



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CIVIL APPEAL NO. 77 OF 2019**

**WILBERFORCE MULAMBA AWINJA.....APPELLANT**

**VERSUS**

**CONCEPTA NAKHUMICHA.....RESPONDENT**

*[An Appeal from the Judgment and decree in Original Bungoma Civil Suit No. 78/2019 delivered on 30.8.2019 by J. King'ori – Chief Magistrate]*

**JUDGMENT**

Wilfred Awinja Nyansada, the deceased died on 27<sup>th</sup> July, 2019. The deceased who was polygamous has 2 wives, - Selina Ayieko Awinja, (who died on 23.6.2017 and Concepta Nakhumicha (2<sup>nd</sup> Wife) who is the defendant in the lower Court and Respondent in this Appeal. Upon the death of the deceased, his body was preserved at Life Care Hospital Mortuary Bungoma, pending burial arrangements. The family met and apparently there was no agreement on the place where the deceased was to be buried necessitating the filing of a Civil Suit CM CC No. 78/19 in the Magistrate's Court by the Appellant Wilberforce Mulama Awinja. In the Magistrate's Court, the Appellant sought orders for;

**(a) A declaration that the body of WILFRED AWINJA (deceased) ought to be buried at his Bunyore home on Land Parcel LR. No. WEST BUNYORE/EAST BUTANYI/61.**

The Appellant/Plaintiff called (4) witnesses and defence called (4) witnesses. After full hearing the trial Magistrate in his Judgment stated.

*Furthermore if the deceased had expressed his wishes to be buried in Bungoma before Pw3 and before Pw4 to whom he is alleged to have even identified the location of his burial at his Mupeli home. That wish is well captured in the deceased's will D Exhibit 1. Dw1 testified that the deceased had expressed his wish to be buried in Bungoma as he distributed his property to his children in the will Exhibit. The High Court has expressed the view that the deceased's wishes should be respected in several authorities. In the case of Charles Onyango Oduke & Another Vs. Samuel Omido Wamboi (2010) eKLR which Judge Cherere quoted in Dina Odhiambo Oyier Vs. Hellen Achieng & 3 Others (2017) eKLR the Court accorded the wish of a deceased woman to be buried at a place of her choice.*

*In conclusion the plaintiff has not proved on a balance of probabilities that he is entitled to the declaration that the body of his friend Awinja (deceased) ought to be buried at his Bunyore home. It is the defendant surviving widow of the deceased to whom the body should be released for burial at her Mupeli home Bungoma as per the wishes of the deceased.*

*The parties being family members should each bear their own costs.*

Aggrieved by the trial court's decision the appellant preferred this appeal on the following grounds;

**i. The learned Magistrate erred in fact and law in failing to appreciate law governing burial rites of the Wilfred Awinja (deceased) is customary law as a polygamist.**

**ii. The LEARNED Magistrate erred in fact and law in failing to consider validity of the will was contested;**

**iii. The learned magistrate erred in fact and law in taking extraneous matters that the deceased first wife was in bad terns with the deceased;**

**iv. That the learned magistrate erred in fact and law in failing to consider the proximity of the plaintiff and Respondents to the deceased and find that they both had a right to participate in the burial of the deceased;**

v. *The learned magistrate erred in law and fact in making a finding that customary law was inapplicable in the suit;*

vi. *That learned magistrate erred in law and fact in failing to appreciate that the Bunyore land is the family graveyard of the deceased as the defendant's late children have been buried in Bunyore.*

vii. *That learned magistrate erred in fact and law to appreciate that Bungoma land is a subject matter in E.L.C. 158 of 2016.*

This being a first appeal this court is obligated and duty bound to reappraise the evidence tendered before the lower court in order to determine whether the findings and the decision of the trial magistrate was justifiable having regard to the evidence. The court however will not interfere with the findings of fact of the trial magistrate unless it is manifestly clear and evident that the trial magistrate misdirected himself on a point of law and/or it is clear he failed to take account of any particular circumstances and/or evidence such that a miscarriage of justice could result unless the court interfered to remedy the situation. Thus, this court as an appellate court of first instance has mandate to reappraise the evidence tendered in the lower court and draw its own inferences of fact. This mandate has been enunciated in many decided cases and the courts have been guided by the principles as set out by the then East African Court of Appeal in the case of **Selle -vs- Associated Motor Limited Company [1968] E. A 123** where the court stated thus:

***“This 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 that respect. In particular, this 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 demeanour of a witness is inconsistent with the evidence in the case generally.”***

Briefly the evidence before the trial Court was that Pw1 the appellant Wilberforce Mulamba Awinja is the son of the deceased by his first wife Selina Ayieko Awinja. He testified that the deceased had 2 wives, the late Selina (now deceased) and Concepta Nakhumicha the Respondent. He testified that his father the deceased had several properties including a plot in Bungoma Town and his ancestral home at Bunyore. He testified that the deceased had set up homes in Bunyore for the wives who had houses. When the 1<sup>st</sup> wife died, she was buried in Bunyore. He testified that the deceased told him that his wish was to be buried next to his first wife at Bunyore/East Butanyi/61. He testified that the Bungoma Plot No. East Bukusu/S. Kanduyi/1206 was purchased jointly by his father and mother for commercial purposes and on the plot are a residential rental houses built. He testified that the defendant/respondent has fraudulently transferred the said parcel of land to her and her sons names, and there is a court case ELC No. 158/2016 in respect of that parcel of land. He testified that clan had agreed to bury the deceased at his Bunyore home according to his wishes and according to Abanyore customs and rites.

Pw2 Noah Asikoya Ogalo a cousin of the deceased testified that the deceased informed him in 2017 when he went to visit him at St. Domiano Hospital that he wished to be buried at Bunyore and that when his 1<sup>st</sup> wife died she was buried in Bunyore. He testified that being a Munyore, according to the customs he should be buried next to his first wife in Bunyore. Pw3 Javan Atolwa Maganga the Cousin of the deceased testified that the Respondent Concepta was deceased’s wife and deceased built a house for her in Bunyore.

The Respondent/defendant called Dw1 Violate Lunani an Advocate of the High Court who testified that she drew up a will on 25.11.2016 for the deceased which she produced as Exhibit. Dw2 Concepta Awinja testified that she married the deceased in 1980 and that their matrimonial home is in Bungoma Township. During the marriage the deceased used to stay both in Bunyore and at his Bungoma homes until 2014 when sour relationship developed between his 1<sup>st</sup> wife and the deceased. She testified that she is a Bukusu by sub-tribe and she does not understand Bunyore customs and that in any case she is a saved christian who will not participate in Bunyore traditions.

Dw3 Ernest Okuna Adulu testified that he witnessed the will on 25.11.2016 where deceased thumb printed the will. He testified that the deceased knew how to read and write and was normal at that time. Dw4 Isaac Onyango Boiya testified that there were people who were buried in Bungoma although they came from Bunyore and nothing has befallen their families.

It is upon this evidence that the trial Magistrate found for the Respondent in the Judgment alluded to earlier in this Judgment.

By consent this appeal was canvassed by way of written submission. Counsel for the parties were allowed to highlight the submissions. Both Counsel filed their respective submissions.

Counsel for appellant M/s Shumila submitted that this a dispute where 2<sup>nd</sup> family seeks to disinherit the first family through a suspicious will and the appellant only became aware of the will during hearing in court. She submitted that the will prepared by the respondent is a hoax on ground that the purported will does not state who prepared it and therefore the will is invalid. He submitted on the lack of testamentary capacity that the deceased was senile and suffered memory loss therefore lacked capacity to make the will relying on case law in **Vaghella versus Vaghella[1992]2 E.A**

She submitted that the purported will was not properly attested as required under section 11 of the succession Act and the same was under undue influence. He submitted that the deceased should be buried in Bunyore citing section 3(2) of the Judicature Act that customary law is part of Kenyan Law relying on case law in **Otieno versus Ougo and another C.A 31 of 1987**

She submitted that customary law is not repugnant to justice and morality since no such evidence was tendered to the court. Counsel submitted that the deceased graveyard was in Bunyore and Land in Bungoma is a commercial plot with rental houses therefore deceased could not be buried in Bungoma.

The respondent submitted through his advocate on record Mr. Mukisu that the deceased was Abanyore but this was not sufficiently proved at the trial that he subscribed to his customary law and in absence of sufficient proof of the alleged custom this appeal must fail.

She submitted the will produced by the respondent was duly witnessed and executed in presence of an Advocate therefore there is no question as to the validity of the will and that it is imperative that the wishes of the deceased be followed relying on case of **James Apeli and Enokaolasi V Prisca Buluka(Civil Appeal No. 12 of 1979)**

She submitted that the appellant has failed to prove his appeal on a balance of probability and has not tendered any evidence to satisfy this court that the trial magistrate erred in reaching to his determination and prayed that the appeal be dismissed with costs to the Respondent.

From the grounds of appeal and respective submissions, the main issue for determination is where should the deceased Wilfred Awinja be buried. For Respondent, Concepta Nakhumicha, the deceased should be buried at Bungoma Town on Plot No. East Bukusu/South Kanduyi/1206. She testified that the Plot measured 0.9HA (about 2 acres). She admitted that built on the land are rental units occupied by tenants. She has built a house on the land, so has her son also built on the same parcel of land. She admits that the land is currently registered in her name and the names of her sons and that from the records, the deceased is not the owner of the property. She however states that this is the burial place the deceased identified in his will.

For the appellant Wilberforce Mulamba Awinja, he testified that he is son of the deceased; deceased had 2 homes one in Bunyore and another in Bungoma. He testified that the deceased had informed him that he would wish if he dies to be buried in Bunyore next to his 1<sup>st</sup> wife. He led evidence that in Bunyore deceased built houses for each of his 2 wives; that he buried the 1<sup>st</sup> wife there in 2017, that the Respondent acknowledged it as her home and when her child died, she buried her there. He submits that the land in Bunyore is in the names of deceased; and that the Bungoma Plot is subject to a Land dispute in Bungoma ELC No. 158/2016 Selina Ayieko Awinja Vs. Wilfred Awinja and Concepta Nakhumicha, and that he same has not been heard and finalized.

Having given the above analysis the question that arise is where should the deceased be buried. This Court concurs with Trial Court, that there is no statutory law on burial however there is case-law and by virtue of the principle of *stare decisis* ought to persuade or bind this Court on determination. By virtue of **Article 2(4) Constitution 2010** and **Section 3(2) Judicature Act Cap 8 Laws of Kenya** they recognize application of customary law where relevant and not repugnant to the Constitution. The law applicable in burial disputes is customary law. There is no statute law in place yet. As stated in the Landmark case of **Virginia Edith Wambui Otieno Vs. Joash Ochieng Ougo & another (1987) eKLR**:

***“the deceased was born and bred a Luo and as such under Luo customary law his wife on marriage became part and parcel of her husband’s household as well as a member of her husband’s clan. Their a children are also Luo as well as members of their deceased father’s clan. On the death of a married Luo man the customs are that the clan takes charge of his burial as far as taking into account the wishes of the deceased and his family. Under the Luo custom to which as we have said she is bound, she has no right to bury her husband and she does not become the head of the family upon the death of her husband. As with other African communities a man cannot change his tribal origin.....”***

Having cited the above provisions of laws and law It is my finding that the deceased left a will behind that was executed 25/11/2016 expressing his wishes. It is also my finding that L.R. No. East Bukusu/South Kanduyi/1206 where the deceased wished to buried in his will is registered is not registered in his name and the same parcel of land is subject to dispute before ELC Court.

It also important to note that L.R. No. East Bukusu/South Kanduyi/1206 is situated within Bungoma municipality which will require necessary approval from local government authority before burial takes place on said parcel of land.

I have also taken note the deceased 1<sup>st</sup> wife together with Respondent/Defendant daughter were buried on L.R. No. West Bunyore/East Ebutanyi/61. It is my consideration this has been the family graveyard for a long period of time and further the 2<sup>nd</sup> wife herein also has a house on the said parcel of land.

The trial magistrate based his determination on the will allegedly executed by the deceased. Reliance was placed by the trial Magistrate on the will produced in court for his finding that the deceased had indicated the place of his burial in the event he passed on. Counsel for the appellant in her submissions appeared to challenge the validity of this will. In my opinion this is not the proper place to do so. This is a dispute of the place of burial of the deceased and not succession cause. However in as much as the said will is said to have given indication of the place of burial, this court cannot ignore it. Even if the court was to accept the contents of the copy, it is clear it is alleged to have been made on 25.11.2016. As at that date the deceased as per the search indicated that he was the registered owner of East Bukusu/South Kanduyi/1206 having been so registered on 04.08.1970. The parcel of Land being in his name, he would make a will on its disposal or use or as in this case to be buried there if he died. However by the time he died, on 27<sup>th</sup> July, 2019 this particular Parcel of land was not his. It had been transferred on 22.2.2018 to (1) Concepta Nakhumicha (2) Godfrey Oyaro Awinja (3) Kennedy Nehemia Awinja as the absolute owners, which matter is also subject to litigation in ELC Case No. 158/2016 which is yet to be determined. This parcel of land as at now is not his. This is an issue he would not have envisaged in his will otherwise a person cannot in his will make disposition in respect of land that is not his. Some of the registered owners are not party to this suit; and this court will be reluctant to make orders in respect of the deceased to be buried in a property he does not own.

After considering this appeal and submission by the parties, I find that the deceased Wilfred would only be buried on a land he owns and is in his name which is West Bunyore/East Butanyi/61. I therefore allow the appeal and set aside the order of the trial court. I order that the body of the deceased which is kept at Life Care Hospital Mortuary to be released jointly to his widow Concepta Nakhumicha and Son Wilberforce Mulanda Awinja to be interred at West Bunyore/East Butanyi/61. In the event Concepta and Wilberforce fail to co-operate with each other, the body be released to the one who is willing to bury the deceased at his Bunyore home. Each party to bear his own costs.

**Dated at Bungoma this 15<sup>th</sup> day of October, 2019**

**S.N. RIECHI**

**JUDGE**