ACW v JW & 5 others (Environment and Land Appeal E007 of 2023) [2025] KEELC 5445 (KLR) (8 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5445 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ENVIRONMENT AND LAND APPEAL E007 OF 2023

BN OLAO, J

JULY 8, 2025

BETWEEN

ACW ..... APPELLANT

AND

JW ..... 1ST RESPONDENT

SW ..... 2ND RESPONDENT

IW ..... 3RD RESPONDENT

RJ ..... 4TH RESPONDENT

MW ..... 5TH RESPONDENT

VW ..... 6TH RESPONDENT

(Being an appeal from the Judgment and Decree of HON PATRICK A. OLENGO SENIOR PRINCIPAL MAGISTRATE delivered on 3rd May 2023 in Busia CMELC Case NO E044 of 2023)

JUDGMENT

"Mothers and their children are in a category all their own. There's no bond so strong in the entire world. No love so instantaneous and forgiving".

Those are the words of Gail Tsukiyamaa Japanese – Chinese American novelist in her novel "Dreaming Water".

1. If ACW (the Appellant) had not previously known about the very strong bond between his estranged, (though not formally divorced), late wife STW (the deceased), and her children JW, SW, IW, RJ, MW,and VW (the 1st to 6th Respondents respectively), then his subsequent discovery of that strong

mother and children relationship must have hit him like a bolt out of the blue when the deceased passed away on 3rd April 2023. I doubt if he has ever recovered from that discovery because he lost the duel over the place of burial of the deceased to his children the Respondents when the trial Court, in it's impugned judgment delivered on 3rd May 2023, directed that the deceased be buried on the land parcel No Bukhayo/Bugengi/xxx which was against the Appellant's wish to bury her on another parcel of land being Bukhayo/Bugengi/xxx.

2. The lesson for fathers to pick from this dispute is to take heed of the words of Gail Tsukiyama. That while you are relaxing in your sitting room glued on your favourite team in the English Premier League or watching Maandamano or simply scrolling through tik tok on your phone, something may be cooking in the kitchen. And it may not necessarily be your favourite meal as the Appellant discovered on 3rd April 2023.

3. Even as I hear this appeal, it appears to me to be moot. This is because, following the delivery of the impugned judgment on 3rd May 2023, the Appellant moved the trial Court vide his Notice of Motion dated 4th May 2023 seeking orders that the said judgment be set aside or stayed pending an appeal. That application was placed before the trial Court on 5th May 2023 but appears not to have been prosecuted.

4. Secondly, in the penultimate paragraph of his submissions, the Appellant's counsel has stated that:

> " The Respondents who are the children of the Appellant, they wish to direct the Appellant on how to deal with his properties in L.R Bukhayo/Bugengi/xxx and L.R Bukhayo/Bugengi/xxx. The Respondents have interred the remains of their late mother who had left with them for over 10 years on the parcel of land No xxx. The Appellant had allocated to another wife and given the Respondents No xxx which they ignored and the trial Court supported them hence this appeal." Emphasis mine

5. As will soon become clear, this appeal is clearly moot.

6. The Appellant (as plaintiff) moved to the Chief Magistrate's Court Busia on 19th April 2023 and sued the Respondents (as Defendants) seeking as the main remedy, an order of injunction to restrain the Respondents whether by themselves, their agents, workers and/or servants from burying the remains of their deceased mother on the land parcel No Bukhayo/Bugengi/xxx or otherwise entering, working on and/or staying on the land parcel No Bukhayo/Bugngi/xxx (the suit land).

7. The basis of the Appellant's case was that he is the registered proprietor of the suit land together with another parcel of land being parcel No Bukhayo/Bugengi/xxx. That the Respondents are the children of the deceased who died on 3rd April 2023. That the Respondents, without any justifiable cause or permission, had trespassed onto the suit land and were making plans to inter the remains of the deceased thereon.

8. The Respondents filed a joint defence dated 27th April 2023 in which they denied having trespassed onto the suit land in an attempt to bury the remains of the deceased thereon without any lawful justification. They pleaded that infact the suit land was matrimonial property over which the deceased had equal rights and was entitled to be buried there.

9. The dispute fell for determination before Hon Patrick A Olengo (senior Principal Magistrate)on 28th April 2023. After hearing the Appellant and his witness Wafula Oduor Charles as well as MAW (the 5th Respondent) and who was the only witness who testified on behalf of the Respondents, the trial magistrate delivered the impugned judgment on 3rd May 2023 dismissing the Appellant's case and directing that the deceased be buried on the suit land. He further directed that the Officer

Commanding [OCS] Busia Police Station do provide security during the burial ceremony. The parties were ordered to meet their own costs.

10. That judgment provoked this appeal in which the Appellant seeks for orders that:

    1. This Court substitutes it's judgment in place of impugned judgment.

    2. The appeal be allowed with costs in this Court and the Court below.

11. The Appellant has put forward the following grounds of appeal:

    1. "The learned trial magistrate erred in law and in fact in finding that the Respondent (sic) should not bury the deceased despite being his wife hence a wrong conclusion."

    2. "The learned trial magistrate erred in law and fact when he erroneously and scantily analysed the Appellant's evidence before him hence a wrong decision."

    3. "The learned trial magistrate erred in law and fact in ignoring the evidence adduced by the Appellant's witness hence reaching a wrong decision."

    4. "That the learned trial magistrate erred in law and fact in failing to appreciate that the Respondents had already been allocated an alternative parcel where they were to bury the deceased STW thereby arriving at a wrong decision."

12. The Court directed that the appeal be canvassed by way of written submissions.

13. The submissions have been filed by Mr Ouma instructed by the firm of B. M. Ouma & Company Advocatesfor the Appellant and by the Respondents who are acting in person.

14. I have considered the record of appeal as well as the submissions by Mr Oumaand the Respondents.

15. This is a first appeal. My duty is to re-consider and re-evaluate the evidence on record and thereafter, to draw my own conclusion. In so doing, I must always remember that un-like the trial Court, I neither saw nor heard the witnesses testify and I must therefore give due allowance in that regard. Where the trial Court's findings are based on no evidence or the Court is shown to have acted on wrong principles, then this Court as an Appellate Court must interfere with those findings – see Selle & Another -v- Associated Motor Boat Company Ltd1968 E.A. 123 and also Mwanasokoni-V- Kenya Bus Services Ltd1985 KLR 931 [1985 eKLR]. In the case of Peters -v- Sunday Post Ltd1958 E.A 414, it was held that:

> " Whilst an appellate Court has jurisdiction to review the evidence to determine whether the conclusion of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate Court will not hesitate so to decide."

16. I shall start by considering ground NO 1 of the memorandum of appeal where it is wrongly stated thus:

> " That the learned trial magistrate erred in law and in fact in finding that the Respondent (sic) should not bury the deceased despite being his wife hence a wrong conclusion."

The reference to "Respondent" in that ground is obviously a typing error and counsel must have meant the Appellant. Having said so, the dispute before the trial magistrate was never about who should bury the deceased. The dispute was about whether or not the deceased should be buried on the suit land.

For avoidance of doubt, I shall reproduce paragraph (a) of the prayers which the Appellant sought vide his plaint. This was:

a. "That an order of injunction be and is hereby issued restraining the defendants/Respondents whether by themselves, their agents, workers and or servants from burying the remains of their mother ST (deceased) on L.R No Bukhayo/Bugengi/xxx or otherwise entering, working on and or staying on L.R No Bukhayo/Bugengi/xxx."

Indeed trial magistrate appreciated as much and at page 3 of his typed judgment (page 77 of the record of appeal) he said:

> " The only issue for determination is where between land parcels Nos Bukhayo/Bugengi/xxx and Bukhayo/Bugengi/xxx should the deceased be buried."

And in the penultimate paragraph of the impugned judgment, the trial magistrate held as follows:

> " The remains of the deceased Scholastica Taaka shall be interred on the land parcel Bukhayo/Bugengi/xxx where she lived as the plaintiff's wife and where she gave birth and raised up the defendants as her children. The burial rites shall be conducted in accordance with the customary laws of Baburi-Bakhayo clan."

Therefore, the dispute which the trial magistrate was called upon to determine was whether the Respondents should be injuncted from burying the remains of the deceased on the suit land. It had nothing to do with who should bury the deceased. It was all about which land the deceased should be buried on. If the dispute was about who should bury the deceased, then this would have been a succession dispute and I would have downed by tools.

17. There is no merit in ground NO 1. It is dismissed.

18. Grounds No 2 and 3 can be considered together. Therein, the trial magistrate is faulted for having "erroneously and scantily analysed the Appellant's evidence" and for "ignoring the evidence adduced by the Appellant's witness".

19. The thrust of the Appellant's case was that although the deceased was his wife, she had left their home some 20 years earlier and so when she died, he intended to bury her body on another parcel of land being land parcel No Bukhayo/Bugengi/xxx where he had planned to establish a home for her. However, the Respondents' case was that the suit land is the matrimonial home of the deceased who was the 2nd wife of the Appellant and where she had a home on a portion measuring 0.4 Ha acres. In her statement dated 27th April 2023 (not 2022 as per the judgment) and which she adopted during the trial, the 5th Respondent states that the land parcel No Bukhayo/Bugengi/xxx on which the Appellant wished to bury the deceased is swampy and near the banks of river Suo which normally floods. When he was cross-examined by Mr Juma then counsel for the Respondents, the Appellant admitted that the deceased was his 2nd wife and had a house on the suit land. This is what he said at paragraph 52 of the record of appeal:

> " I can't recall the year I married her. I can't recall the years I stayed. I paid dowry. She was my legally married wife. She was my 2nd wife. My 1st wife died. I buried her in Bukhayo/Bugengi/x. At the grave of my 1st wife is on Bukhayo/Bugengi/xxx. My 3rd wife died but was buried in the same piece of land. The defendants hired goons. I don't have the OB NO in Court but was not filed. I can't recall when the deceased left. She had a house on Bukhayo/Bugengi xxx. It was the wish of the deceased to be buried on Bukhayo/Bugengi/xxx."

When she testified in her evidence in Chief, the 5th Respondent said as follows at page 55 of the record of appeal:

> " I wish to have the deceased be buried where she used to live, where she had a house, where we were raised, dowry of her daughter paid. It is No xxx."

In his evidence in chief, the Appellant said at page 68 record of appeal:

> " The deceased was my wife. I should be allowed to bury on Bukhayo/Bugengi/xxx opposite Spring board. I bought the land for her and that was her wish to bury. Even if she came back, I would have built a home for her. She stayed for over 20 years outside. She died outside. The defendants want the body to be buried on Bukhayo/Bugengi/xxx."

In addressing this issue, the trial magistrate said at page 4 of the impugned judgment (page 64) of the record of appeal:

> " It is not in dispute that the deceased was the plaintiff's wife. Her home and house was on Bukhayo/Bugengi/xxx before they started living apart. The plaintiff had other two wives who passed on and their bodies were buried on the same Bukhayo/Bugengi/xxx is where they grew up. That is where they were born. That is where they have known as their home since children and that is where some of the defendants' dowry were paid. There was no good reason given why the remains of the deceased should not be buried there."

In the course of the impugned judgment, the trial magistrate brought in the issue of the customs and practices of the parties Baburi-Bakhayo Clan to the effect that when a wife leaves the matrimonial home for six (6) months, she cannot be allowed to come back to the said land alive or dead. This is how the trial magistrate addressed himself at page 3 of the judgment (page 62 and 63 of the record of appeal):

> " PW1 the plaintiff herein said the body should be buried in land parcel Bukhayo/Bugengi/xxx which he claims he bought for the deceased who was his wife and who left-their matrimonial home for over 20 years. This he says is in accordance with the customs and practices of Baburi-Bakhayo clan which requires that when a wife leaves her matrimonial home and goes away for 6 months, she cannot be allowed to come back to the same home whether alive or dead. That when she comes back alive then she comes back alive (sic) then she should be built a one outside her original matrimonial home and if she comes back a head (sic) then she should not be buried in her former matrimonial home but outside that home on separate land."

I have perused the record and in particular the oral testimony of the Appellant during the trial. At no time did he make reference to the said Baburi Bakhayo Clan. That issue was infact brought up by Mr Ouma counsel for the Appellant in his submissions at page 8 of the proceedings (page 57 of the record of appeal) where counsel made the following submission:

> " The plaintiff has established his case on the required standard in law. He is the registered (sic) of both Bukhayo/Bugengi/xxx/xxx. His late wife left home for over 20 years and that to the clan of Baburi/Bakhayo, when the wife leaves her matrimonial home for 6 months, she ceased to be legal wife and when she comes back, she will be given a different place to line (sic) in. On who should bury the body, the plaintiff body (sic) suitable to rest the remains of his wife in a pace he chose as per customs."

It is not clear if Mr Oumais an expert in Baburi-Bakhayo customs. He may very well be familiar with the said customs. However, he could not purport to address the trial Court about those customs from the bar or through submissions. It has been held that submissions are not evidence – Daniel Toroitch Arap Moi-V- Mwangi Stephen Muriithi & Another 2014 eKLR. It is not surprising therefore, and rightly so, that the trial magistrate dismissed those submissions and at page 63-64 of the record of appeal (page 4 of the judgment) he said:

> " However, it is now trite law that customs can be proved by an expert on such customary laws or in some scholarly writings of those who have done research on customs of a particular community or as pronounce by decided cases. Nothing was presented before those as expert evidence to prove the assertions by the plaintiff. No writing of a scholar nor any decide a case (sic) that had pronounced such a practice was shown to this Court for prove (sic) the plaintiff's assertions. This Court is not an expert on customary laws of Baburi-Bakhayo clan. That had to be proved in a way acceptable in law for this Court to follow it."

In short, therefore, there was no evidence properly placed before the trial magistrate to support the assertion that the deceased could not be buried on the suit land due to customary laws.

20. Having said so, there was evidence by the Appellant himself that the deceased was his wife although she had not lived with him for some 20 years. Nonetheless, he had not yet divorced her although given those circumstances, he may have had good grounds to do so. The trial magistrate took cognizance of the fact of marriage between the Appellant and the deceased including the fact that they had cohabited on the suit land where the Appellant's other wives were buried and where the Respondents were born and grew up. The trial magistrate was also guided by the fact that the deceased had never lived on the land parcel No Bukhayo/Bugengi/xxx where the Appellant wanted to bury her and where there was no house. This is what he said at page 65 of the record of appeal (and page 6 of the judgment):

> " The decision of the plaintiff to have the remains of the deceased buried on land parcel No Bukhayo/Bugengi/xxx whether (sic) is no house, no one has ever lived there and the deceased herself has never lived there. In my view arbitrary it is against the justice and morality. It is flies (sic) on the face if (sic) public policy and this Court must revisit such norms".

The Appellant having admitted that the deceased had a house on the suit land as stated above, no reason was given why she would have abandoned the suit land and opt to be buried on the land parcel No Bukhayo/Bugengi/xxx where there was no house and which land was said to be swampy. If there was indeed such a will by the deceased, the Appellant should have availed it.

21. In a dispute such as this, what should weigh on the mind of the Court includes the fact that a marriage exists between the Appellant and the deceased who shared a matrimonial home, in this case, on the suit land where the Respondents wish to bury the deceased. The Court will also take into account which option would best serve the interests of justice. In my view, the trial magistrate carefully considered all the above issues before arriving at the decision which he did. I am not persuaded that the trial magistrate "scantly analysed the Appellant's evidence" or "ignored the evidence adduced by the Appellant's witness" as pleaded in paragraphs 2 and 3 of the Memorandum of Appeal.

22. Counsel for the Appellant has also submitted, citing the decision by Munyao Sila J in the case of Oganga & Another -v- Oranga & 3 Others 2023 KEELC 16348 KLR, that there is no law granting children the right to compel their parents to consult them when dealing with their land. I have looked at the decision. It involved children who were seeking an order that their father held the land in dispute

in trust for them. They therefore sought to cancel the transfer of land by their father to purchasers. In dismissing their case, Munyao Sila J castigated the children in the following terms:

> "It is time that children stopped having a notion that what belongs to their parents also belongs to them in equal measure, and that their parents must sub-divide and distribute land to them in a particular manner."

The Judge went on to describe the children's conduct as "shameful" and "abominable". He added that:

> "They relentlessly hounded their father; they demanded that he distributes the land in the form that they themselves wanted; even when their father gave them some land, they complained that it was too little; they sued their father before the chief, the clan, and before the tribunal; they failed to give their father peace. This is despite the fact that it was their father who took them to school and educated them upto university level and made them to be what they are today. They are thankless. They have forgotten that their father took care of them when they were wobbly and helpless tots and raised them to be responsible adults. The 2nd defendant is a teacher. He can fend for himself. So too the 3rd defendant. I wonder why they are harassing their father over his own property. Why couldn't they use their own knowledge, wisdom and economic empowerment to go and find their own property. May be if the 2nd and 3rd defendants had left the old man in peace and endeavoured to cultivate and nature a good relationship with him instead of harassing him, he would have opted not to sell the land and leave it for them to inherit upon his demise. They have to live with the fact that they led their father to sell the land so that he can have peace. They cannot be heard to complain."

Clearly, the circumstances obtaining in the Oganga -v- Oranga case (supra) are very distinguishable from those obtaining in this case. Here, the Respondents are not making any claim to the suit land or indeed to any land from the Appellant. All they seek is to bury their mother on the suit land where she had established her matrimonial home with the Appellant and where the Respondents were born. I would not consider that conduct by the Respondents herein to be "shameful" or "abominable" or in any way reprehensible as was the case in Oganga -v- Oranga(supra). It is worth noting that in this case, the suit land being matrimonial property, the deceased was entitled to be buried there as she had an interest in it. The Appellant has stated that he had planned to build a permanent house for the deceased on the land parcel No Bukhayo/Bugengi/xxx. In paragraph 20 of his affidavit dated 26th April 2023, the Appellant has deposed as follows:

> 20: "That since I had children with the late STW I bought land known as Bukhayo/Bugengi/xxx where I was to establish for her a home on her return since we had so many children with her."

In paragraph 19 of the same affidavit, he denied that the suit land "is a matrimonial home as the deceased had left me for over 20 years now and I had married another woman and established for her a home on Bukhayo/Bugengi/xxx". I think the Appellant waited until it was the late. Having lived with the deceased on the suit land where they had "many children", that became their matrimonial home

and property as defined under Section 6 of the *Matrimonial Property Act*. It was their matrimonial domicile which is also defined in BLACK'S LAW DICTIONARY 10TH EDITION as:

> " The place which a person has been physically present and that the person regards as home; a person's true fixed, principal and permanent home, to which that person intends to return and remain even though currently residing elsewhere." Emphasis mine.

If the Appellant intended to move the deceased to another home, and specifically land parcel No Bukhayo/Bugengi/xxx, he ought to have done so during her life-time. He may have been irked by her 20 years of absence from the matrimonial home but in the absence of a divorce, she not only remained his wife but also had an interest in the suit land. The trial magistrate had all that in mind and this Court must dismiss prayers (2) and (3) of the memorandum of appeal.

23. In ground No 4 it is stated that the trial magistrate erred in law and fact by failing to appreciate that the Respondents had already been allocated an alternative parcel of land to bury the deceased. The alternative land which the Appellant must be referring to is the land parcel No Bukhayo/Bugengi/xxx. He produced the Certificate of Search for the said parcel of land which shows that it has been registered in the Appellant's name since 31st August 2020. If the Appellant had allocated the said land to the Respondents, nothing would have been easier than transferring it to the Respondents or the deceased. Clearly, he waited until too late to injunct the Respondent from burying the deceased on what is matrimonial property. That ground of appeal is also dismissed.

24. The result of all the above is that this appeal is devoid of any merit. It is for dismissal.

25. Even as I dismiss the appeal, I must revisit my earlier observation in this judgment that in view of the Appellant's counsel's submission, it would appear that the deceased was subsequently buried on the suit land. If that is the correct position, and I have no reason to doubt, then this appeal is moot. I have nonetheless considered it on it's merits since it is pending before this Court.

26. On the issue of costs, the protagonists are a father and his children. To avoid antagonizing them further, I direct that the parties meet their own costs.

27. Before I end this judgment, I wish to point out that at page 19 of the record of appeal, the Appellant has filed an order issued by me in Busia ELC Case No 31 of 2017 injuncting one Julia Akello Chamiand Patrick Ouma Chamifrom burying the remains of one Willimina Knighton the land parcel No Bukhayo/Bugengi/xxx The Applicant in that case was the same Appellant in this case. That order was issued on 6th February 2023 long before the appeal was filed.

28. I did not see the relevance of that order in this appeal. I can only conclude that it was filed as part of the record by error perhaps because the Appellant in this case was also the plaintiff in Busia ELC CaseNO 31 of 2017. Hopefully it was not intended to mislead this Court. I shall leave the matter at that.

29. up-shot of the above is that having considered this appeal, I issue the following disposal orders:

    1. The appeal is dismissed.

    2. The parties shall meet their own costs both here and in the Court below.

BOAZ N. OLAO

JUDGE

8TH JULY 2025

JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 8TH DAY OF JULY 2025.

Right of Appeal.

BOAZ N. OLAO

JUDGE

8TH JULY 2025