



Adhola v Kudha & 2 others; St. Elizabeth Lwak Mortuary (Interested Party) (Civil Appeal E007 of 2024) [2024] KEHC 8491 (KLR) (12 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8491 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E007 OF 2024
DO OGEMBO, J
JULY 12, 2024**

BETWEEN

PATRISIA AJUMA ADHOLA APPELLANT

AND

ARKIPO ORWA KUDHA 1ST RESPONDENT

KENNETH KAUNDA 2ND RESPONDENT

MATILDA BETHA ADHOLA 3RD RESPONDENT

AND

ST. ELIZABETH LWAK MORTUARY INTERESTED PARTY

*(Being an appeal from the Judgement and decree of the Hon. J. A. Ayieta, RM,
delivered on 29/2/2024 in Madiany Pm's Court, PMCC No. E003 of 2023)*

JUDGMENT

1 The appellant herein Patricia Ajuma Adhola, sued the three Respondents, Arkipo Orwa Kudah, Kenneth Kaunda and Matilda Betha Adhola before the lower court by way of plaint dated 1/11/2023. The substantive prayers relevant to this appeal at this stage are prayers (c) and (d) of the plaint as follows:-

(c) That an order that the body of the deceased Welson Sylvester Adhola Kudha be released to the Plaintiff/Applicant (appellant) to inter the remains at their matrimonial home only for the purpose of the burial.

(d) An order that the burial permit in the custody of the 1st Defendant/Respondent be surrendered before the Honourable Court and be issued to the Plaintiff/Applicant herein.



2 The suit of the Plaintiff was heard by the trial and in the judgment delivered on 29/2/2024, the trial court ordered as follows:-

- i. That the Plaintiff's case is dismissed with costs awarded to the Defendants. That Defendant's counter claim succeeds.
- ii. That Matilda Betha Adhola, the 3rd Defendant herein, in the counter claim to lead her family in organizing and determining the date, location and burial site of the late Nelsons Sylvester Adhola Kudha, the deceased herein at his matrimonial home in Ongiello village.
- iii. That the Defendant in the Counter claim herein to sign and retain all the relevant documents regarding the burial of the deceased and appoint any assistance they may require in the process.
- iv. That the plaintiff to meet the costs of preserving the deceased's body at St. Elizabeth Lwak Mortuary, the interested party herein, from the date of filing the suit on 1/11/2023 until the date of the judgment.
- v. An order for St. Elizabeth Lwak Mission Mortuary, the interested party herein to release the remains of the deceased exclusively to the Defendants for the purpose of conducting a fitting farewell ceremony.
- vi. An order prohibiting the Plaintiff, their servants or agents from causing any disruption or disorder during the period when the Defendant will be conducting the burial of the deceased.
- vii. All personal effects of the deceased be held in trust by Matilda Betha Adhola, the 3rd Defendant herein, on behalf of the rightful beneficiaries.
- viii. Officer commanding Ongiello Police station and or officer commanding the nearest police station be authorized to enforce compliance and or help enforcement of the Honourable court orders issued herein.

3 Aggrieved, the appellant has appealed to this court against the said orders. In the Memorandum of appeal filed herein and dated 3/3/2024, the appellant has raised the following grounds of appeal.

1. That the learned trial magistrate erred in law and fact in misinterpreting the provisions of Section 51 of the Evidence Act and the substance of the Juridical and philophysical basis of evidence attained thereto hence noting per incuriam the decision of the Court of Appeal in SAN -VS- GW, KSM Civil Appeal No. 1 of 2020, adopting Nyariba Nyankomba -Vs- Mary Bonareri Munge (2010) on the question of expert witnesses in customary law.
2. That the learned trial magistrate erred in law and in fact in acting per incuriam the Court of Appeal decision in Virinia Edith Wambui Otieno –vs- Joash Ochieng Ougo & Ano. (1987) eKLR, in failing to find that the law applicable in this burial dispute is Luo customary Law which vests burial rights on the first wife in a polygamous marriage.
3. That the learned trial magistrate erred in law and fact in misinterpreting Kisumu Civil Appeal No. 1/2020, San –VS- GWand therefore failing to find that the 3rd Respondent's conduct extinguished her rights to bury the remains of the deceased.
4. That the learned magistrate erred in fact by making findings based on no evidence, a misapprehension of evidence and wrong principles.
5. That the learned magistrate erred in fact by illegally importing evidence of separation for 50 years between the appellant and the deceased which was not adduced at all.



6. That the learned magistrate erred in fact by pronouncing that the appellant's house was constructed by the church contrary to evidence that the same was done by the appellant and deceased under Luo Customary Law with the assistance of their home church.
 7. That the learned magistrate erred in fact by overlooking glaring evidence of the deceased a home for the appellant and instead ascribing to demands by the appellant's daughter.
 8. That the learned magistrate erred in law and facts in admitting and relying on evidence without probative value adduced by the 3rd Respondent during cross examination that purchase of Siaya/Omia Malo/4240 was at the instance of the appellant's eldest daughter.
 9. That the learned magistrate erred in law and in fact in amending the Luo Customary law in polygamous marriage by pronouncing the younger wife who ordinarily hosts the husband as the bona fide party to conduct interment and burial rights of the husband notwithstanding contrary evidence from PW2 and PW3 who were over 80 years of age.
 10. That the learned magistrate erred in law and fact in ignoring glaring evidence that the deceased lived separately from the 3rd Respondent at the 10X10 hut at Ongielo hence lack of closeness proximity could be easily discerned.
 11. That the learned magistrate erred in law and fact in failing to appreciate evidence of DW4 during cross examination which clearly demonstrate that the 3rd Defendant was not close to the deceased in as much as they stayed in the same compound.
 12. That the learned magistrate erred in law and in fact in breathing life to the invalidated will dated 3/8/2015 by purporting it to be the deceased's expressed wish without interrogating all its impeachable yardsticks for instance failure to inform his wide nucleus family.
 13. That the learned Judge misdirected herself on the applicable law and principles in the evaluation of evidence adduced and thereby arrived at a wrong decision in her judgment.
- 4 The appellant prays that his appeal be allowed and that the judgment and decree of the trial court be set aside. She also prays for any other order the court deems fit and costs. The Respondents oppose this appeal.
- 5 As a first appellate court, the jurisdiction of this court is well. In the Court of Appeal decision in *Selle –vs- Associated Motor Boat Co. Ltd & Others* (1968) EA 123, it was held that the same is to re-analyse and re-evaluate the evidence and for the court to come up with its conclusion. Thus this court must consider all the evidence before the trial court and to thereafter make its own determination.
- 6 From the record of the proceedings the case of the plaintiff (appellant) commenced with the evidence of PW1, Patricia Juma Adhola that the marriage between her and the deceased was celebrated in accordance to Luo Customary Law and they did not divorce. That Luo customary law allows for polygamy and deceased had four wives and 3rd Respondent is the younger wife and therefore should not bury the deceased. That it is not strange that the husband would spent more time at the home of the youngest wife, but that would not mean she buries him.
- 7 Regarding the will, the witness testified that at the time of writing the will, deceased was already sick and she only came to know of the will after she had filed the case in court. That deceased was sick for long and was not in a good state of mind and the same was witnessed by 2nd Defendant, a son to the 1st Defendant. That deceased had 14 children all of whom took care of him and that the will is only on one household leaving out the rest.



- 8 On being cross examined, this witness went on that deceased died on 26/10/2023 due to old age after a long illness, aged 89 years. That all his wives were married under customary law. That she had a home at deceased's ancestral home at Kajosiah, but left and built her home, with the help of several pastors. That the deceased stayed in the 10X10 unit house from 1989 after moving from his father's home. That deceased went back to his Kajosiah ancestral home where he built the 10X10 unit. That his 4th wife died while the other one Rebecca stayed at the witness' house at Kajosiah after she moved. House of 3rd Respondent and deceased's 10X10 unit are in the same compound, and being a homestead of a younger wife, the witness stated she cannot spend in the house.
- 9 This witness went on that her home is at Nguka, about 30 minutes' walk from Kajosiah and that Alfred grandson of the deceased took care of him. That sometime in 1979, deceased's 3rd wife had left, while the 4th had died. And that plans by the 2nd wife, deceased filed for divorce so as to remain the only wife of the deceased.
- 10 She confirmed further that the time deceased built her home, he was already married to the other wives. The deceased thereafter built his 10X10 unit where the 2nd wife later joined him.
- 11 Wilson Hayanga Okodo was PW2, 82. His evidence was that under Luo customary law, when a polygamous man dies, he is buried at the homestead of the 1st wife. He went on that he knows the family well and that deceased bought land in Nguka where he built for his first wife.
- 12 And PW3, Michael Okungu Onjoma, a neighbour of the deceased since 1985, testified that he knew deceased and appellant as husband and wife and that under Luo Customary Law, the deceased ought to be buried by his first wife even where there is no love. That even the wife separate from the husband, it is her duty to bury the husband. That he was present when deceased built a house, 'Ligala' for the appellant, before doing the same for 2nd wife. That he would visit the deceased in his 10X10 duol, where the man of the home would be expected to sleep.
- 13 PW4, Tobias Ongar Anyiko, testified that deceased was his cousin. His evidence was that deceased and plaintiff were husband and wife, fellowshipped together and shared the same church. That the deceased built the home in Nguka according to Luo Customary Law. That the 3rd Respondent resided at Ongielo with the deceased who was ill for many years. That when the home at Nguka was built, the deceased was present with fundis. PW5, Florence Ayieko Adhola, daughter of the deceased, produced several photos as exhibits, photos taken at the home of the 3rd respondent. PW6 similarly produced several other photographs but now taken at Kisumu Specialist Hospital.
- 14 PW7, Lynette Saruya Agolla, the last born of the deceased also produced more photographs taken in July 2022, showing her father, the deceased, and 2nd and 3rd Respondents amongst other family members at the ceremony of her sister as deceased welcome the husband of PW5. Further, photos show her and her sister visiting the deceased and a duvet they bought for the deceased and that the photos were taken in the 10X10 unit.
- 15 The 1st Respondent was DW1. He confirmed that appellant is wife to his brother, the deceased. He produced divorce proceedings of suit No. 41/1978, including the decree nisi. He however did not produce the decree absolute. On the will produced, his testimony was that he was not aware a will has to be attested to. That deceased signed the will on 3/8/2015 in his presence and that of 2nd Respondent while already sickly, having fell ill in 1995. He did not know if the deceased informed his family members of the will. And that his son, the 2nd Respondent kept the declaration document. He did not attest to the will. In his evidence, the deceased never stepped in the home of the appellant which was constructed by the church. But that appellant stays in land bought by the deceased in early 1980's and



- registered in deceased's name. That the deceased otherwise went to home of the appellant in matters to do with his children like when one died or was getting married.
- 16 The 2nd Respondent was PW2. He is son of the deceased. His testimony was that he was present when deceased wrote the declaration and signed it. He noted that the declaration is not complete as it has a gap and it is not attested to by any witness. That appellant did not participate at all in the affairs of the deceased during his lifetime, but that she would visit him in hospital. He also conceded that appellant had visited deceased at the home of 3rd Respondent once.
- 17 The 3rd Respondent was PW3. Her evidence was that 2nd Respondent is her son. That appellant separated from the deceased and moved out of the ancestral home in 1978. That the appellant and deceased thereafter divorced in court, though she did not produce the decree absolute. That the appellant never participated in deceased's sickness, but would come once in a while if she had an issue. She would also visit the deceased in hospital. This witness went on that she only learnt of the will from her youngest daughter after the deceased informed the daughter. She mentioned at least three occasions she herself went to the home of the appellant.
- 18 And DW4, Alfred Ayieko Otieno, a grandson of the deceased, testified that he was the caregiver of the deceased and she knew appellant when she visited the deceased in 2023. He however changed and confirmed that appellant had in fact given him a bicycle to ride to school. And that she visited him in hospital in Kisumu and at home. Her children also visited.
- 19 That is basically the evidence that was tendered before the trial court.
- 20 It was submitted by the appellant that PW2 and PW3 effectively demonstrated uncontroverted Luo customs on burial in a polygamous marriage as in *Ojwang Jb; Mugambi J.n And Adnwo G.o (1989) Pp 116*, "the Sm Otien Case, *Deuh And Burial In Modern Kenya*, in which the scholars noted in part;
...indeed the only area where there is no legislation or present is burial and it is here that the courts are given certain African Customs a certain supremacy that they do not enjoy anywhere else....."
- 21 Counsel also relied on the case of *Nyariba Nyankomba –vs- Mary Bonareri Munge (2010) eKLR* in which it was observed;
Time and again, it has been stated that in cases resting purely on customary law, it is absolutely necessary that experts vested in the customs be summoned to testify so as to assist the court reach a fair verdict since the court itself is not well versed in those customs and traditions.
And the admissibility of such customs, rights or opinions under Section 51 (1) of the *Evidence Act*.
- 22 Further the PW2, PW3, and PW4 all established that the deceased was a Luo man engaged in a polygamous marriage and hence had to be buried outside the 1st wife's house (*Mary S. Awino & Ano. Vs. Hellen Akello & 2 Others (2009) Eklr*. And that this position can only change in exceptional circumstances like where the deceased tells his family members (*SAN –VS- GW, Court of Appeal, Kisumu, Civil Appeal No. 1/2020*).
- 23 It was further submitted that 3rd Respondent action of abandoning the deceased to stay in the 10X10 unit impeaches her capacity to bury the remains of the deceased. That a person's conduct to a deceased person, can extinguish the right of that person to bury the deceased (*Samwel Onindo Wambi –vs- Coo & Ano. (2015) Eklr*).



24. The appellant also submitted that the Luo customary law that the husband ordinarily resides with the younger wife but with the common understanding that he will be interred at the home of the 1st wife is not repugnant to justice and morality (Morris Odawa Vs. Samwel Ochieng Auma (2019) Eklr, Edwin Otieno Obanjo –vs- Martin Ondera (1996) Eklr.
25. Finally it was submitted that the deceased ought to be buried in Siaya/Omia Malo/4240 which has no dispute and which all the parties would be able to access unlike the parcel occupied by the 3rd Respondent which would restrict the attendance of the appellant.
26. In response, the Respondent on the other hand submitted that no expert witnesses were produced to testify for the appellant and that the witnesses who testified did not meet the criteria of expert witness as per Section 48 of the *Evidence Act*. And relying on the same authority of San –VS- GW (supra), it was submitted that the wishes or a will on how the deceased’s remains will be disposed of as a general rule are binding, and that the law only recognizes the persons who are closest to the deceased to have the right to bury the deceased. That this proves the right of the 3rd Respondent to bury the deceased. The Respondents urged that this appeal be dismissed with costs.
27. I have considered the evidence of the parties herein. I have also considered the submissions made by the parties and the authorities relied on. I have also carefully considered the judgment of the lower court appealed against.
28. This dispute is basically on who between the appellant and the 3rd Respondent has the right to bury the remains of the deceased in her home. The parties herein referred this court (and the lower court) several authorities that would obviously guide this court in determining this issue. Amongst the cited cases are:-
- i. San –VS- GW (2020) eKLR, that to resolve burial disputes, it is settled that applicable laws include customary law, marriage law, succession law, human right law and other personal laws.
 - ii. In re-burial of Musa Magodo Keya (2021) eKLR, that the burial place of a person is closely linked to 3 things, his wishes, duty imposed on those closely related to him and his home.
 - iii. Ruth Wanjiru Njoroge –VS- Jeremiah Njeri Njoroge & Another (2004) eKLR, that in the social context in this country, the person who is first in line of duty in relation to the burial of any deceased person is the one who is closest to the deceased in legal terms and as the marital union is the closest chain of relationship touching on the deceased therefore, it is only natural that the one who can prove this fundamental proximity to the deceased, has the right of burial ahead of any other claimant.
29. The case of San VS GW (2020) eKLR further holds that the law only recognizes that persons who are closest to the deceased to have the right to bury the deceased and that those persons may be identified as the spouse, children, parents and siblings in that order, and further that the person claiming the right to bury the deceased must be one who has demonstrated to have been close to him or her during his or her lifetime.
- iv. Samwel Onindo Wambi –Vs- COO & Ano. (2015) eKLR, that a person’s conduct to a deceased person can extinguish the right of that person of burying the remains of the deceased..... The court has to consider all the circumstances of the case and justice of the case.
 - v. Nyariba Nyankomba –Vs- Mary Bonareri Munge (2010) eKLR, that on customary law, it is absolutely necessary that experts versed in the customs be summoned to testify so as to assist the court reach a fair verdict since the court itself is not well versed in those customs and traditions.



In absence of such expert testimony, there can only be one conclusion, that such claims remain unproved.

30. These are just some of the authorities that the parties relied on before the trial court and which they adopted by way of submissions before this court.
31. There is no doubt that the deceased was a Luo man whose personal law was Luo customary law. From the evidence on record, this fact is proved by several pieces of evidence. The deceased first lived in his ancestral land at Kajosiah Kudha. He then moved, put up a home at Ongielo where he stayed with the 3rd Respondent. He bought land at Nguka where the home of the appellant is established. He was a polygamous man having married four wives under Luo customary law and out of the unions, he had upto 24 children (the evidence of DW1). It is also clear that a part from the homes and houses of his wives, the deceased constructed for himself a 10X10 unit within the compound of the home of the 3rd Respondent, where he stayed, ate and slept. He was a caring father who was directly involved in the affair of his children including participating in burial rituals of his children as well as dowry negotiations and marriage ceremonies of his daughters.
32. Being one who had adopted Luo customary law, practiced and lived the same, this court is convinced beyond doubt, that in this dispute relating to the burial of the deceased, it is Luo customary law that ought to be applied to determine where and by whom the deceased ought to be buried.
33. The deceased and the appellant were married under Luo Customary Law. Appellant was deceased's first wife before he married the 3rd Respondent and 2 other wives. It is clear from the record that after their marriage in 1955, the two encountered marital differences leading to the appellant leaving their matrimonial home in 1971. The deceased then filed for divorce with the appellant in 1978. The deceased obtained decree nisi in case Number 41 of 1978. As rightly observed by the learned trial magistrate, the decree nisi issued on 2/9/1981 was to lapse after 6 months. There is no evidence on record to show that any decree absolute was even issued by the court upon the lapse of the decree nisi. The effect of this ie. The absence of any decree absolute, can only lead to one conclusion. That the divorce between the deceased and the appellant was never concluded and that in law, the two remained legally married as husband and wife.
34. It is worth noting that in fact the deceased personally bought the land at Nguka on which the appellant's home is situated well after he had obtained the decree nisi. He must have bought this land fully aware that the appellant was still his wife. I accordingly find. And if the appellant remained the wife of the deceased, obviously she retained her position as the first wife of the deceased.
35. At the trial, the appellant called at least two witnesses, PW2 Wilson Hoyanga Okodo, aged 82 years and PW3 Michael Okungu Onjoma a long time neighbour. PW2 gave evidence that under Luo customary law, a deceased husband ought to be buried at the home of his first wife. This witness at the age of 82 years gave evidence with authority as one well versed with Luo customs. And it was further his evidence that the position that a deceased husband ought to be buried at the home of his first wife would not change even in situations where there was no love between the two. This witness further testified that he was present and witnessed as the deceased put up the home for appellant, with the help of the church. Nowhere in the defence was case it even denied the opinion of this witness that deceased husbands must at all times be buried at the homes of their first wives. And a part from DW1 denying that deceased never built the home, the evidence of DW1 fell short of challenging the evidence of PW2 since he himself was not present to witness the construction of the home of the appellant as to be sure the deceased did not participate in the same.



36. And there is corroboration of the evidence of PW2, by PW3, who also confirmed that the deceased indeed attended and participated in the putting up of the appellant's home at Nguka.
37. It is to be noted that this witness is a cousin of the deceased. These are witnesses versed in Luo Customary Law out of prolonged use of the same and not experts as a result of any technical training as envisaged under Section 48 of *Evidence Act*.
38. And then there is the evidence of PW5 Florence Ayieko Adhola, that indeed her father, the deceased attended her dowry negotiations at the home of the appellant. And that even the 3rd Respondent attended and participated with the 1st Respondent in fact being the master of ceremonies at the event. Had the deceased not considered this as his home and appellant as his wife, I cannot see how the deceased would have attended and participated in the ceremony at the home of the appellant.
39. And regarding the actual relations between the deceased and the appellant and her family, again evidence was tendered that greatly aids this court. PW5 and PW6 testified as to assisting in taking care of their sick father. Photographs were produced showing them visiting their sick father at hospital and also in his 10X10 unit at the home of the 3rd Respondent. There is also evidence on record and admitted even by the Respondents that even the appellant visited deceased in hospital and at the compound of the 3rd Respondent.
40. To me, these factors put together, point to a picture where whereas the deceased resided in his 10 X 10 unit within the compound of homestead of the 1st Respondent, and whereas, not much affection may be seen in the relationship between the appellant and the deceased, the whole family knew and accepted the fact that the appellant remained a first wife of the deceased and that the home of the appellant was in fact also the home of the deceased. I so find.
41. The Respondent's case is first based on the alleged divorce between the two parties. This court has already determined on the same that the said divorce was never concluded.
42. The Respondents have also based their claim on the alleged declaration or "will" written by the deceased allegedly expressing the wishes of the deceased. I have perused the judgment of the trial court and I am convinced that the court expressed itself conclusively on this issue. There has been no challenge or cross appeal against the finding of the trial court that the same is not a will as required under Section 11 of the laws of Succession Act, to the extent that the same was never attested to by two or more competent witnesses. And that there cannot be property in a dead body and a person cannot dispose of his body by will in any case (APELI -VS- BULUKU (2008) 1 KLR 873. I am equally not convinced that this document would aid the Respondents' case in any way.
43. Article 159 (3) of *the Constitution* of Kenya envisages and encourages the use of traditional dispute resolution mechanisms which could include customary law with a rider that same may not be applicable where same is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality. The decision of this court on the burial of the deceased would in no way go against this guiding principle of *the Constitution*.
44. The deceased, being a Luo man, manifested and lived according to the customary law as seen above. Had the trial magistrate considered the above circumstances, the court would have probably come up with a different verdict. It did not, regrettably.
45. On my part, considering the above circumstances, I am convinced that the appellant proved on a balance of probabilities that being the first wife of the deceased, she has the right to bury the remains of the deceased in her home according to Luo Customary Law. I accordingly therefore, allow this appeal and set aside the judgment and the decree of the lower court.



46. I order as follows:-

- i. That the body of the deceased Nelson Sylvester Adhola Kudha, be released to the appellant (Plaintiff in the lower court) to inter the remains at their matrimonial home at Kudha.
- ii. That the burial permit in custody of 1st Defendant/Respondent, be surrendered to the appellant to facilitate the burial of the deceased.
- iii. That the Officer Commanding Aram Police Station be ordered to supervise the enforcement of this order.

47. Regarding the issue of costs, I have noted that this is a family dispute in which there is need to foster harmony within the family. For this reason, I order that costs of this appeal and costs of the case before the trial court shall be in the cause ie. each party shall bear own costs.

48. However, I order that the appellant shall pay the costs of the 4th Respondent of preserving the deceased's body at St. Elizabeth Lwak Mortuary from the date of filing this suit on 1/11/2023 till the date of release of the body for burial.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 12TH DAY OF JULY, 2024.

D. O. OGEMBO

JUDGE

12/7/2024

Court

Judgment read out in Open Court in presence of Mr. Arika for Respondents and Ms. Nyambeki for Applicant.

Mr. Arika

We ask for stay of execution for 14 days.

Ms. Nyambeki

We only pray for copies of judgment.

Court

Stay of execution for 14 days as prayed for by the Respondent. Parties to be supplied with certified copies of the judgment upon payment of requisite fee.

