



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 39 OF 2017

BETWEEN

JANE AWINO ONYANGO.....APPELLANT

AND

NORAH ADONGO ONYANGO.....1ST RESPONDENT

GLORIA APIYO ONYANGO.....2ND RESPONDENT

PAUL ONYANGO ACHOLA.....3RD RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. H. Adika, SRM dated 27th March 2017 at the Chief Magistrates Court at Kisumu in Civil Case No. 56 of 2016)

JUDGMENT

1. **STEPHEN ONYANGO ACHOLA** (“the deceased”) fell ill and died on 4th February 2016 at Avenue Hospital in Nairobi. His body has been lying at the hospital mortuary as his family has been engaged in a dispute where he should be buried. The trial magistrate who heard the matter made the following orders which are now the subject of this appeal:

a) The deceased be buried in his father’s homestead at a spot to be decided upon by elders and all other traditions being fulfilled including building a house on his father’s compound.

b) Burial must be done within 30 days of this Judgment.

c) The Defendant shall be allowed to lead funeral arrangements as dictated by Luo Custom now that she is the surviving widow.

2. As this is an appeal, I am required to analyze the evidence before the trial court and reach my own conclusion bearing in mind that I neither heard nor saw the witnesses.

3. What is apparent and in fact not disputed is that the respondents, who were the plaintiffs in the court below, are the deceased’s children from his first wife, Penina Juma Nyithiga, who is also deceased. The appellant is the surviving wife and she married the deceased in 1978 and they lived together. In her testimony she stated that her husband built his house in Ofunyu and that is where he wished to be buried.

4. The respondents’ contention is that the deceased should not be buried in their step mother’s homestead since the house there was not blessed in accordance with Luo customary law. Their case is a house should now be built for him in accordance with Luo custom before he can be buried.

5. During the hearing of the appeal, it emerged that a consent had been recorded in court and an order extracted dated 11th March 2016 on the following terms:

*i. THAT by consent the remains of **STEPHEN ONYANGO ACHOLA**, deceased hereon, be interred at Ofunyu village, Nyalunya Sub-location, Central Kolwa Location within Kisumu County.*

ii. The burial site shall not be on the parcel of land where the deceased’s homestead is located but on a different and adjacent parcel of land.

6. The consent could not be implemented due to the vagueness regarding the precise location of the “different and adjacent parcel of land” and that is why the matter proceeded for hearing as the parties could not agree. I took the position that since the parties were agreed that the deceased was to be interred in Ofunyu village, the parties should agree on the particulars of the deceased’s piece of land where he should now be buried.

7. In his judgment, the trial magistrate gave primacy to the application of customary law and relied heavily on the case of **Virginia Edith Wambui Otieno v Joash Ochieng Ougo and Another [1987]eKLR**. While I agree that a person cannot fully extricate herself from the customs of his people, I recognise that customary law is not static but dynamic. In this particular case, the court must take into account the status and dignity of the widow who is the person the deceased chosen to live with until he died. As Ojwang J., (as he then was) stated in **Ruth Wanjiru Njoroge v Jemimah Njeri Njoroge NRB HCCC No. 330 of 2005[2004]eKLR** that, “*In Social Context prevailing 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 deceased in legal terms.*” The same point was made in the case of **John Omondi Oleng and Another v Sueflan Radal [2012]eKLR** where Mabeya J., stated that, “... *When it comes to the disposal of the body of a married man or woman the spouse should play a leading role. It would be better if the relatives of the deceased can sit down and agree on how to give their loved one a dignified exit. When they fail to agree and approach the Court for solution, the court has no option but to step in...*”

8. Thus the deceased should be buried where he and his surviving wife had established a home. That is the home the deceased built and it does not become less of a home merely because Luo traditions were not followed in the deceased’s lifetime. Further and as I have alluded to, a widow must be accorded her proper status and dignity to bury the man she loved during her lifetime. As parties agree that the deceased house is on parcel **KISUMU/NYALUNYA/1638**, he shall be buried on that plot.

9. The final orders are therefore as follows:

a) **THAT** the appeal is hereby allowed and the judgment and decree in the subordinate court set aside.

b) **THAT** the deceased **STEPHEN ONYANGO ACHOLA** shall be buried on his homestead situated on **KISUMU/NYALUNYA/1638** located in Ofunyu village, Nyalunya Sub-location, Central Kolwa Location, Kisumu County.

c) **THAT** the appellant, **JANE AWINO ANYANGO**, as the deceased surviving widow shall lead the funeral arrangements together with her children and those of the deceased first wife and shall all ensure participation of entire family in the funeral and burial arrangements.

d) As this is a family matter, each party shall bear their respective costs.

DATED and DELIVERED at KISUMU this 7th day of February 2018.

D.S. MAJANJA

JUDGE

Mr Omondi instructed by Omondi, Abande and Company Advocates for the appellant.

Mr Omollo instructed by Ken Omollo & Company Advocates for the respondents.