



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO 146 OF 2014

**[An appeal from the original decree in Milimani Chief Magistrate's Court in CMCC No 1546 of 2014
– Oganyo R. (S.P.M) dated 4th April 2014]**

LUCAS ODHIAMBO OPONDO.....APPELLANT

VERSUS

ZACHEUS OCHIENG OKOK.....RESPONDENT

J U D G M E N T

1. This appeal involves a burial dispute. The Deceased is **Millicent Akong'o Odhiambo**. The Appellant was the plaintiff in the lower court and the father of the Deceased. He claimed the right to bury the remains of her daughter who he asserted was not married to the Defendant.
2. The Respondent was the defendant; he claimed to be the husband of the Deceased with the right to bury her remains.
3. The Deceased died on 17th March 2014 while undergoing treatment in hospital. The Respondent then embarked on funeral arrangements which hit a snag when the Appellant claimed the right to bury his daughter, asserting that there was no valid marriage between the Deceased and the Respondent. He moved to court seeking injunctive reliefs and release of the Deceased's body to himself for burrial.
4. A defence was filed in which the Respondent asserted that he has all along lived with the Deceased as husband and wife which fact has always been known to the Plaintiff and his family. In any case, there was a valid customary marriage between the two. He insisted that he therefore had a right to bury the Deceased, as she was his wife under Luo customary law until her death.
5. During hearing of the case it emerged that the Respondent had, prior to meeting the Deceased, contracted another customary law marriage which was later formalized under the ***African Christian Marriage and Divorce Act, Cap 151*** before the Respondent purported to marry the Deceased. The Respondent admitted his prior statutory marriage.
6. The learned trial magistrate made the finding that while the Respondent had a **church celebration** of his marriage to his first wife, his first marriage was **basically customary and hence potentially polygamous**. She also held that though dowry had not been paid to the Deceased's family by the Respondent's family, as required of a valid Luo customary marriage, **enough had transpired to warrant**

presuming existence of marriage between the Respondent and the Deceased. She further held that -

'While it is true that the defendant had not fully complied with basic ingredients for a valid marriage under the Luo customary law, I am not convinced that such failure is sufficient to compel this court to hold otherwise.'

5. It is against this judgment that the Appellant filed this appeal on the main grounds that -

1. **The learned magistrate erred in law and fact by misconstruing the evidence in court and hence arriving at a wrong judgment.**
2. **The learned magistrate erred in law and fact by holding that the defendant had legal capacity to marry the Deceased.**
3. **The learned magistrate erred in law and facts by not considering the plaintiff's submissions and authorities produced in court hence arriving at a wrong decision.**
4. **The learned magistrate erred in law and facts by not making a finding that the plaintiff had proved his case on a balance of probability."**

6. I have considered the submissions of the learned counsels, including the cases cited. I have also read through the record of the trial court. The main issues in this appeal are -

(a) Whether the Respondent had capacity to marry the Deceased and by extension whether there was a valid marriage under Luo customary law between him and the Deceased, and if so, whether the same was subsisting at the time of the Deceased's death?

(b) Whether the Deceased expressed any clear wish as to her place of burial.

7. The evidence of cohabitation of the Respondent and the Deceased was strongly contested by the Appellant and was tenuous at best. She appeared to have been living alone in her own house, not with the Respondent in his compound. And when she fell gravely ill and could not take care of herself, she went to her brother's house, not to the Respondent's home. There were no children born of her and the Respondent.

8. More importantly, the Respondent having contracted a statutory marriage with another woman prior to commencing cohabitation with the Deceased, he had no capacity to contract another marriage while his statutory marriage lasted. No length of cohabitation with the Deceased, if there was such cohabitation, could have resulted in any valid marriage while the statutory marriage lasted. He equally could not contract a Luo customary marriage; in any event there was no evidence of a valid Luo customary marriage.

9. The trial court therefore profoundly erred in law in holding that despite the Respondent's prior statutory marriage he could contract a marriage by repute with the Deceased.

10. As to whether the Deceased expressed any clear wish as to her place of burial, there was no proper evidence of this. Only the Appellant testified to it; there were no independent witnesses to this contested issue.

11. Having held that there was no valid marriage between the Respondent and the Deceased, the right to bury her remains reposes with her father, the Appellant, under Luo customs as apparently she had no adult children.

12. I will in the event allow this appeal in its entirety. The judgment of the lower court is hereby set aside. There is substituted therefor an order entering judgment for the plaintiff as prayed. The Appellant

will have costs of this appeal and of the court below. Those will be the orders of the court.

DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF JULY 2014

H P G WAWERU

JUDGE

DELIVERED ON THE 11TH DAY OF JULY 2014