



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CIVIL APPEAL NO. 126 OF 2018**

**MORRIS ODAWA .....APPELLANT**

**VERSUS**

**SAMUEL OCHIENG AUMA ..... RESPONDENT**

**JUDGMENT**

1. The appellant had sued the respondent at the lower court seeking for orders that:-

- (a) An order restraining the defendant, his agents, servants, employees from taking the body of the deceased and allow the plaintiff to take the body of deceased for burial.
- (b) The defendant be condemned to pay the costs of this suit.
- (c) The honorable court be pleased to grant any other or further relief as may be just.

2. The suit herein relates to the remains of the late **Sellah Auma Odawa** (herein referred to as the deceased). The deceased was married to one Dixon Odawa Owaka of Masaana Sub-location in Vihiga County. She and her husband were blessed with 7 children. The appellant was their first born son. Thereafter the appellant separated with her husband in the 1960s and settled at Kibos in Kisumu County. She bore a son there, the respondent. She established a home at Kibos where she was living with the respondent. She died in July, 2018. The respondent wanted to bury her at Kibos. The appellant did not agree. He filed suit at the lower court seeking for orders stated above.

3. After a full trial the trial magistrate dismissed the appellant's suit with no order as to costs. The appellant was dissatisfied with the decision of the learned magistrate and filed this appeal. The grounds of appeal are that:-

- (1) The learned trial magistrate completely misapplied the law relating to burial disputes.
- (2) The learned trial magistrate erred in law and in fact in giving the body to the respondents to the exclusion of the appellant.
- (3) The magistrate erred in law and in fact in failing to recognize that the right place to bury Sellah (the deceased) is in her husband's home where most of her children (7 in number) are residing.
- (4) The magistrate did not appreciate that the deceased had a place where the husband had already designated for her to be buried.
- (5) That the elders had met and resolved where the deceased was supposed to be buried.

4. The appeal was opposed by the respondent through the written submissions of his advocates, **Odhiambo Ouma & Company Advocates**.

5. The claim of the appellant to bury the body of the deceased was based on the Luo custom that where a woman has separated with her husband upon death her body has to be taken back to be buried at the home of her husband as long as she had sired children with the said husband. In dismissing the appeal the learned trial magistrate held that the Luo custom that dictated that the deceased should be returned to the place she chose to stay away from for half a century even when she had settled on her own land is repugnant to justice and morality. That her husband who is still alive has not shown any interest in her remains. That the appellant did not disclose where he wants to bury the remains of the deceased.

**The case for appellant**

6. The appellant stated that his mother was separated from his father and that she had settled at Kibos. That he and his siblings contributed money to build her a house at Kibos. That the deceased had expressed a wish to him that she be buried at the family home at Masaana. He further stated that he has a right under Luo customary law to bury the body of his mother if his father was unwilling to do so. He said that the deceased had introduced the respondent to him as a caretaker of her house. His sister PW4 however confirmed that the respondent is a son to the deceased.

7. The appellant called an 86 year old man PW2 who said that he is a member of Luo Council of Elders well versed in Luo customary law. His evidence was that the Luo customary law does not recognize separation or divorce where a woman has left behind children at the home of her husband. That even if the woman establishes a home elsewhere upon death she has to be returned to the home of her husband for burial. That if her husband is unwilling to bury her, her first born son has the right to bury her. That the son does not have to bury the mother at the homestead of her husband as he can bury her on land belonging to the clan.

### **The Case for Respondent**

8. The respondent on his part contended that he is a son to the deceased. That he was born in 1969. That he was living with his mother at Kibos prison where she was a nursery school teacher. That in 1992 she established a home at Kibos. He was staying with her and taking care of her. That the appellant and his brothers never went to visit her. That it is only his step-sister PW4 who usually used to pay visits to the deceased.

### **Submissions**

9. The advocates for the appellant submitted, **Mwamu & Co. Advocates**, that the fact that the deceased built a house elsewhere does not mean that she ceased to be a wife of the father to the appellant. That according to Luo customs she remained a wife to the appellant's father as there was no evidence that dowry was returned and there having been children of the marriage.

10. The advocates submitted that it was the wish of the deceased to be buried where she was married by the appellant's father. That according to Luo custom her children can bury her where her husband is unwilling to take responsibility.

11. The advocates for the respondent on the other hand submitted that the wishes of the deceased to be buried at her home at Kibos were expressed by the fact that she had established a home of her own at that place where she lived for many years. That both parties are biological sons of the deceased and therefore that the appellant has no basis of claiming a superior position to that of the respondent. That in cases concerning burial disputes the court should ensure that the wishes of the deceased whether express or technical are respected. That the wishes of the deceased reign supreme and should be the fundamental basis upon which the court must base its decision. That in this case the deceased expressed her wish to be buried at her home where she lived for many years. That it will be grossly unfair, unjust and immoral to disturb and frustrate such clear expression of intent about her life and lifestyle by taking her remains for burial in a place she had turned her back on many years ago.

12. The advocates submitted that the Luo customs are not in consonance with the spirit of the constitution and the aspirations of the deceased. That the matter should not be determined on the basis of customary practices that the deceased did not live by at the time of her demise.

### **Analysis and Determination**

13. This is a first appeal. The duty of a first appellate court was explained in the case of **Kiruga –Vs- Kiruga & Another (1998) KLR 348**, where the Court of Appeal observed that:-

**“An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.” See also *Selle & Another –Vs- Associated Motor Boat Co. Ltd & Others (1468) EA 123*.**

14. The question before the court is whether the trial court erred by making an order that the deceased be buried at Kibos in Kisumu County.

15. The parties herein are Luo tribesmen. They are governed by Luo customary law. There is yet no statute governing burial disputes in Kenya. It is therefore personal law of the individual that would govern his/her burial.

16. The application of African customary law in Kenya is guided by 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.”**

17. While interpreting the meaning of this section, the Court of Appeal in **Edwin Otieno Ombajo –Vs- Martin Odera Okumu, Civil Appeal No. 209 of 1996 (1996) eKLR** stated that:-

**“..... If African Customary Law is not caught up by the qualifications under S.3 (2), above, then it must be given effect**

**by the courts and must be applied in deciding cases before it but according to “substantial justice.” We are, also, of the view that the manner in which S. 3(2), of the Judicature Act, is worded gives flexibility to the administration of justice, as courts are thus empowered to weigh all the circumstances of a case before coming to a decision, without whittling down the place of customary law in the administration of justice in Kenya. So the discretion the courts have is not whether to apply customary law or not, but the discretion is to consider whether to enforce a right, which under the law vests in a particular person, or not.”**

My understanding of the section is that it is the duty of the court to apply customary law where applicable and where it is not to determine the matter on the basis of substantive justice by weighing all the circumstances of the case.

18. There is no dispute in this case that the deceased was married by the appellant’s father and left him more than 50 years ago. There was no evidence that dowry was refunded in her case. The deceased therefore remained married to the father of the appellant upto the time of her death.

19. Further, there is no dispute that the deceased had settled at Kibos in Kisumu where she had worked for many years. She acquired land there and established a home there.

20. There is no dispute that the deceased’s husband, the father to the appellant, was not a party to the proceedings at the lower court and apparently has no interest in burying the remains of the deceased. It is the two sons of the deceased who are from different fathers who are fighting for her remains.

21. There is no dispute that the appellant in his plaint did not state the exact place where he wanted the deceased to be buried. In his witness statement he pleaded that the deceased be buried at his father’s home. In his evidence in court he wanted the body to be released to him for burial at his home.

#### **Right to bury -**

22. Both the appellant and the respondent are sons to the deceased. The appellant’s claim to bury the deceased is anchored on Luo customary law while the claim for the respondent is based on substantive justice. In the case of **Ruth Wanjiru Njoroge –Vs- Jemimah Njeri Njoroge & Another (2004) eKLR**, Ojwang J. (as he then was) held that:-

**“In the social context prevailing in this country the person who is the first in the line of duty in relation to the burial of the deceased person is the one who is closest to the deceased in legal terms. And therefore, it is only natural that the one, who can prove this fundamental proximity in law to the deceased, has the colour of right of burial, ahead of any other claimant.”**

The first in line to bury the deceased herein is her husband but as noted above he has no interest in doing so. In the absence of the deceased’s husband the question before the trial court was as to who between the appellant and the respondent had the legal right to bury the deceased.

23. PW2 stated that according to the Luo customary law a woman separated from her husband has on death to be taken back to be buried at the home of her husband and that where her husband is unwilling to bury her, her first born son has a right to do so. This position of Luo customary law was cited with approval by the Court of Appeal in **Edwin Otieno Ombajo –Vs- Martin Odera Okumu (Supra)** where the learned judges stated that:-

**“Odhiambo Gor Juma (PW6) who described himself as a publisher and a researcher on Luo customary law, testified in court below, that there are instances when other people may bury the body of a deceased Luo woman during the lifetime of her husband. Although he did not enumerate such instances, we think that those will depend on the peculiar circumstances of each case. We, therefore, agree with Mr. Nowrojee, that the trial court had a discretion under S. 3(2), above, to consider whether, in the circumstances of this case, a person other than the respondent could bury the deceased.”**

One of these peculiar circumstances which was being referred to by the learned judges was as explained by PW2 in the instant case that where the deceased’s husband is unwilling to bury his wife the deceased’s first born son can do so. The respondent therefore had established that he had a right to bury his mother under Luo customary law as his father had failed to exercise that right. The question was whether the appellant had exclusive right to bury his mother as opposed to any right of the respondent.

24. The respondent on his part contended that he had a right to bury the deceased because he is the one who was staying with her at Kibos. That she had established a home at that place which implied that it was her wish to be buried there. That the respondent never used to visit her and therefore that he has no right to bury her at his place of choice.

#### **Deceased’s wishes -**

25. The Court of Appeal in **Apeli –Vs- Buluku (1980) eKLR** held that the wishes of a deceased person ought to be given effect where they are not contrary to custom, general law, public policy or safety. In **Samuel Onindo Wambi –Vs- COO & Another Kisumu Civil App. No. 13 of 2011 (2015) eKLR** the Court of Appeal held that:-

**“A deceased person’s burial wishes are akin to a will. Save for a compelling reason, they supersede customary law and should be followed.”**

26. In this case the appellant stated that his mother had expressed to him a wish that he buried her at his father’s home at Masaana. However

his final pleadings were for the court to allow him to bury her at his home. This notwithstanding, the appellant stated that since the deceased left her husband's home she never went back even for a visit. There was no evidence that the deceased used to visit the appellant at his home. If the deceased had expressed a wish to be buried at her husband's home at Masaana, why would the appellant now want to go against her wishes and bury her at his own home? That the deceased never visited Massana after she left more than 50 years ago was a clear indication that she had completely cut her ties with the place. The appellant did not prove that the deceased had expressed a wish to be buried there.

27. In **Samuel Onindo Wambi –Vs- COO & Another (Supra)** the Court of Appeal stated that 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 mobilised his siblings to build a house for her at Kibos there was no credible evidence to prove so. The appellant's claim to bury the deceased at Masaana is only being driven by custom. 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. Though Luo custom dictated that the deceased ought to have been buried at her husband's home the court could not have made such an order as her husband was not a party to the case and there was no evidence that the said husband had designated a place at his home for the burial of the deceased.

28. The fact that the deceased established a home at Kibos was an implied wish that she be buried there. I agree with the findings of the trial court that the deceased should be buried at the place where she had established her home. It would be unconscionable to order for the remains of the deceased to be buried at Masaana, a place she turned away from for half a century never to return when she was alive. The justice of the case is for the deceased to be buried at her home at Kibos.

30. The upshot is that the appeal has no merit. The same is accordingly dismissed and the judgment of the trial court is upheld. The court thereby orders that the remains of the deceased be released to the respondent **Samuel Ochieng Auma** for internment at the deceased's home at Kibos in Kisumu County.

Each party to bear its costs of this appeal and both to share equally the mortuary charges.

For avoidance of doubt the appellant is not precluded from taking part in the burial preparations and the burial.

Orders accordingly.

**Delivered, dated and signed in open court at Kakamega this 6<sup>th</sup> day of June, 2019.**

**J. NJAGI**

**JUDGE**

In the presence of:

Mr. Ombaye holding brief for Mwamu for the appellant

Mr. Osango holding brief for Odhiambo Ouna for the respondent

Parties:

Appellant - present

Respondent - absent

Court Assistant - George

30 days right of appeal.