



**Onderi v Ontweka & 3 others (Civil Appeal E048 of 2023)  
[2023] KEHC 19506 (KLR) (Civ) (5 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19506 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E048 OF 2023**

**EKO OGOLA, J**

**JULY 5, 2023**

**BETWEEN**

**ZIPPORAH MASESE ONDERI ..... APPELLANT**

**AND**

**JOSEPH ONTWEKA ..... 1<sup>ST</sup> RESPONDENT**

**ELISHA ONTWEKA ..... 2<sup>ND</sup> RESPONDENT**

**STANLEY ONTWEKA ..... 3<sup>RD</sup> RESPONDENT**

**DAVID ONTWEKA ..... 4<sup>TH</sup> RESPONDENT**

*(Being an Appeal from the Judgment of the Learned Principal Magistrate, Hon. S.A. Opande, Milimani delivered on 5th June, 2023, in CMCC No. E1878 of 2023)*

**JUDGMENT**

1. On 4<sup>th</sup> May, 2023, the Appellant who was the Plaintiff in the Lower Court case filed an Amended Plaint dated 4<sup>th</sup> May, 2023 praying for judgment against the Respondents for:
  - a. A permanent injunction do issue against the Defendants by themselves, their agents, their servants, and or employees or otherwise from interfering removing, interring, burying, transferring the remains of the late Naftali Onderi Ontweka from Lee Funeral Home, Nairobi County to Kisii for burial
  - b. The Honorable court do order the remains of Naftali Onderi Ontweka to be released from Lee Funeral Home to the Plaintiff for burial at Kamulu, within Nairobi County
  - c. Costs be provided for



2. The Defendants filed a Statement of Defence and Counterclaim dated 5<sup>th</sup> May, 2023 where they prayed for the Plaintiff's suit to be dismissed and Judgment be entered for the Defendants in the Counterclaim as follows: -
  - a. Naftali Onderi Ontweka body at Lee Funeral Home be released to the 4<sup>th</sup> Defendant for burial at Kiango, Bomachoge, Borabu Kisii County
  - b. Costs of the Counterclaim.
3. Having considered the suit, the Learned Magistrate Ordered that: -
  - a. The Amended Plaint before the court dated 4<sup>th</sup> May, 2023 is hereby dismissed
  - b. The Counterclaim dated 5<sup>th</sup> May 2023 is allowed as prayed
  - c. Each party to bear its own costs
4. Being aggrieved by the said Judgment, the Appellant filed the present appeal and raised the following grounds of appeal: -
  1. The Learned Principal Magistrate erred in law and fact by dismissing the Appellant's claim to be allowed to bury her deceased husband and as a consequence arrived at a wrong decision
  2. The Learned Principal Magistrate erred in law and fact by holding that the right to bury was not an issue in the proceedings contrary to the pleadings and evidence before the Honorable Court
  3. The learned Principal Magistrate erred in Law and fact by failing to find the Appellant as the widow had superior rights over everybody when it came to who could bury the deceased spouse
  4. The Learned Principal Magistrate erred in law and fact by brazenly ignoring and disregarding the binding decisions of the superior courts on the position that the widow of the deceased had the first right to bury her deceased spouse and as a consequence arrived at a wrong decision
  5. The Learned Principal Magistrate erred in Law and fact by handing over the remains of Naftali Onderi Ontweka to the 4<sup>th</sup> Respondent, who is a brother of the deceased, who ranks below the widow and children of the deceased as per law and as such arrived at a wrong decision
  6. The Learned Principal Magistrate erred in law and fact by failing to find that the deceased wishes as communicated to the appellant were that he wanted to be buried in Kamulu and not in Kiango
  7. The Learned Principal Magistrate erred in law and fact by disregarding the evidence of the Appellant that was uncontroverted that the deceased informed her his wishes to be buried in Kamulu where they had established a home
  8. The Learned Principal Magistrate erred in law and in fact in finding that the burial place of the deceased was in Kiango contrary to the wishes of the deceased and the immediate family members
  9. The Learned Principal Magistrate erred in law and in fact by allowing the Respondents Counterclaim even though it was incurably defective for want of authorization by the other Respondents for the 1<sup>st</sup> Respondent to verifying the counterclaim
5. The appellant therefore asks for orders: -



- a. That the appeal herein be allowed with costs;
  - b. That the decision/judgment delivered on 5<sup>th</sup> June 2023 be set aside and the Appellant be allowed to bury the deceased spouse, Naftali Onderi Ontweka.
6. The Respondents opposed the Appeal vide a Replying Affidavit dated 12<sup>th</sup> June, 2023 sworn by the 4<sup>th</sup> Respondent on behalf of all the Respondents. The Respondents state that the Orders of the Lower court did not stop the appellant or her children from attending the burial as the court only determined the place of the burial. The Respondents state further that since the death of the deceased, everything was brought to a standstill in their home as no activity is allowed to take place until a person is buried as per their customary law; besides that, the Respondents state that the mortuary expenses are increasing daily.
  7. The Appeal was canvassed by way of written submissions. The Appellant's submissions are dated 26<sup>th</sup> June, 2023 whilst the Respondents' submissions are undated.

### **Appellant's Submissions**

8. The Appellant was represented by the Law firm of Moindi & Company Advocates whilst Respondents were represented by the Law Firm of Mogeni & Company Advocates.
9. The Appellant's counsel Mr. Manyara submitted that the fact that the trial court granted the respondents the right to bury the deceased without considering that she was the deceased's spouse amounts to discrimination contrary to Article 27(3) of the Constitution.
10. Counsel submitted that the trial Magistrate recognized that the Law grants priority to a spouse over brothers with respect to the burial of the deceased but proceeded to give the body of the deceased to the 4<sup>th</sup> Respondent who is the brother of the deceased. It is submitted that the trial Magistrate did not determine the issue of who has the right to the body of the deceased.
11. It was counsel's submission that the trial court found that the deceased had made a choice to be buried in Kiango, his ancestral home yet this was not backed up by any evidence; this decision was made without considering that the appellant had evidence that the deceased wanted to be buried at Kamulu.
12. It is Appellant's submission that the trial magistrate erred in declaring the counter-claim competent yet it was not supported by the verifying Affidavit of 1<sup>st</sup> to 3<sup>rd</sup> Respondents.
13. The Respondents' counsel Mr. Omogeni submitted that the issue of discrimination is a new issue which was not raised at the trial court. Therefore, it should not be raised in this Court. Counsel submitted that the appellant was married to the deceased vide Gusii customary laws and such Gusii customs and traditions recognize the manner in which a person should be buried which traditions the Appellant did not seek to challenge.
14. It was the Respondents' case that they have not barred the Appellant from participating in the burial of the deceased as a widow; the dispute is on where to bury the deceased considering that it was the deceased's wish to be buried at his ancestral home. The Respondents submitted that the deceased's expressed and wished to be buried in his ancestral home and this is shown by the deceased's participation as the chairman of the clan and also in the design that he built his house showing that he was comfortable dwelling among his people.
15. Counsel submitted that the counterclaim could not be rendered incurably defective as submitted by the Appellant's. This is because the 1<sup>st</sup> to 3<sup>rd</sup> Respondents gave evidence before the court during the



hearing. Counsel relied on *Ahmed Dolai & Others V Kengen & Another* (2018) eKLR and *Research International East Africa Ltd V Julius Arisi & 213 Others*

16. Counsel submitted that the deceased was a highly respected member of the Gusii Community and it is evident from the activities that he did including building a house as per the customs of the Gusii community; that the deceased fully embraced the customs and traditions of his community and should be buried in his ancestral home.

### **Determination**

17. I have carefully considered the appeal herein, the grounds proffered, the parties' submissions and the orders appealed against. This Court is alive to the fact that it did not hear the witnesses testify nor did it observe their demeanor, and therefore should be slow to reverse the trial court's decision. It is however, not lost on this court that an appeal is in a way a retrial and the court must therefore reconsider the evidence, evaluate it itself and draw its own conclusions. In *Oluoch Eric Gogo v Universal Corporation Limited* [2015] eKLR and in *Peter M. Kariuki -vs- Attorney General* [2014] eKLR the court held inter alia as follows:

“We have also, as we are duty bound to do as a first appellate court [to] reconsider the evidence adduced before the trial court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.”

18. The above holding captures the locus classicus decision in the case of *Selle v Associated Motor Boat Co.* [1968] EA 123 where it was held that:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

19. I shall determine issues raised based on the grounds of Appeal before the court and at the same time weigh evidence before the trial court on the grounds raised by the Appellant.
20. Grounds 1-5 deal with the right to bury the deceased. The Appellant argued that the trial Magistrate did not consider that the Appellant being the spouse of the deceased has priority over any other person to bury the deceased. From the Judgment of the trial court which is found from page 201-220 of the Record of Appeal, the trial court discussed the issue of whether the right to burry was an issue before the court. The trial magistrate stated that the law recognizes that a spouse has priority over the rest when it comes to who should burry the deceased. The trial Magistrate also took note of the fact that the deceased spent most of his time with his spouse and the Appellant was present even when the deceased was being crowned an elder of the Mogunde clan in Kisii community. The trial magistrate stated that what was before her was not who has the right to bury the deceased but where to bury the deceased.
21. On this issue, as to who has the right to the body of the deceased, it is to be noted that all the parties in this case are relatives of the deceased and are therefore entitled to bury their deceased. There is no



- property in a dead body. However most African communities show respect to their loved ones by honoring their wishes. The trial magistrate rightfully held that the right to bury was not a dispute before the trial court.
22. Grounds 6-8 of the Memorandum of Appeal as raised by the appellant deal with failure by the trial magistrate to consider the wishes of the deceased in ordering that the deceased be buried at his customary home at Kiango in Kisii.
  23. The trial Magistrate in considering where the deceased should be buried used Article 44 of the Constitution which is to the effect that every person has the right to participate in the cultural life of the person's choice. The trial court went on to state that there was no controversy that the deceased was practicing Gusii Customary Law; the trial court was guided by the fact that the deceased married the Appellant through the Gusii Customary Law and the deceased was appointed as an elder of Mogunde clan. The trial court considered the evidence of PW2, Haron Onderi Okindo the second son of the deceased who testified that the deceased had not expressed where he wished to be buried but it was the wish of his immediate family that he is buried in Kamulu. The trial court strongly relied on the evidence of PW2 who further testified that the deceased exercised Gusii Customs and did not divorce himself from his ancestral home; that it was the deceased's desire to stay at his ancestral home longer.
  24. The trial court was of the view that burying the deceased at Kamulu would be contrary to what the deceased wanted. The trial court in coming up with the decision to have the deceased buried at his ancestral home in Kiango gave the following reasons: that the deceased desired to live longer in Kiango and had the intention to build a new house; that the deceased never divorced himself from his people; that the right of a spouse to bury a spouse is not absolute and that Article 44 of the Constitution allows for one to exercise customs and traditions of his choice.
  25. The trial court when coming up with its decision placed reliance on the evidence of PW2 who is the son of the deceased. It is not clear how the trial court deduced that it was the deceased's wish to be buried at Kiango yet according to the evidence of PW2 he stated at cross-examination that "if I stated that my father told me to be buried at Kamulu, I would be lying". Could it be that trial court understood that statement to mean that the deceased wished to be buried in Kiango?. PW1 the widow of the deceased testified that she spent most time with the deceased who had projects in Kisii that she would frequently travel to see how the projects were progressing. PW1 testified that the deceased always stated that Kisii was their ancestral home but their main home was in Kamulu. PW1 also stated that the deceased had expressed his wish to be buried at Kamulu in the event of his death.
  26. The Defendant witnesses also testified that it was the desire of the deceased to be buried in Kiango where the deceased had constructed a house with two doors. According to the witnesses, a house built with two doors indicates that the deceased had in mind in the event of death, the rite of being taken into his house through one door and out of the house through the other door. PW3, Boniface Gwaka Onderi, the first son of the deceased also testified that even the Kamulu home was constructed with two doors. According to PW2 the house built in Kisii was in bad state and the deceased never repaired it; that if the deceased had the intentions of living in that house, he would have repaired it.
  27. In light of the evidence presented before the trial court, the parties are claiming that the deceased expressed his will to be buried in Kiango and also in Kamulu. I do not find any piece of evidence showing the express statement of the deceased on the place where he preferred to be buried. I therefore disagree with the trial Magistrate on the decision that the deceased desired to be buried in Kiango. Both sides claim that the deceased's expression was done orally.



28. In *James Apeli & Enoke Olasi vs. Priscilla Buluku* Civil Appeal No. 12 of 1979 [1985] KLR 777, it was held by the Court of Appeal that:

“There can be no property in a dead body. A person cannot dispose of his body by will. After death the custody and possession of the body belong to the executors until it is buried... If the deceased had left directions as to the disposal of his body though these are not legally binding on his personal representative, effect should be given to his wishes as far as that is possible.”

29. In *Re Estate of Evanson Mbugua Thong’ote (Deceased) Succession Cause 2519 of 1998* [2016] eKLR Judge Musyoka stated that:-

“An oral will is made simply by the making of utterances orally relating to disposal of property. In assessing whether the deceased had made a valid oral will, it needs to be considered first whether there was an utterance of the will. The question being whether there was an oral utterance of the terms of the will...The other consideration is that the utterance ought to be made in the presence of two or more persons.”

30. The appellant claims that the deceased expressed his desire to be buried in Kamulu which he considered his home, the Respondents claim that it was the deceased’s desire to be buried in Kiango his ancestral home. From what the parties are saying about the deceased, he seemed to have been an esteemed member of the society who had almost everything figured out. It is highly unlikely that he would have been confused on his resting place; he seems to have been someone who would know that giving such contradictory statements would bring conflict to the family.

31. In this regard I find that the deceased had not declared his wish as to his final resting place as no evidence has been provided by any of the parties to prove the same.

32. Where then should the deceased be buried? As earlier mentioned, the trial magistrate was of the view that the deceased should be buried at Kiango due to the fact that he exercised the Gusii customs and traditions and he always paid frequent visits to his ancestral home. The magistrate relied mostly on the evidence of PW2 who in his testimony stated that the deceased did not divorce his customs.

33. The Defendant witnesses testified that the deceased practiced Gusii customary laws and traditions; that he even built his house in accordance with the Gusii customs which is an expression of where he wished to be buried since the house has a front door and a back door. According to the Gusii customs and traditions, when a house is built in that pattern, it means the deceased’s corpse would have to be carried through from the front door to the back door so as to be rested. PW3 testified that even the house in Kamulu is built in similar pattern. The Defendant witnesses also testified that the deceased should be buried in Kiango since he had been crowned an elder of the Mogunde clan and elders are supposed to be buried in their ancestral home.

34. Another reason why the defendants wish for the deceased to be buried in Kiango is that when the father to the deceased and the defendants was alive, he wished that all his children should be buried in the ancestral land. According to the Defendant witnesses, the deceased even buried his child in the ancestral land. The Defendant witnesses believe that since the burial rituals have already been done and the grave already dug in Kiango; the deceased should be buried there.

35. It was the defendants’ case that when the deceased fell ill, he travelled to the village where he stated that he wished to spend time in the village. When his condition worsened the deceased had to go back to Nairobi for treatment where he succumbed.



36. The Plaintiff's witnesses on the other hand claimed that the deceased had spent years with them in Nairobi; had established a matrimonial home at Kamulu which is also built in the same way as the house in Kiango. PW1 who is the spouse of the deceased stated that she was married to the deceased through Gusii customary law but they have lived in Nairobi with frequent visits to the ancestral home. Plaintiff's witnesses are the nuclear family of the deceased and they believe they should be given priority and be considered to bury the deceased where they wish to bury him at their Kamulu home.
37. From the statements of the witnesses, the deceased was a person who knew how to play balance. He was always building his family in Nairobi and also contributing to his community by making frequent visits and undertaking projects to help the community. The people involved in this dispute were closest to the deceased but they can't seem to agree on where the deceased should be buried.
38. In *Dinah Odhiambo Oyier vs. Hellen Achieng & 3 Others* High Court Civil Appeal No. 14 of 2017 [2017] eKLR Cherere, J held that where the people who are legally closest to the deceased:
- “have shown that they cannot now agree on that issue, it is desirable and, indeed imperative, in the circumstances of this case, for this court to intervene and direct as to the deceased's place of burial.”
39. Also in *Virginia Edith Wamboi Otieno vs. Joash Ochieng Ougo & Another* Civil Case No. 4873 of 1986 [1987] eKLR Bosire J. held that:
- “It is my judgment and so declare that the 1<sup>st</sup> defendant and also the plaintiff have the right under Luo custom, to bury the deceased and to decide where the burial is to take place. However, because the two have shown that they cannot now agree on that issue, it is desirable and, indeed imperative, in the circumstances of this case for this case, for this court to intervene and direct as to the deceased's place of burial.”
40. Customary Law is one of the sources of Law in this country. Customary law is applied by dint of Section 3 (2) of the Judicature Act that provides that: -
- “The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”
41. In *Dinah Odhiambo Oyier vs. Hellen Achieng & 3 Others* (Supra), it was held that “...if African customary law is not caught up by the qualifications under section 3(2) of the Judicature Act then it must be given effect by the courts and must be applied in deciding cases before it but according to ‘Substantial justice’.”
42. In *Sakina Sote Kaitany & Ano. vs. Mary Wamaitha* [1995] eKLR the Court of Appeal held that: -
- “The Parties in this case are Africans and therefore the court will take judicial notice of such African Customary Law as may be applicable but subject to the provisions of reg. 4 as set out above. The difficulty remains how are these customary laws to be established as facts before the court. In some cases the court will be able to take judicial notice of these customs without further proof as for instance in cases where the particular customary law has been the subject of previous judicial decision or where the Customary Law is set out in a book or document of reference as provided in sub-s. (2) above, but usually in the High Court



or in a Magistrate's court, the relevant customary law will, as a matter of practice and of convenience, have to be provided by witnesses called by the party relying on the particular customary law in support of his case."

43. It follows that where a finding has been made by a court as to the existence of a particular customary law, that finding may be relied upon in subsequent cases. The Gusii Customary Law in this case has been codified in case law in *Oliver Bonareri Omoi & 5 others v Joseph Basweti Orogo* [2010] eKLR where it was held that:

"Does Kisii Customary Law provide for burial disputes like the one in this case? Yes it does.

Under Kisii Customary Law, the widow or widower has a right to bury his or her deceased spouse. It follows that the respondent in this case has a right to bury the deceased. That right, is, however, not absolute. The deceased's views as to where and who should bury his or her body as well as other circumstances do in most cases override that right." (emphasis supplied)

44. Maraga J (as he then was) proceeded to state in the Bonareri case (supra) that:

"it is common knowledge and I take judicial notice of the fact that a reasonable fraction of Kisiiis have moved out of Gusii land and settled in other parts of the country. Except in cases of ownership disputes, nearly all of them are buried in their new acquired homes when they die. "it is common knowledge and I take judicial notice of the fact that a reasonable fraction of Kisiiis have moved out of Gusii land and settled in other parts of the country."

45. I agree with Maraga J. The Kisiiis are believed to have originated from the Congo and moved through the Mt. Elgon region of Uganda and later settled at the Kisii and Nyamira Counties of Kenya. Over the years due to land constraints and also for the desire of diversity, business and job opportunities, a population of Kisiiis have moved from the Kisii and Nyamira Counties into other counties such as Kajiado, Mombasa, Narok, Nakuru, Machakos to name but a few. Most of them have established homes away from their original counties.

46. It is not new that Kisii people have been buried in the places where they have established homes. It does not mean that customs or traditions do not apply if one is buried away from Kisii or Nyamira.

47. In the instant case, the deceased being a Civil servant and mostly moving around during his working years established a home in Nairobi and built a matrimonial home in Kamulu which is way bigger than the house built in Kiango. Both houses are built to contain the front and the backdoor where the burial rite of carrying the body from the front door through to the back door can be done.

48. In the case of *SAN V GW* (2020) eKLR the court of Appeal stated that:

"The law only recognizes the persons who are closest to the deceased to have the right to bury the deceased. Those persons have been identified as the spouse, children, parents and siblings, in that order.

The other consideration is that the person claiming the right to bury the deceased must be one who is demonstrated to have been close to him or her during his or her lifetime. Regarding this last limb, the Court of Appeal in *Samuel Onindo Wambi vs. COO & Another* Kisumu Civil App No. 13 of 2011 (2015) eKLR expressed the following view:

"...A person's conduct to a deceased person can extinguish the right of that person of burying the remains of the deceased. The appellant did not show any family



closeness with the deceased when she was alive. Though he said that he used to visit the deceased and that he mobilized his siblings to build a house for her at Kibos there was no credible evidence to prove so. (sic). The fact that he was the deceased's first-born son did not give him an automatic right to bury her even if Luo customary law dictates so. The court has to consider all the circumstances of the case and the justice of the case...In this case, besides the fact that given the father and his family's treatment of the deceased he is not deserving of the right to bury the deceased's remains".

49. In the instant case, it is not disputed that the deceased married the Applicant under Gusii customary law, it is also not in dispute that the deceased had a home in Kamulu and another home in Kiango. It has not been argued whether the appellant is deserving of burying the deceased as the spouse. From the evidence before Court, it has been established that the Appellant has always been with the deceased; they were travelling together and undertaking projects together. None of the defendants' witnesses has said anything that would render the Appellant undeserving of the remains of her husband. The issue that DW1 raised the issue about the Appellant changing the next of kin form from her name to the name of the 4<sup>th</sup> Respondent when the deceased was in the hospital was explained where it was stated that the Appellant would panic every time the hospital called her. This is a panic that everyone would go through if a loved one was to be in the same position as the appellant's husband. The Appellant cannot be faulted or even rendered undeserving due to this single reason that happened a day before the deceased died.
50. As held by Maraga J in the Bonareri case (supra), the customary law of the Gusii demands that the widow or the widower of the deceased had the right to bury his/her spouse. In that regard I find that the Appellant herein has the right to bury the deceased.
51. Ground 9 of the Memorandum of Appeal as raised by the Appellant was failure by the learned Magistrate to render the counterclaim incurably defective since the Verifying Affidavit was not sworn by all the defendants. The Appellant sought for the counterclaim to be struck off since the verifying Affidavit was only signed by the 4<sup>th</sup> defendant and there was no written authority to sign on behalf of other defendants which is contrary to Order 1 rule 13 (1) and (2) of the Civil Procedure Rules.
52. The trial magistrate in declaring the counter claim competent relied on the Court of Appeal case of Research International East Africa Ltd V Julius Arisi & 213 others where it was held that "a court has a discretion in cases of non-compliance with Order 1 Rule 13 of the Civil Procedure Rules, 2010, to allow the parties to remedy the situation by complying with the rules of procedure. The trial magistrate further stated the issue of non-compliance with order 1 rule 13 was not raised in the pleadings and therefore could not be considered.
53. On this issue I agree with the trial Magistrate. When the appellant was served with the Counterclaim, she should have responded to it and raised the issue of non-compliance. It is trite that parties are bound by their own pleadings and new issues cannot be raised in the submissions.

### **Disposition**

54. Article 45 of the Constitution recognizes the family unit and provides that "the family is the natural and fundamental unit of the Society and the necessary basis of social order and shall enjoy recognition and protection of the state."
55. The nuclear family is the basic unit of the family which is recognized and protected by the state. The core and basic unit of a family is the nuclear family; this means that basic unit of the family has rights that should be recognized and upheld by the state. In this case, the Appellant's family being the



basic unit and the nuclear family of the deceased, has the right to bury their dead unless exceptional circumstances arise to render the nuclear family undeserving of burying the dead. With that in mind, I declare that the Appellant has the right to bury the deceased. Consequently, I order as follows:

1. The Appellant shall proceed to bury the deceased at the Kamulu land LR Mavoko Town Block 12/221.
2. Kisii customs shall apply in the burial.
3. The Respondents are free to participate in the burial at Kamulu
4. The mortuary expenses shall be borne by the Appellant and the Respondents.

Orders accordingly

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF JULY, 2023.**

**E.K. OGOLA**

**JUDGE**

