that as it may. It can be said that by the time Hellen left the deceased's home a home, had not been established for her. When she returned in 1989 it was the Anglican church which built a house for her at Okela. It was not this court's impression that the deceased did so alone or together with the church. And that came first from Hellen herself. At one point she claimed that the deceased and the church build a house for her. Then in re – examination she claimed the deceased built the house and the church only offered prayers. Even her own witness Dickson Ochola (PW1) told the learned trial magistrate that in 1989 he found Hellen at home:

“ I built the house. Anglican Church did it.”

Without going to any other evidence saying that the church built a house for Hellen when she returned to Okela some 28 or so years after being in Kisumu, the conclusion is that either it was PW1 and/or the Anglican Church who built her house – not the deceased. PW1 was more than emphatic that the church built that house. But it was not in dispute that when the deceased built a house for Mary at Okela and as quoted above from Joash Dan Oguma (PW3), that indeed the deceased established that home with Mary. Hellen was not there. According to PW3 that made Mary the 1st wife and her house/homestead became senior – most. So when Hellen returned she could not enter Mary’s house and the church built for her a house in a separate compound, while the deceased’s other 3 wives occupied another. And when Tobias moved to Rakoro, he build the houses for Mary with Rosemary and Phoebe in the order of their ranking. Hellen was yet to return. It can also not be disputed that even when Hellen was away for so long, her Luo marriage to Tobias did not come to an end that is because the dowry paid for her was never returned. So all being equal, Hellen remained the deceased’s wife. But was she truthful when she told the lower court that she never married John Obanda Oburu? Like in the case of who built for house for her in 1989, she was not. She denied it, although she admitted, that she knew and used to visit that Oburu man. Of all the evidence on this marriage that of John Obore (DW5) was direct, emphatic and he was not even cross – examined on it. Hellen married his cousin Jacob Nyabanda Oburu. They lived in Kisumu and at Nyawida. That ended the issue. Hellen lied to court.

It is not doubted that Tobias ancestral land is at Okela. He lived and built houses for the 3 other wives (excluding Hellen) at Rakoro on the land he bought. While three of the wives demand that Tobias should be buried at Okela close to the house of Hellen, Mary and her son (appellants) stick on Rakoro. The main reason raised by the respondents is that the custom says so. Even the “experts” they presented to the learned trial magistrate had no reason other than that of a custom and or that “Chira” (it was not translated/described) would befall the family if burial was not at Okela. Or that the claiming of land had something to do with where one is buried. But nobody said that the deceased’s land at Okela was about to be claimed by strangers in the event he is not buried there. Indeed there was nothing to suggest that a person cannot be buried on his land other than the ancestral one. And most of all if the deceased did not build a house for Hellen in 1989 at Okela, the Church did, how does that became his house in death so that he must now be buried there? This court was inclined to take it that a deceased man should be buried next to the house of his first wife only if he built the house for her and/or recognized and accepted the house built for her on her return. Tobias did not build Hellen’s house at Okela when she returned. He did not live there. He was last at Okela in 2003, it was not said for what. When Tobias fell sick he was all the time at Rakoro. He wished to be buried there and he pointed to a spot. While there he held a big and last family meeting. Hellen did not attend. Can it be safely said that Tobias never came to take her as his first wife? Otherwise he would have held the meeting in her home at Okela or she should have been invited and given opportunity to speak as the first wife. That did not happen. So even as a man must be buried near the 1st wife’s house, did it include burying a man near a house built by strangers? Not quite so. The case here is not a normal one where a polygamist has died, he has built houses for his wives and so it may as well go without saying that he must be buried near the house of the 1st wife.

As per S. 3 (2) of the Judicature Act (Cap. 8) this court is enjoined to be “guided” by customary law where it is involved. The evidence by the so – called experts (PW1 samba, PW3, Oguma) was given to guide the court in normal situations where a polygamist falls dead and it is clear that he will be buried by the house of the first wife. As said above, this was not a normal case. Hellen left the matrimonial home and returned after about 28 years. The church and other strangers built a house for her – not the deceased Tobias. He does not seem to have acknowledge/recognized that act. He did not live in the house at Okela. He had established another home at Rakoro and he had expressed his wish to be buried there. He lived there with 3 of his wives and children and died there (while at Star Hospital). He pointed to his son and others where he wished his grave to be. Those were wishes this court would consider to be put into force. They do not contravene any customary law. So all in all the lower court decision is set aside and substituted with one to the effect that the deceased’s remains be taken from the mortuary and laid to rest at Rakoro village. Each party to bear its costs. In a similar vein, all these are one family. Each side to bear half the mortuary costs.

Judgment accordingly. Costs to the appellants.

Delivered on 21.1.2009.

J. W. MWERA

JUDGE