



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 14 OF 2017**

**JAMES ODHIAMBO NYAWADE.....PLAINTIFF**

**VERSUS**

**PHILIP OTIENO.....1<sup>ST</sup> DEFENDANT**

**CHAIRMAN OGUTU.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application dated 25<sup>th</sup> January, 2017 seeks the following orders:

**1. Spent**

**2. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents by themselves, their servants and/or agents be restrained by a temporary injunction from taking the body of Caroline Adipo Odhiambo (now deceased), that is presently lying at Chiromo Funeral home, Nairobi until this application is heard and determined.**

**3. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents by themselves, their servants and/or agents be restrained by a temporary injunction from burying the remains of Caroline Adipo Odhiambo (now deceased) at Yiro, Ugunja, Ugenya of Siaya county until this application is heard and determined.**

**4. That the Applicant who is the immediate next of kin and other relatives be allowed access to the deceased's children, namely M F A aged 9 years and R O aged four (4) years**

**5. That the costs of this application be provided for.**

**6. That any other relief this honourable court may deem just to grant.**

2. The application is based on the grounds stated in the body of the application and the facts deponed in the affidavit in support and the further affidavit sworn by the Applicant, James Odhiambo Nyawade. The Applicant's case is that the deceased, Caroline Adipo Adhiambo (hereinafter the deceased) was married under the Luo Customary Law to the late Christopher Omondi, (hereinafter Christopher) a brother to the Applicant. That the marriage was blessed with two children. That when the late Christopher who was a police officer died on 8<sup>th</sup> May, 2016, the deceased herein participated in the burial ceremony together with her children. That the deceased herein also lodged a claim for the terminal benefits of the Late

Christopher as his wife. The Applicant is aggrieved by the plans by the brother of the deceased who is the 1<sup>st</sup> Respondent herein to bury the deceased at the home where the deceased was born. The Applicant's contention is that the deceased ought to be buried in Karateng, Marera sub-location Kisumu West, next to her late husband in accordance with the customs and traditions of the Luo Community. That such a burial will secure the interests of the children who are expected to get their inheritance from their father's side.

3. The application is opposed. The 1<sup>st</sup> Respondent, Philip Otieno filed a replying affidavit and a further affidavit in opposition to the application. The 1<sup>st</sup> Respondent stated that as the eldest son in a family of ten who included the deceased herein he was introduced by the deceased to the late Christopher as her boyfriend whom she intended to get married to. That the two however never solemnized any form of marriage and neither did they live or cohabit long enough to give rise to the presumption of marriage. That neither the late Christopher nor his family or clan ever visited the home of the deceased herein nor contacted them with a view to solemnize a customary marriage. The Applicant conceded that the late Christopher and the deceased herein were blessed with two children and that the deceased and the children participated in the burial arrangements of the late Christopher, but further stated that he advised the deceased not to perform any traditional rites or rituals. That during the said burial the deceased was not treated as a widow and neither were any traditional ceremonies or rites performed on her as a widow and that during the said burial, the deceased herein faced hostility from the Applicant and his family.

4. The 1<sup>st</sup> Respondent further stated that the deceased herein came to Nairobi after the burial of the late Christopher. That thereafter the deceased single handedly raised her children until the day she died. That since the Applicant's family did not show any interest in participating in the burial arrangements the Respondents went on with their arrangements to bury the deceased. The Respondents see this case as a manifestation of the Applicant and his family's interest in the terminal benefits of the late Christopher.

5. When the application came up for hearing, the counsels made oral submissions and relied on the authorities filed herein. I have considered the said submissions and authorities.

6. 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 v 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 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.....”**

7. The person closest to the deceased in legal terms has the right to bury the deceased. As stated by Hon Ojwang, J (as he then was ) in the case of **Ruth Wanjiru Njoroge v Jemimah Njeri Njoroge & another [2004] eKLR:**

**“in social context prevailing in this country, who is in the first line of duty in relation to the burial of any deceased person, is the one who is closest to the deceased in legal terms. Generally the marital union will be found to be the focus of the closest chain of relationships touching on the deceased. 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.”**

8. On whether to grant or refuse an injunction, the principles applicable were well settled in the case of **GIELLA –VS- CASSMAN BROWN & CO. (1973) EA**. To succeed, the applicant must establish a *prima facie* case with a probability of success, that irreparable loss would be suffered and if in doubt, the

court will decide on a balance of convenience.

9. Both sides are in agreement that the deceased was a Luo and the late Christopher was a Luo. The law applicable is therefore the Luo Customary Law. The bone of contention in this case is whether the deceased and the late Christopher were married. The issue of co-habitation has also cropped up.

10. The Applicant has contended that the late Christopher and the deceased herein were married under Luo Customary Law. In paragraph 3 of the further affidavit, he has deposed that the late Christopher and the deceased had stayed together for more than ten (10) years and were blessed with two children. That the late Christopher had gone to the home of the deceased as a man seeking a bride and the family of the deceased had accepted him and prepared him food. That the late Christopher had paid Ksh.40,000/= to his in-laws, the deceased being an orphan. However, there are no details of the family members paid that Ksh.40,000/=. What did the Kshs.40,000/= signify? What was expected when an orphan was being married under Customary Law? The averment that “the late Christopher made a payment of Ksh.40,000/= which was paid to Caroline’s in-laws the late Adipo (Caroline) being an orphan” is not evidence of compliance with any customary rites of marriage.

11. Two letters have been exhibited by the Applicant from the chiefs of both the late Christopher’s home area and the area where the deceased herein was born. Although both letters refer to the late Christopher and the deceased herein as man and wife, they lack details on how the fact of marriage came to their knowledge and also lack details on how the marriage was conducted.

12. The further affidavit by the Applicant gave details of the deceased’s participation in the burial of the late Christopher as a wife by attending the burial, performing the Luo rituals of accepting to be built a house from where she accompanied the body of the late Christopher for burial, sitting next to the coffin, being the first to sprinkle soil into the grave and sleeping twice in the house that had been put up and thereafter lodging a claim for the late Christopher’s terminal benefits. The funeral programme for the late Christopher’s funeral was also exhibited in court. The said programme reflects the name of the deceased herein as a wife to the late Christopher. The children’s names are also reflected as well as photographs of the late Christopher and deceased herein plus their children. The Respondents have also exhibited the burial programme for the deceased herein where it is reflected that the deceased was not married but had two children. The photographs therein are those of the deceased and her two children.

13. My view of this evidence is that in the absence of any marriage rites, no amount of participation in the burial rites or entries made in the burial programmes can take the place of marriage rites. Probably the best the parties could do if their customs and traditions allow is to carry out a posthumous ceremony which can signify a marriage between the late Christopher and the deceased. The question of the terminal benefits and the welfare of the children are matters that fall within the domain of the family court and the children’s court

14. On the presumption of marriage due to long cohabitation, the law was restated by the Court of Appeal in the case of **Anastasia Mumbi Kibunja & 4 others v Njihia Mucina [2013] eKLR:**

**“In my judgment before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute.”**

15. In the case at hand, there is no evidence to show where the late Christopher and the deceased herein lived together and for how long. Although the deceased and the late Christopher had two children together, having children *per se* is not proof of marriage. As stated by the Court of Appeal in the **Anastasia case (supra)**

**“Having children and naming them after some man’s relatives is not itself proof of marriage of any sort.”**

16. Having arrived at the conclusion that *prima facie* there is no sufficient evidence in support of the assertions that the late Christopher and the deceased were either married under the Luo Customary Law

and that they cannot be presumed to have been married due to long cohabitation, then the Applicant is not the person closest to the deceased and cannot take charge of the burial process. Consequently, I hold that the Applicant has not met the threshold for the grant of the orders sought. None of the parties can be compensated in monetary terms. The balance of convenience cannot be said to favour the Applicant's. Exhumation which has been alluded to would be a stark reality for either side, depending on the final outcome of the case.

17. Having arrived at the above conclusion, I will not delve into the question of costs incurred so far by the Respondents following the issuance of the interim orders. The same can be addressed in the main suit.

18. Finally, before I windup this ruling I must state that I belong in the school of thought that a burial dispute being a dispute under customary law falls within the jurisdiction of the lower court. I have considered the following cases which were decided prior to the Magistrates' Courts Act No. 26 of 2015 which commenced on 2<sup>nd</sup> January 2016 and the Judicature Act 2016:

(i) **Kiplagat Korir v Dennis Kipngeno Mutai HCC Kericho App. 52/2005** (unreported) where Hon Justice Kimaru held that a resident magistrate had no jurisdiction to hear a customary law dispute under Section 2 of the then Magistrates' Courts Act.

(ii) **HCC APPL No. 19 of 2008** (unreported) where Mwera, J (as he then was) held that a resident magistrate had jurisdiction to determine a burial dispute under Section 2 and Section 9 of the then Magistrates' Courts Act.

(iii) The case of **Martha Wanjuru Kimata & another v Dorcas Wanjiru & another [2015] eKLR** where Achode, J followed a similar route as Mwera, J.

19. The current Section 7(3) of the Magistrates' Courts Act is a replica of the former Section 2 of the former Magistrates' Courts Act. The said provision states as follows:

**“A magistrate's court shall have jurisdiction in proceedings of a civil nature concerning any of the following matters under African customary law-**

**(a) Land held under customary tenure;**

**(b) Marriage, divorce, maintenance or dowry;**

**(c) Seduction or pregnancy of an unmarried woman or girl;**

**(d) Enticement of, or adultery with a married person;**

**(e) Matters affecting status, and in particular the status of widows and children including guardianship, custody, adoption and legitimacy; and**

**(f) Intestate succession and administration of intestate estates, so far as they are not governed by any written law.**

Although the current Magistrates' Courts Act has no similar provision as Section 9 of the former Magistrates' Courts Act, Section 3(2) of the Judicature Act states as follows:

**“ 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.”**

My view of the aforesaid provisions of the law is that they give jurisdiction to the Magistrates courts to hear customary law cases. Although the High Court is a court of unlimited jurisdiction, matters ought to be filed in the court of lowest jurisdiction

20. With the foregoing the application is dismissed with costs in cause.

**Dated, signed and delivered at Nairobi this 1<sup>st</sup> day of February 2017**

**B THURANIRA JADEN**

**JUDGE**