



**Muchesia v Muchesia (Civil Appeal E170 of 2023)
[2024] KEHC 2195 (KLR) (4 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2195 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E170 OF 2023
PJO OTIENO, J
MARCH 4, 2024**

BETWEEN

MARTHA C. M MUCHESIA APPELLANT

AND

DEBLA ANDEGA MUCHESIA RESPONDENT

*(Being an appeal from the Judgment of Hon. Z.J. Nyakundi (SPM) in
Kakamega CMC Civil Case No. 214 of 2023 delivered on 6th November, 2023)*

JUDGMENT

Background of the Appeal

1. By way of a plaint dated 20th September, 2023, the Respondent moved the trial court for a declaration that she be recognized as a wife to the late Thomas Muchesia Mumalakani (“deceased”) and that she be entitled to bury the deceased at her matrimonial home in Lugari Sub-County, Kakamega County. She also sought for orders restraining the Appellant and/or her agents from burying the deceased or even removing his body from the mortuary.
2. In a statement of defense and counter claim dated 5th October, 2023, the Appellant pleaded and averred that the Respondent and the deceased had separated in the year 2018 after which the Respondent stopped taking care of the deceased. She claimed that the deceased had established his matrimonial home in Shinyalu and had settled his family including the Respondent thereon. The Appellant further averred that the deceased, who was her father, wrote a Will explaining how he wanted to be buried and on which parcel of land he was to be buried.
3. By a Judgment of the trial court delivered on 6th November, 2023, the Court dismissed the will on the ground that it was made under suspicious circumstances since it was drafted at the home of the Appellant and directed that the body of the deceased be released to the Respondent for burial at her home in Lugari.



4. Aggrieved with the decision of the trial court, the Appellant lodged a Memorandum of Appeal dated 13th October, 2022 setting thirteen grounds. A keener look at the grounds however reduce the challenge against the Judgment to two wide grounds; whether the case was ever proved on the requisite standards and, if the trial court was right in rejecting the Will on the grounds that it was made under coercion, duress and suspicious circumstances. That position is taken with the consideration in mind that being a first appellate Court whether or not the evidence and submission were adequately considered are ground that the Court must address in executing its mandate of re-appraising the evidence afresh and in its entirety with a view to reaching its own independent conclusions.
5. Based on the grounds of appeal, the Appellant prays that the Judgment of the trial court be set aside and judgment be entered as per her counter claim.
6. The appeal was directed to be and has been canvassed by way of written submissions. It is submitted for the Appellant that no evidence was provided by the Respondent to show that there was land in Lugari and that it was confirmed by PW1, PW3 and PW4 that the Appellant and the deceased still have their matrimonial home in Shinyalu where the children of the Respondent are buried. She further contends that according to the Luhya culture, children are only buried at their parent's home when they died. She argues that none of the parties questioned how the Will was made and that the wishes of the deceased expressed during his lifetime ought to take precedent over other considerations. In that regard, she cites the case of *Jacinta Nduku Masai v Leonida Mueni Mutua & 4 others* [2018] eKLR for the proposition that the wishes of the deceased needs to be given effect. It is additionally submitted that DW3 in his re-examination clarified that an Isukha polygamous man could choose where to be buried.
7. It is her submission that in the social context prevailing in Kenya the person who is first in line of duty in relation to the burial of any deceased person is the one who is closest to the deceased in legal terms and cites the case of *Jacinta Nduku Masai v Leonida Mueni Mutua & 4 others* [2018] eKLR. She submits that this position was supported by DW2 who stated during cross examination that in Isukha culture if a man is married to two wives and he dies he gets to be buried at the house of the 1st wife.
8. On whether the deceased left a valid Will she contends that the trial court was right to determine that the alleged Will of the deceased had not gone through the authentication process of a Will by a Probate Court. She also contends that in line with the section 3(2) of the *Judicature Act* on the application of customary law, the Isukha customs ought to apply on the place to bury the deceased.

Issues, Analysis and Determination

9. This Court has considered the grounds of appeal, the proceedings of the lower court as well as the Judgment together with the rival submissions by both the Appellant and the Respondent and discerns the two issues for determination to be whether the deceased had a valid written Will and if so, if he should be buried in accordance with the Will or the Isukha customs and if the Respondents case was proved on a balance of probabilities.
10. Section 11 of the *Law of Succession Act* provides for the conditions of a valid Will to be the fact of signing of the Will by the testator by self or by a person in the presence and direction of the testator in a manner that show intention to give effect to the Will and that the Will be attested by at least two competent witnesses who saw the Will get signed. The document produced as a Will was duly signed and witnessed, prima facie in accordance with the law.
11. I have looked at the Judgment of the trial court and noted that it was the finding of the trial magistrate that the Will was not valid for the reason that it was procured under suspicious circumstances in that it was prepared at the home of the Appellant. That finding is not supported by any evidence on



record even though the Will was pleaded on the counter claim and reply to defence and defence to counterclaim. It is still trite that a Judgment by the Court must flow from the pleadings by the parties and proved by the evidence tendered.

12. The appellant having pleaded the existence of a will and the same having been denied by the Respondent, once the Will was produced by consent, it was the duty of the Respondent to prove the invalidity of the Will. The Court has re-appraised the evidence recorded at trial and noted that no attempt was made to disprove the Will at all. With such state of affairs, the Court finds that the Will was not challenged by any evidence to be invalid, and in dismissing the Will as the trial did, it erred. That error stands to be corrected by this Court declaring that the Will stood at the close of evidence and ought to have been upheld.
13. On the proof of the case pleaded by the Respondent, the Court notes that the contest was whether or not the deceased had established a home at Lugari in accordance with Isukha Customary law as to demonstrate that he was an adherent of the customs and traditions of the Isukha people. A perusal of record show that very little was done in that regard. PW2, who gave evidence and said he was a brother to the deceased said nothing in his witness statement and in cross-examination about the deceased having been adherent of the Isukha customs. In fact, none of the witnesses ventured in that direction. It is thus the law that which is neither proved nor disproved is not proved. Without proof that the deceased observed, respected and practice the Isukha traditions, it was an error for the Court to find that the deceased be buried in Lugari as the home he had established with the Respondent. The Court thus finds that the Respondent's case was not proved on a balance of probabilities.
14. Having considered the materials pleaded in both plaint and statement of defence as well as submissions offered and based on the evidence recorded and the Judgment of the trial court, the Court finds that the Respondent had been estranged to the deceased. On that basis when added to the fact that the deceased had expressed his wish in the Will, I do find, on the authority of *Samuel Onindo Wambi vs COO* [2015] eKLR, that the Respondent's conduct towards the deceased, in life, extinguished her right to bury him or direct the place for his burial.
15. For that reason, the appeal succeeds, the Judgment of the trial court in favour of the Respondent is set aside and in its place an order is made that the deceased's remains be interred in accordance with his wishes expressed in the Will.
16. Being a family dispute, it is directed that each party shall bear own costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 4TH DAY OF MARCH, 2024

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Kombwayo for the Appellant

Mr. Mukavale for the Respondent

Court Assistant: Polycap Mukabwa

