



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL 61 OF 2010**

**GEORGE MAKOKHA OSUNDWA & 3 OTHERS.....APPELLANTS**

**VERSUS**

**BENEDETTA OKWADO OCHONDO & ANOTHER .....RESPONDENTS**

**RULING**

The appellants were aggrieved by the decision of the trial Magistrate who reached a finding in favour of the respondents. The appellants filed an appeal to this court against the said decision. In a material part of the judgment, the trial magistrate granted the respondent's prayer in the plaint which sought to perpetually restrain the appellants, by themselves or through their agents, from carrying out any funeral service rites and or ceremonies in respect of the deceased (Maximilla Wameyo Osundwa) on the compound consisting of LR Nos. Marachi/Elukongo/2559 and 2560. This issue, although unpleaded, was the core issue in the dispute between the appellants and the respondents. The trial court noted as much in its judgment which was delivered on 12<sup>th</sup> October 2010. At page 5 of its judgment, the trial court made the following observations:

*“As well, although neither pleaded in the plaint nor prayed for in the application herein aforesaid, the issue of where to celebrate the last rites of the deceased did come up, with the plaintiffs (respondents) alleging the defendants wanted to celebrate the same in their compound comprising of the two title deeds herein said (sic) Marachi/Elukongo/2259 and 2560, an allegation the defendants did not mince words about in fact the defendants passionately expressed their desire to carry out the deceased's last ceremonies in the aforesaid compound maintaining that that was where her house lay”.*

This court, upon perusing proceedings of the court and the pleadings filed in this appeal, noted that the appellants have been anxious for the appeal to be heard because since the judgment was delivered by the subordinate court on 12<sup>th</sup> October 2010, the appellants have not buried the body of the deceased – Maximilla Wameyo Osundwa. This was because of the insistence by the appellants that the funeral rites of the deceased ought to be performed in the compound where the house of the 1<sup>st</sup> respondent, Benadetta Ochondo Osundwa is situate. The argument that the appellants advanced before the trial court and which they reiterated before this court, is that the deceased funeral rites ought to be performed in the compound of her deceased husband and not in the compound of one of her sons, where she had lived for nearly twenty (20) years prior to her death. The explanation given by the appellants for their desire to perform the funeral rights in the compound where the house of the 1<sup>st</sup> respondent is situate is to accord with the dictates of the Luhya customary law that recognizes the pride of place of a first wife in a polygamous family. For added effect, the appellants advanced the argument that if they do not perform the said funeral rights as required by custom, they will be cursed or ill will befall them.

On their part, the respondent's case before the trial court was that the said funeral rites should not be performed in the 1<sup>st</sup> respondent's compound, firstly, because she was the registered owner of the particular parcel of land, and secondly, because the deceased did not at any time reside in the said compound before her death.

This court noted that it was apparent that there was an underlying land dispute between the appellants and the respondents. The appellants were not satisfied with the manner in which the respondents are alleged to have obtained title in respect of the contested two parcels of land. According to the respondents, Henry Osundwa (deceased) transferred the two parcels of land to the respondents before his demise. Henry

Osundwa (deceased) was the husband of Maximilla Wameyo (deceased) and the 1<sup>st</sup> respondent. The appellants are of the view that the deceased could not have transferred the said parcels of land to the respondents. It is their case that the manner in which the said parcels of land were transferred to the respondents reeked of fraud. That is an issue that is yet to be determined by this court. It suffices for this court to state that that issue appears to have been interwoven with the dispute regarding where the last funeral rites of the deceased should be performed.

Since it was apparent that the appellants were anxious to have the issue regarding where the funeral rites of the deceased should be performed determined as soon as possible (in view of the escalating costs involving the preservation of the body of the deceased in a mortuary pending the determination of the appeal), this court directed the parties to this appeal to make submission only in regard to determination of the question where the funeral rites of the deceased should be performed. The other issues in the appeal, including the determination of the land dispute, would await the hearing and determination of the appeal. The parties to this appeal agreed to this proposal by the court. This court duly heard oral submission made by George Osundwa, one of appellants (the appellants are acting in person) nominated by the other appellants to present the argument on their behalf, and by Mr. Manwari on behalf of the respondents. The thrust of their submission has been summarized by this court earlier in this ruling.

Having carefully evaluated the issue in dispute, this court is of the opinion that the issue for determination is whether the appellants established a case for this court to grant their application to be allowed to perform the funeral rites of the deceased in the compound where the house of the 1<sup>st</sup> respondent is situated. Certain facts are not in dispute in this application. It is not disputed that the deceased will be buried next to the grave of her late husband. This burial site was identified by Henry Osundwa (deceased) as the burial grounds for members of his family. This site is situated on LR.No.,Marachi/Elukongo/2558 which is still registered in the names of the said Henry Osundwa (deceased). The basis of the appellants' application (as state earlier in this ruling) is that the funeral rites of the deceased ought to be performed in the compound where the deceased and her late husband lived. It is the appellant's case that although the deceased was living in the compound of one of her sons at the time of her death, her funeral rites (according to Luhya customary) must be performed in the homestead of her late husband.

It was not disputed that Henry Osundwa (deceased) indeed died while he was living with his 6<sup>th</sup> wife, the 1<sup>st</sup> respondent. What is disputed is whether the compound of the 1<sup>st</sup> respondent was the compound where the house of the deceased was situated before the deceased made the decision to relocate and live with one of her sons. It was clear from the proceedings before the trial court that both the appellants and the respondents were in agreement that the deceased left her matrimonial home in 1992 to reside with one of her sons. It was common ground that the house of the deceased was demolished by her late husband soon thereafter. From 1992 to the time of her death, the deceased did not have a matrimonial house that had specifically been erected for her by her late husband – instead she lived in a house built for her by one of her sons. The 1<sup>st</sup> respondent on her part, was residing in a house which was built for her by the said Henry Osundwa (deceased).

The argument advanced by the appellants to the effect that the compound where the 1<sup>st</sup> respondent resides was the former compound where the deceased used to live is not supported by evidence. Further, since the parcels of land (i.e. LR Nos Marachi/Elukongo/2553, Marachi/Elukongo/2559 and Marachi/Elukongo/2560) are sub-divisions of LR No.Marachi/Elukongo/2 which was formerly registered in the name of the said Henry Osundwa (deceased), this court is of the considered opinion that the funeral rites of the deceased can be performed in any part of the land except the compound of the 1<sup>st</sup> respondent. As stated earlier in this ruling, shorn of the underlying land dispute, there is no reason why the appellants should not perform the funeral rites in any part of the land that belonged to their late father. The appellants' desire to perform the funeral rites for their late mother in the 1<sup>st</sup> respondent's compound appear to have been made with a view to advancing their claim over the said parcel of land that the compound of the 1<sup>st</sup> respondent is situated. As stated earlier in this ruling, that is a different issue that will be determined at the appropriate time.

The upshot of the above reasons is that the application by the appellants to be allowed to perform the

funeral rites in the compound where the house of the respondents are situated cannot be allowed. The application lacks merit. The appellant are at liberty to perform the said funeral rites in any part of the land belonging to their late father including burying the deceased next to the grave of her late husband Henry Osundwa, except in the compounds of the respondents. The application lacks merit and is hereby dismissed but with no orders as to costs.

**DATED AT BUSIA THIS 10<sup>TH</sup> DAY OF JULY 2012.**

**L. KIMARU**

**J U D G E**