



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU, KWACH & LAKHA, JJ.A.)

CIVIL APPEAL NO. 108 OF 1995

BETWEEN

SAKINA SOTE KAITTANY.....1ST APPELLANT

MUSTAFA KIBET KAITTANY.....2ND APPELLANT

AND

MARY WAMAITHA.....RESPONDENT

(Appeal from the Judgement of the High Court of Kenya at Nairobi by the Hon. Mr. Justice Erastus Githinji dated 4th April, 1995

IN

H.C.C.C. NO. 4446 OF 1994)

JUDGMENT OF GICHERU, J.A.

After admitting that he did not wish to participate in the burial dispute of his deceased brother, Hezron alias Hassan Kipkosgei Kaittany (hereinafter referred to as the deceased), and that he had only appeared to give evidence in the superior court in that dispute in obedience to that court's summons, Mohamed Kaittany (D.W.9) who is the Executive Director of the Industrial & Commercial Development Corporation, subsequently told that court that his only desire was the burial of his deceased brother in accordance with his wishes. D.W.9 was the deceased's immediate follower by birth. Both had grown up together and were close to each other in life. His reluctance to take part in his deceased's brother's burial dispute and his only desire being to have him buried according to his wishes is testimony of the anguish burial disputes in this country inflict to those who were close to a deceased person in life for, notwithstanding the law, custom or religion, it is only to them that the pain of the sting of death is sharpest. Any relish in such disputes borders on callousness.

By an amended plaint dated 12th January, 1995 and filed in the superior court on the same day, the appellants who are mother and son inter alia made the following averments:

"4. THAT on or about the 2nd day of September, 1967 the first plaintiff underwent a ceremony of marriage under Islamic Sharia with the late Hassan Kipkosgei Kaittany alias Hezron Kipkosgei

Kaittany at Chalingwa Primary School and thereafter cohabited as husband and wife at Kaptaget Scheme, Plot Number 36, Eldoret where the first plaintiff has lived ever since with her children.

6. THAT the late Hassan Kipkosgei Kaittany alias Hezron Kipkosgei Kaittany died on 14th December, 1994 and his Body is lying at Lee Funeral Home awaiting the burial.

7. THAT while the first and second plaintiffs were making arrangements to collect the deceased remains from Lee Funeral Home for burial at the deceased's home at Kaptaget Settlement Scheme, Plot No.36, Eldoret, the defendant without any consultation or agreement with the plaintiffs made an announcement that she is the wife of the deceased and that she intends to bury the deceased at a place unknown to the plaintiffs.

9. THAT the alleged Christian marriage of the defendant to the deceased is null and void in that the deceased had contracted a valid Muslim marriage with the first plaintiff which was subsisting as at the time of the alleged Christian marriage and at the death of the deceased.

10. THAT the defendant has alleged that her actions are in accordance with the wishes of a will allegedly signed by the deceased four (4) days prior to his death.

12. The plaintiffs further state that 4 days prior to his death the deceased had no mental and physical capacity to dictate and/or execute a will as alleged or at all.

13. THAT the plaintiffs plead that the defendant not being a wife of the deceased has no legal right to bury the deceased in Athi River or any other place."

The appellant then sought, besides the costs of the suit and any other or better relief which the superior court may have deemed fit and just to grant, the following specific reliefs:

1. An injunction restraining the defendant by herself, her agents and/or servants from burying, interfering, moving, transferring or in any manner howsoever interfering with the remain of Hassan Kipkosgei Kaittany alias Hezron Kipkosgei Kaittany (deceased).
2. A declaration that the plaintiffs have the prior right as a wife and son of the deceased person to arrange and effect the burial or cause the burial of the remains of the deceased person Hassan Kipkosgei Kaittany alias Hezron on plot no. 36, at KAPTAGAT SETTLEMENT SCHEME on Plot No. 36, ELDORET in the UASIN GISHU DISTRICT or elsewhere.
3. (A)declaration (that) the defendant is not a legal wife of the deceased (and) therefore lacks capacity to arrange and interfere with the body of the deceased."

The appellants also sought that the deceased's alleged will disregarding them be declared null and void.

In her statement of defence, the respondent averred inter alia that at the hearing of the suit against her she would seek to have some averments in the appellants' amended plaint struck out as they related to matters of probate. She did not, however, pursue her declared intention in this regard. She then had gone on to state in paragraphs eight (8) and twelve (12) of that defence as follows:

" 8 . The defendant states that the deceased divorce the first plaintiff in 1972 or thereabout and that as a consequence of this, he had the necessary capacity to contract a valid Christian marriage in 1977 having also converted himself into a Christian in 1976.

12. The defendant denies that she was not the deceased's legal wife and had no legal right to bury him as alleged in paragraph 13 of the amended plaint and puts the plaintiffs to strict proof thereof."

The respondent then sought to have the appellants' suit in the superior court dismissed with costs.

In September, 1964 the deceased was among the first recruits in the Inspectorate Department of Nairobi City Council. Over the years, he rose through the rank and file and became the Director of that Department. As at the date of his death on 14th December, 1994 he was the Deputy Managing Director of Kenya Airports Authority.

On 2nd September, 1967 the deceased married the first appellant at Changaliwa Primary School under Islamic law. As at the date of their Islamic marriage both the deceased and the first appellant were Muslims. From their union as husband and wife they begot three children, namely:

- i. Sarah Jemutai Kaittany, a girl, born on 24th June, 1968;
- ii. Saida Chepkoech Hassan, a girl, born on 27th June, 1970; and
- iii. Mustafa Kibet Kaittany, a boy, born on 6th July, 1972.

Late in 1974, the deceased met the respondent at her place of work with Kenya National Trading Corporation, Uchumi House, Nairobi. Thereafter, a relationship developed between them which became serious in 1976. In that year, the deceased approached Reverend George Ernest Wanjau (D.W.7), a minister in the Presbyterian Church of East Africa in-charge of St. Andrew's Presbyterian Church, Nairobi, and sought membership in that church. The deceased received instructions on Bible doctrines of the Christian Church and practice of that Church and on ascertainment of his commitment to the Lord Jesus Christ he was baptised, confirmed and received into the full membership of St. Andrew's Presbyterian Church, Nairobi on 30th May, 1976. He continued to be a regular member of that Church until his death.

In June that year (1976), the deceased took the respondent to his home in Kaptaren Village, Mutei Location of the now Keiyo District. He introduced her to his parents, brothers and sisters who asked her where she came from and she told them that her parents were farmers in Molo Division of Nakuru District. In September of the same year, the respondent took the deceased to her parents in Molo and introduced him to them as her fiancée who wanted to marry her. Her parents asked the deceased where he came from and he told them that his father's name was Salim Chepkaittany. Being Christians in the Presbyterian Church of East Africa, the respondent's parents expressed surprise at the Muslim name of the deceased's father and therefore asked him whether he was a Muslim. The deceased told them that his father was a Muslim but he himself had changed his religion. He was then told that if he wanted to marry the respondent he had to bring his parents to Molo to request for such marriage. In October that year, the deceased's family comprising of his father, Alhaji Salim Chepkaittany (P.W.3), his mother, Mwanahawa, two of his step-mothers, his step-brother who is the eldest son of P.W.3 – Saidi Salim Kittany (D.W.6) – and a clan member, Kiptur Kirui, visited the respondent's parents in Molo who on the said visit were together with two other men, namely; Richard Wainaina and Evan Ngugi both of whom were farmers in Molo. The deceased and the respondent were also present. Saidi Salim Kaittany (D.W.6) introduced the members of the deceased's family to the family of the respondent and thereafter the two families held a meeting to discuss the issue of marriage between the deceased and the respondent in the absence of the latter two. After the discussion between the two families, the deceased and the respondent were called to the meeting and the respondent was asked by Richard Wainaina if she had decided to get married to the deceased and she said yes. The deceased was similarly asked if he had decided to get married to the respondent and he said that he had waited for it so much. Richard Wainaina on behalf of the respondent's family told them that there was no objection to their getting married and Saidi Salim Kaittany (D.W.6) on behalf of the deceased's family said that they too had no objection to the marriage between the deceased and the respondent. Richard Wainaina, however, told the deceased's family that the respondent was a Christian in the Presbyterian Church of East Africa and that if there was to be a marriage between the deceased and the respondent it was to be in a Presbyterian Church. Richard Wainaina then asked the deceased about his denomination and the deceased said that he had changed his religion and was a member of St. Andrew's Presbyterian Church, Nairobi. There was no objection to the deceased and the respondent solemnizing their marriage in a Presbyterian Church. The latter two were left to fix the date of their wedding.

Towards the end of 1976, the deceased again went to Reverend George Ernest Wanjau (D.W.7) and told him that he wanted to be married in the Church to the respondent who was also a member of St. Andrew's Presbyterian Church, Nairobi. After the preliminary requisites attendant to such marriage, D.W.7 performed the marriage ceremony between the deceased and the respondent at St. Andrew's Presbyterian Church, Nairobi on 8th January, 1977 and pronounced the two as husband and wife. Despite the warning to the members of the deceased's family by his father not to attend this wedding as he was vexed by the deceased's apostasy, Saidi Salim Kittany (D.W.6) attended both the wedding ceremony at St. Andrew's Presbyterian Church, Nairobi and its reception at Charter Hall, Nairobi on the same day.

After their marriage, the deceased and the respondent lived together in a City Council house at Westlands, Nairobi until 1982 when they moved to the house situated on plot No. 5/63 off Waiyaki Way, Nairobi owned by Kawaken Holdings Limited whose shareholders were the deceased and the respondent. Their marriage was blessed with four children, namely;

i. Jennifer Chelagat Kittany, a girl, born on 16th August, 1977;

ii. Margaret Njeri Kaitany, a girl, born on 17th August, 1979;

iii. Kenneth Mutai Kaitany, a boy, born on 28th August, 1982; and

iv. Catherine Wanjiku Kaitany, a girl, born 26th June, 1986.

In August, 1993 the deceased went to Japan for a four (4) months course. While there, he informed the respondent that he had undergone a Barium Meal Test and was found to have a lot of acidity in his stomach. When he returned to Kenya in December that year, he was on antacid drugs. In February, 1994 he had another Barium Meal Test at the M.P. Shah Hospital, Nairobi which showed the same results – excess acidity in his stomach. He continued to take medicine without improving. In May that year, he decided to see Dr. Daniel K. Gikonyo at Nairobi Hospital. Tests carried out on him at that Hospital showed that he had duodenum ulcer which was turning cancerous. Doctor Gikonyo recommended an operation by Mr. Richard Wangansizi Baraza (P.W.12). That operation was carried out on the deceased by P.W.12 on 13th June, 1994. On recommendation of P.W.12 and Dr. Gikonyo, the deceased sought treatment in the United Kingdom and on 27th June, 1994 he went to Britain for this purpose. In the United Kingdom he was admitted and treated at St. Thomas Hospital and Princess Grace Hospital both of which are in London. In both these Hospitals he received Chemotherapy treatment to reduce the tumor in his stomach before operation. He then returned to this country on 4th August, 1994 and on the 29th of the same month, he again left for the United Kingdom for treatment. On 29th September, 1994 he was operated at the Queen Mary University Hospital in London and the tumor in his stomach was removed. He was discharged from that Hospital on 10th October, 1994 and on the 19th of the same month he returned to Kenya. On 5th November, 1994 the deceased went back to the United Kingdom for further treatment and on the 17th of that month he was operated again at the Queen Mary University Hospital in London. The tumor in his stomach was found to have spread all over the abdomen and it became obvious that nothing could be done medically to cure him.

In all his trips to the United Kingdom and back to Kenya as I have tried to outline above, the deceased

was accompanied by the respondent and when he was not admitted in Hospital in London but was undergoing out-patient treatment there, he and the respondent stayed with the latter's sister, Grace Wanjiru, who is a Lecturer at Middlesex University and lives in Woodgreen, North London.

Before being discharged from Queen Mary University Hospital in London, the deceased together with the respondent were accordingly advised about the deceased's state of health by the surgeon who had attended to him and as the two returned to Kenya on 3rd December, 1994 they both had no illusions about the deceased's health. They both knew that his condition was terminal.

The deceased had been referred to Nairobi Hospice, a Specialist Unit of terminal cancer, by Palliative Care Team at the Queen Mary University Hospital in London which is like the Nairobi Hospice and which had taken care of him at that Hospital. On 4th December, 1994 therefore, the deceased was admitted at Nairobi Hospital and was discharged two (2) days later on the 6th day of that month to his residence off Waiyaki Way, Nairobi where he was to be under the care of Dr. Michael John Hughes (D.W.3.), a Medical Officer at Nairobi Hospice. That care consisted of control of the deceased's physical symptoms such as pain and psychological health through medication besides giving him social and spiritual support. On 14th December, 1994, however, the deceased died inside his residence as a result of cardio-respiratory arrest due to the spreading cancer of the stomach.

On his return from the United Kingdom on 3rd December, 1994 the deceased had called some of his close family members who included his mother, Mwanahawa, Saidi Salim Kaityany (D.W.6), his younger brother, Yusuf Kipkorir Kaityany (D.W.8), and his other brother and immediate follower by birth, Mohamed Kaityany (D.W.9). These close family members met the deceased at Nairobi Hospital on 5th December, 1994 who told them that he was being discharge on the following day and that he would tell them why he had called them. On the evening of 6th December, 1994 he held a meeting with them in his bedroom at his residence and told them that since he was not going to live long, he wished to have a Christian burial at Langata Cemetery. He also told them that he would have retired at his Athi River farm and probably he would have been buried there. The reason for the choice of his place of burial, he said, was because he was a Christian and he did not wish to annoy his relatives who were Muslims. The deceased's mother told him that there was plenty of land at home where he could be buried. She requested him to change his mind so that he could be buried at the family's Belgut farm where there was a portion of land reserved for the burial of anyone dying within his father's family. Already four members of that family, one of them a non-Muslim, were buried there.

Twenty (20) acres of the Belgut farm where there is the family burial ground are occupied by Yusuf Kipkorir Kaityany (D.W.8) and as the deceased's father has several wives that portion of the Belgut farm is given to the house of the deceased's mother but the ownership of the same is in his father. In response therefore to his mother's request, the deceased said that if his father agreed that he could be buried at the family's Belgut farm in accordance with the Christian rites, then he would be buried there. On 11th December, 1994 his father was approached on this issue and he agreed that the deceased would be buried at the family's Belgut farm but some fifty (50) metres away from the other graves. This information was communicated to the deceased on the evening of the same day. In the meantime, on 8th December, 1994 the deceased executed a will in which he expressed his desire to be buried at the home of his father in Belgut village, Kaptaren Sub- location, Iten in accordance with the rites of the Presbyterian Church of East Africa. In that will, he appointed the respondent the sole executrix of the same. The deceased had also told his younger brother, Yusuf Kipkorir Kaityany (D.W.8) to look after his grave at the Belgut farm and had enjoined him not to take his body to Kaptagat farm where the first appellant was living.

Before the deceased died on the morning of the 14th December, 1994 he knew that he was going to be buried at this father's Belgut farm. Subsequently, his father resiled from his earlier agreement that the deceased be buried at his Belgut farm unless the first appellant and her children were recognised by the respondent and an inventory of the deceased's properties be filed in court. The respondent refused to do either of them and thereafter the deceased's burial dispute commenced in earnest with the appellants claiming to have prior right as wife and son of the deceased to arrange and effect or cause the burial of his remains at plot No. 36, Kaptagat Settlement Scheme, Eldoret in Uasin Gishu District or elsewhere as the

respondent being not the deceased's legal wife lacked the capacity to arrange and interfere with the body of the deceased.

According to Mohammed Sheebwana Mohammed (P.W.11) and Ali Mohammed Shee (D.W.1) both of whom are Islamic religious leaders in Nairobi and are versed in Islamic law to the graduate level, a Muslim woman cannot be married by a non-Muslim man and therefore if the deceased converted to Christianity when he was still married to the first appellant, that conversion automatically dissolved their Islamic marriage and cohabitation between them was not possible as it is completely prohibited. Communication to the first appellant of the deceased's apostasy was, however, important to the dissolution of their Islamic marriage. That communication need not have been made to the first appellant by the deceased. It could have been received by her through some other person or by the deceased's conduct. P.W.11 further informed the superior court that when a Muslim man dies and is survived by young children and/or only adult daughters, his father is responsible for his burial. But if he is survived by an adult son, that son will be responsible for his burial.

In his judgment dated and delivered on 4th April, 1995 the learned trial judge held that on the evidence before him and on the authorities referred to in the submissions of counsel, the Islamic marriage between the first appellant and the deceased became void on 30th May, 1976 when the deceased was baptised and confirmed as a member of St. Andrew's Presbyterian Church, Nairobi so that when the deceased and the respondent celebrated their Christian marriage on 8th January, 1977 the Islamic marriage between the deceased and the first appellant was no longer in existence. To the learned trial judge therefore, on account of this, the Christian marriage between the deceased and the respondent was valid. The learned trial judge also found that up to the time of the deceased's death on 14th December, 1994 there was a firm agreement by his relatives that this body should be buried at his father's Belgut farm on the twenty (20) acres portion of the same which was in the occupation of his younger brother, Yusuf Kipkorir Kaitany (P.W.8), whom he had asked to look after his grave and who had accepted and expressed his desire to fulfill his deceased's brother's wish. It was also on this portion of the farm where there was land reserved as the family burial ground and P.W.8 looked after the graves of the family members buried there. Indeed, according to the learned trial judge, even at the trial of the dispute before him, the deceased's brothers: Saidi Salim Kaitany (D.W.6), Yusuf Kipkorir Kaitany (D.W.8), Mohamed Kaitany (D.W.9); besides his mother, Mwanahawa, wanted him to be buried at this farm and the respondent had no objection to such burial as it would have been in accordance with the wishes of the deceased. Notwithstanding the subsequent change of mind of the deceased's father that the deceased was not going to be buried at the Belgut farm, the learned trial judge proceeded to hold that such burial would be in accordance with the law, to wit, that although the deceased's wishes as to the disposal of his body were not binding, nevertheless, effect should be given to those wishes as far as possible. Having therefore concluded that the first appellant had ceased to be the wife of the deceased on the latter's apostasy, the learned trial judge proceeded to dismiss the appellants' suit before him and ordered that the remains of the deceased be released to Yusuf Kipkorir Kaitany (D.W.8), Mustafa Kibet Kaitany (the second appellant herein) and Mary Wamaitha Kaitany (the respondent herein) or to any two of them for burial in accordance with the rites of the Presbyterian Church of East Africa at any suitable site on the portion of the twenty (20) acres of the Belgut farm occupied by Yusuf Kipkorir Kaitany (D.W.8) and situated in Kaptaren Village, Mutei Location, Keiyo District.

Against the decision of the learned trial judge, the appellants now appeal to this court and have put forward thirteen (13) grounds of appeal.

Shortly after the commencement of the hearing of this appeal on 1st August, 1995, this court pointed out to counsel for the appellants that as Keiyo customary law was not pleaded in the superior court, no reliance could be placed on it and that it was not open to the appellants to urge this appeal in that regard. The reasons for this course cannot be better put than was stated in the case of ERNEST KINYANJUI KIMANI V. MUIRU GIKANGA & ANOTHER, [1965] E.A. 735 at pages 738 and 739 where after setting out the provisions of regulation 4 of the Kenya (Jurisdiction of Courts and Pending Proceedings), Regulations, 1963 which is similar to section 3(2) of the Judicature Act, Chapter 8 of the Laws of Kenya in regard to civil cases, Duffus, J.A. said:

"Section 60 of the Evidence Act, 1963 provides inter alia:

"60. (1) The Courts shall take judicial notice of the following facts:

a. all written laws, and all laws, rules and principles, written or unwritten, having the force of law, whether in force or having such force as aforesaid before, at or after the commencement of this Ordinance, in any part of Kenya;

(2). In all cases within sub-s.(1) of this section, and also on all matters of public history, literature, science or art, the court may resort for its aid to appropriate books or documents of reference.

(3). If the court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it considers necessary to enable it to do so."

The parties in this case are Africans and therefore the court will take judicial notice of such African customary law as may be applicable but subject to the provisions of reg.4 as set out above. The difficulty remains how are these customary laws to be established as facts before the courts? In some cases the court will be able to take judicial notice of these customs without further proof as for instance in cases where the particular customary law has been the subject of a previous judicial decision or where the customary law is set out in a book or document of reference as provided in sub-s. (2) above, but usually in the High Court or in a magistrate's court, the relevant customary law will, as a matter of practice and of convenience, have to be provided by witnesses called by the party relying on the particular customary law in support of his case.

The appellant also claimed that the court should have called in the aid of assessors as provided by s.87 (1) of the Civil Procedure Code which reads as follows:

"87.(1) Any court may, in any cause or matter pending before it in which questions may arise as to the laws or customs of any tribe, caste or community summon to its assistance one or more competent assessors, and such assessors shall attend and assist accordingly."

This is a discretionary power of the court and whilst it may be of great value and assistance to the court in cases dealing with customary law, yet this does not cast the burden of proof in establishing the customary law on the court and not on the litigant himself. In this respect I would refer to ss.13 and 51 of the Evidence Act which read:

"13. Where the existence of any right or custom is in question, the following facts are relevant:

a. any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence;

b. particular instances in which the right or custom was claimed, recognized or exercised, or in which its exercise was disputed, asserted or departed from.

51.(1) When the court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of such custom or right of persons who would be likely to know its existence if it existed are admissible.

(2) For the purposes of sub-s (1) of this section the expression 'general custom or right' includes customs or rights common to any considerable class of persons."

In my opinion custom as referred to in these sections would include African customary laws and these two sections together with sub-s. (3) of s.60 (above) would support my view that the onus of proof to

establish a particular customary law rests on the party who relies on that law in support of his case. This Court has, in several cases dealing with customary law in criminal cases, decided that where the prosecution relies on a local custom then that local custom must be proved by witnesses called by the prosecution, and that it would not be correct for the judge to act only on the opinion of the assessors. I would refer to the case of R v. Ndembra, [1947] 14 E.A.C.A. 85 and R v. Kiswaga, [1948] 15 E.A.C.A. 50. The point was stressed that while witnesses as to the local custom could have their evidence tested by cross-examination and the defence would also have the opportunity of calling evidence to controvert their opinion the opinions given by assessors would, in the normal course, be given at the end of the case when the parties would have no opportunity to test their opinions by cross-examination, or be able to call evidence to contradict these opinions. The same position would arise in a civil case and it would, in my view, be wrong to rely only on the opinions of assessors given at the conclusion of the trial in order to establish what is the customary law applicable to the particular case. To summarise the position, this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity the customary law must accurately and definitely established. The court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward the customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially, of the present apparent lack in Kenya of authoritative text books on the subject, or of any relevant case law, this would in practice, usually mean that the party propounding the customary law would have to call evidence to prove that customary law, as he would prove the relevant facts of his case.””

At page 743 letters D and E, Newbold, V.-P. had this to say in the same case:

" When it is alleged that by any particular African customary law a result follows different from that which would follow under the ordinary law of Kenya, then the existence of that African customary law has, unless it has become of such general notoriety that judicial notice may be taken of it under s.60 of the Evidence Act, 1963, to be proved by the person invoking it in precisely the same way that a person invoking customary rights has to prove the custom. In proving such African customary law opinion evidence is admissible under s. 51 of the Evidence Act, 1963, and in accordance with s.60 (2) of that Act, it may also be proved by the production of a book or document."

It follows therefore that customary law must be pleaded by the person invoking it to avoid the element of surprise and in order to put the other party on his guard by telling him what he has to meet when the case comes up for hearing. This must be so because customary law in Kenya may be as variant as the various tribes that inhabit this land and to hold otherwise would be to permit ambush tactics in the civil process of this country in this regard.

Having disallowed the appellants to pursue their appeal on the unpleaded Keiyo customary law, the remaining grounds of their appeal mainly concerned the subsistence of the first appellant's Islamic marriage to the deceased and therefore the invalidity of the respondent's Christian marriage to the deceased; the learned trial judge's error in law in ordering that the younger brother of the deceased, Yusuf Kipkoriri Kaitany (D.W.8), and the respondent should bury the deceased when the former was not a party to the suit in the superior court; and the learned trial judge's error in making orders regarding the burial of the deceased which were incapable of performance.

In regard to the foregoing grounds of appeal, counsel for the appellants, Miss Abida Ali who appeared with Miss Betty Murungi, submitted that the fact that the deceased became apostate did not dissolve his marriage to the first appellant as there was no evidence that that fact was communicated to her. It follows therefore that the deceased did not have the capacity to contract a monogamous marriage with the respondent. Consequently, his marriage to the respondent was invalid and the latter was not his legitimate wife. Miss Ali also contended that the deceased' younger brother, Yusuf Kipkoriri Kaitany (D.W.8), was not a party to the suit before the superior court and had made no claim to the body of the deceased. It was therefore wrong, according to her, for the learned judge to make an order releasing that body to D.W.8 and the respondent for burial at Belgut farm which belonged to the deceased's father. That farm was not available for the burial of the deceased as his father, Alhaji Salim Kaitany (P.W. 3),

had said in no uncertain terms that he did not wish to have the body of the deceased buried in that farm. The order of the learned trial judge in this regard was therefore unenforceable. Miss Ali therefore sought to have the appellant's appeal allowed and the judgment of the superior court set aside and in lieu thereof judgment be entered in favour of the appellants.

In answer to Miss Ali's submissions, Mr. Muthoga who appeared with Mr. Adipo for the respondent, contended that the record of the proceedings before the superior court contained adequate evidence to show that the first appellant had been divorced by the deceased. From that record, there was nothing to show that after 1972 when the deceased allegedly divorced the first appellant the two ever had any conjugal relationship. The Christian marriage between the deceased and the respondent was celebrated in the open and in accordance with the Christian rites espoused by the Presbyterian Church of East Africa. The first appellant was on notice of the existence of the respondent's Christian marriage to the deceased but she chose not to enquire about it. She knew that she had been divorced by the deceased and the latter had never thereafter regarded her as his wife. Hence her nil role when it became obvious that the deceased was terminally ill. According to Mr. Muthoga, the first appellant knew of the deceased's apostasy and of his Christian marriage to the respondent. That marriage was valid and the respondent was the deceased's legitimate wife.

As the executrix of the deceased's will, Mr. Muthoga further submitted, the respondent had a duty to dispose of the deceased's body and since there are no propriety rights over the dead body of the deceased, there was nothing wrong in including the deceased's younger brother, Yusuf Kipkoriri Kaitany (D.W.8), on the list of those to whom the deceased's body was to be released for burial at his father's Belgut farm. After all, D.W.8 was to be the deceased's grave-minder.

Finally, in regard to the refusal by the deceased's father, Alhaji Salim Chepkaitany ((P.W.3), to have the deceased buried in Belgut farm, Mr. Muthoga submitted that P.W.3 was a person affected by the decision of the superior court. He has not appealed against that decision. It therefore did not lie in the appellants' mouths to say that the decision of the superior court to bury the deceased's body at this father's Belgut farm was incapable of being carried out. According to Mr. Muthoga, any difficulties encountered at the deceased's Belgut burial would be adequately handled by the respondent. He then concluded his response to the appellants' appeal by saying that the respondent will go to Belgut farm for the burial of the deceased as ordered by the superior court.

According to a commentary at page 13 in A Code of Muslim Personal Law by Dr. Tanzil-ur Rahman:

" The question as to who is a Muslim is of basic importance. A Muslim, in common parlance, means a person who professes the religion of Islam i.e. acknowledges that there is no God but One and that Muhammad is His Prophet. In several judgments of the superior Courts of Indo-Pak sub-continent this definition has found favour."

Indian Courts' Decisions:

In a Division Bench case of Madras High Court, Marantakah vs. Parakkal (Indian Law Reporter (1992) 45 Madras, p.986) the principle laid down was that the essential doctrines of Islam are that there is but one God and that Muhammad is His Prophet. On the basis of this it was held that "this is the indispensable minimum and a belief short of this is not Islam and that a belief in excess of this for the law courts is a redundancy". With the result that a Court of law was not concerned with peculiarities in belief, orthodoxy or heterodoxy so long as the minimum belief exists.

Pakistan View:

A judge of the High Court of Sind and Baluchistan in a recent case, Mrs. Aiyasha Koreshi vs. Hishmatullah (Pakistan Legal Decisions, 1972, Karachi, 635.) observed, 'For becoming a Muslim all authoritative books of Islam are agreed that if a person believes in the unity of God (Allah) and Muhammad (May peace be upon him) to be His Prophet and also says that he is a Muslim then he becomes a Muslim and no other formalities or rituals are to be gone through by him'."

Any Islamic marriage between a Muslim man and a Muslim woman is rendered ipso facto void by the apostasy of the former. Islam prohibits absolutely any marriage between a Muslim woman and non-Muslim man. By being baptised and confirmed as a member of St. Andrew's Presbyterian Church, Nairobi on 30th May, 1976 and by professing the Christian religion, the deceased renounced the very basic tenets of Islam and henceforth he was not a Muslim. His very act of renouncing Islam therefore rendered his Islamic marriage to the first appellant void and from then on, that marriage was of no legal effect.

It was urged on behalf of the first appellant that since the deceased's apostasy was not communicated to her, she was entitled to assume that she was still married to the deceased as to hold otherwise would be inequitable. The first appellant had been married to the deceased under Islamic law and in a prominent Islamic family in Keiyo Marakwet headed by the deceased's father, Alhaji Salim Chepkaitany (P.W.3), who was well known in Islamic circles in this country as a committed Muslim. She lived in the locality where this family practised Islam. When the deceased was preparing to marry the respondent, this family represented by its Patriarch, Alhaji Salim Chepkaitany (P.W.3), his eldest son, Saidi Salim kaittany (D.W.6), the deceased's mother, Mwanahawa, two other Muslim wives of P.W.3 and a clan member, Kiptur Kirui, was in October, 1976 involved in the negotiation of that marriage at home of the respondent's parents in Molo Division of Nakuru District. As I have attempted to outline above, at the negotiation of this marriage, the deceased made it clear that he had become a Christian and a member of St. Andrew's Presbyterian Church, Nairobi. It was also made clear that his marriage to the respondent was going to be a Christian marriage conducted and solemnized in a Presbyterian Church. On that occasion, if at no other time before, the Chepkaitany family was left in no doubt as to the deceased's apostasy. Saidi Salim Kaittany (D.W.6) attended the wedding ceremony of the deceased's marriage to the respondent on 8th January, 1977 notwithstanding the caveat by his father to members of his family not to attend that wedding. For nearly eighteen (18) years hence, there is no evidence of any conjugal relationship between the deceased and the first appellant. Indeed, since 1972 there was no evidence of such relationship. With the obvious knowledge to the Chepkaitany family of the deceased's apostasy and Christian marriage to the respondent and in the circumstances of that family into which the first appellant had been married to the deceased under Islamic law, it is hypocritical of her to expect that for nearly eighteen (18) years without any conjugal relationship with the deceased any credibility would be attached to the allegation that she was unaware of the deceased's apostasy. In any event, for the purpose of the deceased's burial dispute in the superior court, according to Mohammed Sheebwana Mohamed (P.W.11), even if she was the deceased's Muslim wife she had no role in his burial.

Regarding the superior court's order releasing the deceased's body to the deceased's younger brother, Yusuf Kipkorir Kaittany (D.W.8), and the respondent for burial at Belgut farm belonging to the deceased's father, it is to be noted that this Court has said before that there are no propriety rights in the dead body of a deceased person and that the executor's duty is to give effect to the wishes of a deceased person as far as it is practicable. As I have indicated in this judgment, the deceased's younger brother, Yusuf Kipkorir Kaittany (D.W.8), is in occupation of the portion of his father's Belgut farm where the deceased wished to be buried. He acceded to the deceased's wish to be his grave-minder. The respondent is the executrix of the deceased's will and has therefore a primary obligation to dispose of his dead body giving effect to his wishes as far as it is practicable. And as to the availability of Belgut farm for the burial of the deceased, the deceased's father, Alhaji Salim Chepkaitany (P.W.3) being directly affected by the decision of the superior court in this regard has not appealed against that decision. The appellants have therefore no mandate to speak on his behalf in connection therewith.

Evidently, from what I have endeavoured to outline in this judgment, I would dismiss the appellants' appeal with no order as to costs and confirm the decision of the superior court that the body of the deceased be released to his younger brother, Yusuf Kipkorir Kaittany (D.W.8), his son, Mustafa Kibet Kaittany (the second appellant herein), and Mary wamaitha kaittany (the respondent herein) or to any two of them for burial at any suitable site on the portion of the twenty(20) acres occupied by D.W.8 on Belgut farm, Kaptaren village, Mutei location of Keiyo District in accordance with the Christian rites of the Presbyterian Church of East Africa. As Lakha, J.A. agrees, there will be a majority decision of this Court in the terms proposed in this judgment.

It is so ordered.

JUDGMENT OF KWACH J.A.

Following the death in Nairobi of Hassan Kipkosgei Kaittany alias Hezron Kipkosgei Kaittany (the deceased) on 14th December, 1994, a dispute erupted over where, and by whom, he should be buried, pitching his two widows Sakina Sote Kaittany (Sakina) and Mary Wamaitha (Wamaitha), against each other. Mustafa Kibet Kaittany (Mustafa Kibet), who is the deceased's eldest son by Sakina, joined the fray on his mother's side. At his death, from cancer of the stomach, at the age of 50, the deceased was the Deputy Managing Director of the Kenya Airports Authority. Prior to that appointment, the deceased had served for many years as the Director of the City Inspectorate with the Nairobi City Council. The deceased had received specialised treatment for his ailment both locally and in London.

The deceased was the son of Alhaji Salim Chepkaittany almost 90 years old now, and a very devout Muslim. On 2nd September, 1967, the deceased who was then a Muslim himself, married Sakina under Islamic Law. They had two daughters, Sarah Jemutai and Saida Chepkoech and a son, Mustafa Kibet, the second appellant. Sakina and her children live on a 40-acre farm in Kaptagat Settlement Scheme which the deceased's father, Alhaji Salim Chepkaittany, acquired for the deceased in 1964, and is registered in the deceased's name.

In 1976 the deceased decided to abandon Islam and to become a Christian. After receiving appropriate instruction in his new faith he was accepted, and on 30th May, 1976, he was baptised (Hezron) at St Andrew's Church, Nairobi, and confirmed as a full member of the Presbyterian Church of East Africa (PCEA). In 1974, the deceased met Wamaitha who was a member of the PCEA, and was then employed by the Kenya National Trading Corporation in Nairobi, and fell in love with her. The deceased told Wamaitha he was a bachelor – a male who has never previously married. By 1976, and coincidental with the deceased's conversion, their romance had blossomed, and they decided to get married. A Kikuyu ceremony of ngurario was performed at Wamaitha's parents' home in Molo in December 1976 in the presence among others, of the deceased's parents and other relatives. This was followed hot on the heels with a church wedding at St Andrew's PCEA Nairobi on 8th January, 1977 under the African Christian Marriage and Divorce Act (Cap 151). The deceased's parents and most of his relatives did not attend the wedding though invited apparently because the deceased's father had issued an edict against attendance. The ceremony was conducted by Reverend Wanjau who issued a marriage certificate in which the deceased's condition was shown as a bachelor. The deceased and Wamaitha cohabited at various addresses the last one being house off Waiyaki Way near Kangemi where the deceased died. They had four children, three daughters and a son.

From the time the deceased and Wamaitha got married and settled down to a married life, the deceased never allowed Sakina or her children to visit him at their matrimonial home. Nor did he at any time introduce them to Wamaitha. Mustafa Kibet and his sister, Saida, met Wamaitha for the first time on 3rd December, 1994 when they went to meet their father at Jomo Kenyatta Airport on arrival from London. The deceased never took Wamaitha to Kaptagat to introduce her to Sakina and her children. He kept the two women apart and in total ignorance of the existence of each other. Or so he thought.

On his last visit to London for medical treatment, the deceased was informed by his doctors that he was terminally ill and he did not have long to live. Upon his return to Kenya in early December 1994, the deceased had a meeting with his mother and three brothers to discuss his final resting place. He told them that his wish was to be buried at Langata cemetery as he did not think his father would approve of his burial at Belgut farm as he was a Christian. They told him that burial in a public cemetery would bring shame to the family and assured him that his father could be prevailed upon to relent. His father was summoned and arrived in Nairobi on 8th December, 1994 and almost immediately fell ill and was admitted to Nairobi Hospital. On 11th December, 1994 when he was feeling a little better, but still confined, the issue of the deceased's burial in Belgut was raised with him and he readily agreed, the only condition he imposed them being that the deceased's grave would be dug a short distance from the other graves. This acceptance was communicated to the deceased the same evening and he thereupon

confirmed to his mother and brothers his agreement and wish to be buried at Belgut farm. That is how it came to pass that the deceased designated Belgut as his final resting place in his Will.

At a family meeting held in the deceased's house on 14th December 1994 in the evening after the deceased's death, his father was able to confirm his agreement and now specified that the deceased's grave would be set some 50 paces from the rest of the graves. This stipulation created its own difficulties because the land at Belgut slopes towards a nearby river and would be unsuitable for a grave at the distance set by the patriarch. In order to overcome this particular difficulty, it was apparently agreed at the same meeting that the deceased be buried on an empty plot at Kapkorom measuring six acres or so some one and a half kilometers from Belgut farm, also belonging to the deceased's father.

After that meeting, Wamaitha, who had followed the proceedings closely had a change of mind and sent a message to Saidi Salim Kaitany, the deceased's eldest brother, saying that she objected to the deceased's burial at Kapkorom. She suggested that the deceased be buried on a 30-acre piece of land she and the deceased owned at Athi River. Her argument was that the land at Kapkorom was too small and undeveloped. Wamaitha had led the deceased's father and his brothers to believe that the land at Athi River was a single parcel owned jointly by herself and the deceased, but upon further inquiry it turned out that there were half a dozen pieces of land none of which was in fact registered in the name of the deceased. In the majority of cases Wamaitha was the sole owner. This apparent lack of candour on the part of Wamaitha got the old man's goat and as a consequence he now turned round and withdrew his earlier consent to the burial of the deceased at Belgut farm. Wamaitha stuck to her guns and proceeded to make arrangements for burial at Athi River. She issued a notice in the press that the burial would take place on 21st December 1994. And that was the signal for Sakina and Mustafa Kibet to fire the first salvo in this saga.

On 19th December 1994, Sakina and Mustafa Kibet filed a suit against Wamaitha in the superior court complaining about Wamaitha's announcement to bury the deceased at Athi River and their exclusion from participation in the arrangements for the deceased's funeral. They challenged the validity of Wamaitha's Christian marriage to the deceased and her right to bury him. They sought an injunction restraining Wamaitha from proceeding with the burial and a declaration that they have a prior right to bury the deceased at Kaptagat Settlement Scheme in Uasin Gishu District. On the same day they obtained an ex parte temporary injunction stopping the burial. Wamaitha filed a replying affidavit explaining in detail her life with the deceased and the circumstances leading to her decision to break rank and decide to bury the deceased at Athi River. She also filed a defence in which she denied the plaintiff's claim. She stated in her defence that Sakina, Mustafa Kibet and Sakina's other children were strangers to her and that the deceased had allegedly divorced Sakina in 1972 thereby giving the deceased the necessary legal capacity to contract a valid marriage with her. Wamaitha also denied the allegation made in the amended plaint that at the time of making the alleged will, shortly before his death, the deceased did not have the necessary testamentary capacity and the will was consequently null and void and of no legal effect.

On 17th January 1995, Wamaitha filed P & A Cause No. 117/95 seeking a grant of probate of the will made by the deceased on 8th December 1994. Sakina and her three children have filed objections to Wamaitha's application alleging that the deceased was in no mental condition to make condition to make a will. This cause is still pending.

After Sakina and Mustafa Kibet had obtained their temporary injunction, but before the case went for trial, a further meeting was held by members of the deceased's family in an attempt to reach a compromise and it is said it was again agreed that the deceased be buried at Belgut farm. But this time round, the deceased's father, quite out of the blue, now imposed two totally new conditions. The first condition was that Wamaitha should recognise Sakina as a widow and her children as the children of the deceased. The second was that Wamaitha should provide a full inventory of the deceased's property. Wamaitha refused.

The case was heard by Githinji J who after a lengthy trial dismissed the claim by Sakina and Mustafa Kibet and ordered that the remains of the deceased be released to Yusuf Kipkorir Kaitany, Mustafa Kibet

and Wamaitha or any two of them for burial on the portion of Belgut farm occupied by Yusuf Kipkorir kaittany in accordance with the rights of the PCEA. Sakina and Mustafa Kibet were dissatisfied with that decision and they appealed to this court, having in the meantime obtained an order of stay of execution under rule 5(2) (b) of the Court of Appeal Rules.

The judge declined to deal with the issue of the validity of the deceased's will which had been challenged by Sakina and Mustafa Kibet. He held that this is a matter which should be decided by the Judge hearing the probate cause filed by Wamaitha. There can be no doubt that in taking this view, the Judge was right. The law of Succession Act (Cap 160) provides a special procedure for application for grant of probate and for dealing with any challenges to such an application. It is therefore not open to any party to mount such a challenge otherwise than in accordance with the statutory procedure.

The judge did not accept the claim by Wamaitha that the deceased had divorced Sakina 25 years ago as he felt the evidence in support of this allegation was scanty. But he nevertheless found that as a result of the deceased's apostasy brought about by his conversion to Christianity in 1976, his marriage to Sakina was automatically dissolved notwithstanding the fact that Sakina was not informed by the deceased and knew nothing about it. In arriving at this conclusion the judge relied on the evidence of two witnesses who claimed to be Islamic scholars. The judge also thought that the principle of Islamic law involved was one over which the court had no discretion. From that premise he held that the deceased had the necessary capacity to contract a valid Christian marriage with Wamaitha whose marriage to the deceased was therefore lawful.

The inclusion of Mustafa Kibet in the final order was justified by the Judge on the basis that evidence had been led to the effect that under the Keiyo customary law, to which the deceased was subject, the eldest son plays a prominent role in the burial of his father. As for Yusuf Kipkorir Kaittany, the Judge took into account the fact that he was in actual occupation of Belgut farm and had in fact undertaken to look after the deceased's grave.

The memorandum of appeal contains 13 grounds of appeal. We did not allow Miss Abida Ali, for the appellants, to argue grounds 5, 6 and part of ground 2 because these relate to errors alleged to have been committed by the Judge in regard to Keiyo customary law. It is true that evidence of Keiyo customary law was led at the trial in accordance with section 51 of the Evidence Act and the judge made some findings based on it. As it turned out this was really wasted labour because Keiyo customary law was never in issue, and did not form part of the appellant's case in the superior court. It was never pleaded as should have been done. The Judge obviously this serious irregularity in the pleadings and was made to listen to totally irrelevant evidence the exclusion of which would have reduced the length of the trial considerably. Ground 8 which is a complaint against the order for burial at Belgut farm was abandoned because it is now agreed by all the parties in this appeal that the deceased should be buried at Belgut farm. Grounds 3, 4, 4, 12 & 13 have really no substance being the sort of grounds usually added merely to increase the number. I will therefore not trouble myself with them. That leaves only grounds 1, 7, 9, 10 & 11.

The complaint in ground 1 is that the learned judge erred in making findings and arriving at a judgment whose orders are incapable of performance. Miss Abida Ali submitted that Belgut farm where the judge had ordered that the deceased be buried is owned by his father, Alhaji Salim Chepkaittany, and did not belong either to the deceased or his brother Yusuf Kipkorir Kaittany. She said the deceased father was against the idea and cannot be forced to have the deceased buried on the farm against his will. I have read the testimony of Alhaji Salim Chepkaittany but I cannot find anywhere he said categorically that he would not permit the burial of the deceased at Belgut farm. As I have already said, shortly before his death the deceased discussed the issue of his resting place with the members of his family. He was terminally ill and was anxious to settle the issue of his place of burial before his death. The matter was regarded by everyone concerned to be so important that the deceased's father was summoned to Nairobi for consultations. Because of his apostasy the deceased was quite certain that his father, who is a devout Muslim, would not agree to his burial on his Belgut Farm. The deceased had expressed a preference for burial at langata cemetery but he was talked out of this idea because it was felt it would cause embarrassment to the family. The deceased's mother and two and two of his brothers assured him that his

father could be persuaded to drop his objection and they undertook to do this. The deceased's father was duly consulted and he gave his consent the only condition he imposed being that the deceased's grave would be set at some distance from the other graves. This stipulation was perfectly reasonable because the graveyard was intended exclusively for Muslim members of the family. It was only after the deceased had been assured that his father would have no objection that he finally abandoned the idea of being buried at Langata and made a firm decision to be buried at Belgut Farm.

In my opinion the father cannot now impose new conditions, which he did not discuss with the deceased before his death, and which if he had raised during the discussions before the death of the deceased, the deceased would almost certainly have made an entirely different decision. Alhaji Salim Chepkaitany is now estopped forever from raising any objection to the deceased's burial at his Belgut Farm. He misled the deceased and it is only fair and just that he should be compelled to deliver on his promise. I would therefore dismiss this ground of appeal.

Ground 7 of appeal is that the judge erred in law when he ordered that the respondent Mary Wamaitha and Yusuf Kipkoriri Kaitany, a brother of the deceased, who lay no formal claim on the body of the deceased, should bury the deceased.

I agree entirely with Miss Abida Ali's submission that the order in favour of Yusuf Kipkoriri Kaitany had no legal basis as he was not a party to the proceedings. It was in my view made in error and I would set it aside. Since he had assured the deceased that he would look after his grave there was no need for a court order to give effect to what was really an obligation he had voluntarily assumed and he had not sought any such order.

With regard to Wamaitha, the position is entirely different. She had lived with the deceased as husband and wife continually since their marriage in 1977 and it would be grossly absurd to deny her the right to bury the man she regarded as her lawful husband. I would therefore reject this part of this ground of appeal.

The complaint in ground 9 of appeal is that the learned judge erred in law and in fact by finding that Sakina's marriage to the deceased's apostasy. This is to me by far the most substantial ground in this appeal. On it depend the fates of the marriages of both Sakina and Wamaitha. The judge did find that Sakina's marriage to the deceased was automatically dissolved by his apostasy. This finding was based on the Judge's appreciation of the evidence of two witnesses, one called by Sakina and her son, the other, by Wamaitha. The first was Mohammed Shebwana Mohammed (P. W. 11), an Assistant Imam of Jania Mosque in Nairobi. He is also the headmaster of a school called Biafra Muslim Welfare Society and a producer of Islamic Programmes in the KBC Television. He holds a BA degree in Islamic Education from the University of Kuliyyatu Daawa in Libya from where he graduated in 1987. On his return to Kenya in 1987, he taught Islam in Kajiado where he also held the position of Imam. He explained to the court what constitutes apostasy and the effect of it on the apostate's marriage. He told the judge that the deceased's apostasy dissolved the marriage between him and Sakina from the time Sakina became aware of it and that if Sakina had not been informed her marriage to the deceased subsisted until the deceased's death. He said further that Sakina would have the rights of a widow if she was not aware of the deceased's conversions to Christianity.

The second witness was Ali Mohammed Shee (DW1), Imam of Jamia Mosque in Nairobi, a BA graduate of Umdurman Islamic University in Sudan, where he read Sharia and Secular law. He graduated in 1975. His previous experience included a stint as a Kadhi and he also worked for Islamic Institute in Mombasa rising to the position of Deputy Principal. He too told the judge that according to Islamic sharia if a husband becomes a murtadi (apostate) his marriage is dissolved automatically, and that there is no requirement either in the Holy Koran or Hadith that the wife must be informed. But he conceded that according to the 4th source of Islamic Sharia "Qyasi" the wife of a murtadi is entitled to assume that she is still the wife if she was not informed of his apostasy unless it is proved that the assumption is wrong. This particular witness was surprised to learn that the deceased was an apostate because he had known him all along as a Muslim.

As I have already said, the judge expressed himself unable to find that the marriage between Sakina and the deceased had been dissolved by divorce as alleged by Wamaitha by her pleading and evidence, but he felt bound by the evidence of these two Islamic witnesses which he regarded as absolutely watertight, to hold that the marriage between Sakina and the deceased had been automatically dissolved by reason of the deceased's apostasy when he turned Christian. The authenticity of the evidence of these two witnesses rests entirely on this claim that it is the unanimous view of all Muslim scholars. To begin with, their own testimony before the judge did not reveal such unanimity. Secondly, the scholars' view is not supported either by the Holy Koran or Hadhi, the two fundamental sources of Islamic law.

Mr. Muthoga, for the respondent, cited a Case from India, IQBAL ALI (defendant) V HALIMA BEGAM (plaintiff) [1938] A. I. R. 296. That was a second appeal from the judgment and decree of the District judge of Jhansi who reversed the judgment and decree of Jhansi who reserved the judgment and decree of Musif of Jhansi. The appellant was the defendant in the action which was for a declaration that the marriage of the plaintiff with the defendant had been dissolved as the result of the plaintiff having abjured Islam and having converted to Christianity. The Musif dismissed the suit but the judge decreed it. The plaintiff's case was that she had renounced the Muhammadan religion and had been formally baptised as a Christian and that she believed in Christianity and no longer believed in Islam. She pleaded that her conversion ipso facto dissolved the marriage tie between her and her husband the defendant.

The defendant contested the suit and denied that the plaintiff had been converted to Christianity and pleaded that in no case could the marriage tie be dissolved. The court of first instance held that the plaintiff had not as a matter of fact been converted to Christianity and that she was not in law entitled to the declaration prayed for. The learned judge came to the conclusion that it was established the plaintiff had renounced Islam and had been baptised as a Christian. On the question of law, he referred to the case of AMIN BEG V SAMAN [1910] I. L.R. 33 and decided in favour of the plaintiff. Counsel for the defendant appellant tried to attack the finding of the judge that the plaintiff had as a matter of fact been converted to Christianity. Counsel cited the views of Mr. Ameer Ali expressed in the 3rd edition of his well known work on Muhammadan law but was unable to support his contention by reference to any other book or authority. The court dismissed the appeal holding that a Muhammadan wife's conversion to Christianity effects a dissolution of marriage with her Muhammadan husband, and she was entitled to a declaration to that effect

Amin Beg's case, which is not binding on this Court, proves three things. First, that apostasy is a ground for dissolution of a Muhammadan marriage. Secondly, that views of scholars on the subject are neither conclusive nor binding. And finally, that such dissolution is not automatic as alleged by the two witnesses in this case and contended for by Mr. Muthoga on behalf of the respondent. Either party can seek a declaration to the effect that the marriage has been dissolved. Unless that is done, the marriage must subsist. I have obtained support for this view from MINIHAJ ET TALIBIN (A manual of Muhammad Law According to the school of SHAFFI) by Mahivdin Abu Zakaria Yahya Sharif en Nawasi. In book 51 under the rubric APOSTASY at page 437 there is this passage:-

“As to the ownership of the property of an apostate dead in impenitence, it remains in suspense, that is, the law considers it as lost from the moment of abjuration of the faith, but in case of repentance, it is considered to have been never lost. However, there are several other theories upon the subject; though all authorities agree that debts contracted before apostasy, as well as the personal maintenance of the apostate during the period of exhortation, are charges upon the estate. It is the same with any damages due in consequence of pecuniary prejudice caused to other persons, the maintenance of his wives, whose marriage remains in suspense, and the maintenance of his ascendants and descendants.” (underlining mine).

This is a work of undoubted scholarship and the author says that the marriage of the wife of an apostate husband is not automatically dissolved but remains in suspense. I am of the view therefore that the claim by the two imaams who gave evidence in this case that the deceased's apostasy automatically dissolved his marriage to Sakina is not supported either by scholarship or authority. On this evidence and mistaken belief that he was dealing with a point of Islamic law in which he had no discretion, the judge held that Skinba's marriage to the deceased was automatically dissolved when he converted to Christianity in May

1976.

I realise that there is a world of difference between Islam and Christianity. I am also not oblivious of the fact that Islam and Hinduism are two different religions. But the members of these three great religions are all members of the greater community of the human race and should therefore be accorded equal treatment before the law. There is no divorce by stealth among Christians and Hindus. For instance, it is provided by section 10 (1) of the Hindu Marriage and Divorce Act that -

“10(1) A petition for divorce may have been presented to the court by either party to a marriage whether solemnised before or after the commencement of this Act on the ground that-

(e) the respondent has ceased to be a Hindu by reason of conversion to another religion

This is apostasy, pure and simple, and in the case of Hindus, the innocent party can petition for divorce on that ground. Islam is undoubtedly a religion of justice. Why should a Muslim be given preferential treatment by not being required to at least apply for a declaration that his marriage has been dissolved on the ground of apostasy while a Hindu has to petition for divorce on the same ground? I can see no reason for this selective application of the law.

There is at the present moment an appeal pending before the Egyptian Supreme Court in Cairo, where a prominent Islamic academic, who has been declared an apostate for denouncing Hadithi, and his wife, are challenging a “decree” by a group of fundamentalists that their marriage has been automatically dissolved and they can no longer live as husband and wife. While I express no view as to the scholarship of the Muslim witnesses who gave evidence before the Judge, there is clearly no unanimity among Islamic scholars on this particular point as the two witnesses purported to convey to the judge. In my judgment, a custom, religious or secular, which decrees that a valid marriage can be dissolved by stealth and surreptitiously as the whim of an adulterous husband is one that does not appear to me to be in accord with the tenets of justice inherent in the Islamic faith and which I am not prepared to accord legitimacy by application as part of the law of Kenya in this day and age. Apostasy should only form a ground for divorce at the suit of either party. I would accordingly allow this ground of appeal and set aside the finding by the judge that Sakina’s marriage was dissolved by her deceased husband’s apostasy. It is not necessary for me to speculate in this appeal the possible consequence of the decision I have arrived at on this ground of appeal on the marriage of Wamaitha. That is for the Judge in the probate court to decide. But while still on this point I would express the hope that Christian churches like PCEA should not just be interested in increasing their flock. In a situation such as this one where one is changing one’s faith from one great religion to another, there can be no harm done by the receiving religion inquiring into the consequences of such change upon those closely related to the party seeking to change his faith. In this case if the PCEA had, for instance, called the father of the deceased they may well have learnt that the deceased had a family of his own and was still married to Sakina. If PCEA had been aware of that position it is very unlikely that it would have sanctioned Wamaitha’s marriage to the deceased. The deceased would have had to sort out his position with Sakina first.

I do not accept the submission by Mr. Muthoga that the duty to bury a deceased person lies with the executor. That may be the position in England but certainly not in Kenya; but even then what the law says is that upon death the possession and custody remain with the executor which is why if he decides to bury the body he is obliged to have regard to the wishes of the deceased. Possession and custody give rise to certain legal incidents but they do not curtail the rights of others.

Section 82 of the law of Succession Act (Cap160) which came into force in July 1981, sets out the powers of a personal representative but these do not include the power to bury the deceased. The duties are set out under section 83 of the Act and the only duty relevant to burial I can see is the duty to provide and pay, out of the estate of the deceased, the expenses of a reasonable funeral for him. The duty to settle funeral expenses cannot imply exclusive right to bury, or any duty to bury for that matter. The only duty imposed is to settle the expense. If it had been the intention of parliament to impose the duty to bury on the personal representative this would have been expressly provided. Accordingly, I reject Mr Muthoga’s submission on this point.

In view of what I have just said about Sakina's marriage to the deceased, I do not find it necessary to deal with ground 10 of appeal.

I now turn to ground 11 of appeal. The judge did indeed dismiss Mustafa Kibet's claim but it seems to me that he nevertheless made an order in his favour because according to the evidence led at the trial, he would have a special role to play as the deceased's eldest son. It was really quite a harmless order and he had in any case asked for it in the plaint. There is no substance in this ground of appeal and I reject it.

This case is not about inheritance. It is simply a dispute over the disposal of the remains of the deceased. It is important to point this out because the impression that I have formed, from reading the record of proceedings in the superior court and listening to the submissions of counsel in this appeal, is that there is some material benefit to be gained by the widow who is ultimately given the right to bury the deceased. That is a total misconception.

I do not have to deal with the grounds of affirmation filed by Wamaitha because they are incompetent having been filed in breach of the rules of this Court.

The deceased's father regards both Sakina and Wamaitha as widows of his deceased son. That is a positive attitude. The right of a widow regardless of her perceived legal status to mourn her husband and to participate in his burial is so deeply entrenched in the African tradition that in my opinion it is not open to abridgment by such imported concepts as wills and executorship. To do so would be an aberration amounting to judicial trespass.

For the reasons I have given, I would allow this appeal, set aside the judgment and decree of Githinji and substitute it with a decree giving judgment for Sakina and Mustafa Kibet in terms of the first part of prayer 2 in the amended plaint and order that the body be released to Sakina, Wamaitha and Mustafa Kibet jointly and severally for burial at Belgut farm. I would make no order as to costs.

JUDGMENT OF LAKHA, J.A.

This is an appeal by the plaintiffs, in an action instituted by them, from a decision given on 4th April, 1995 by Githinji, J. dismissing the plaintiffs' suit and ordering the remains of Hezron Kipkosgei Kaitany (the deceased) be released to Yusuf Kipkoriri Kaitany, Mustafa Kibet Kaitany (the second appellant) and Mary Wamaitha (the respondent) or to any two of them for interment at any suitable site on the portion of 20 acres occupied by Yusuf Kipkoriri Kaitany in Belgut farm Kaptaren village, Mutei location Keiyo District in accordance with the rites of Presbyterian Church of East Africa.

This appeal raises the question as to who has the right to bury the deceased and the place where the burial is to take place. The facts with which these proceedings are concerned have been the subject of a hearing before the superior court when the plaintiffs called twelve witnesses and the defendant called nine and the hearing took a total of 30 days. These have been fully analysed with care in the judgment of Githinji, J. It is accordingly sufficient in this Court for me to summarise in a chronological narrative form the salient features of the series of events which preceded the filing of the suit. It must be remembered, however, that in doing so I have done no better than set them out as they were set out in the judgment of the learned judge.

The deceased who was born in a Muslim family died in his house off Wayaki Way in Nairobi on the 14th December, 1994 aged 50. He was the former Director of City Inspectorate and at the time of his death he was the Deputy Managing Director of Kenya Airports Authority. He married the first appellant on 2nd September, 1967 under Islamic Sharia. By this marriage there are two daughters and one son who are all adults. In or about 1976 the deceased approached Rev. George E. Wanjau, the then Minister in charge of St. Andrews PCEA Church. He was accepted and was baptized and confirmed as a full member of the PCEA church on 30th May 1976. On 8th January, 1977 the deceased and the respondent went through a ceremony of marriage at St. Andrews Church which was followed by a reception at Charter Hall Nairobi. By this marriage there are three daughters and one son.

The deceased started being sick in May 1994. He was treated and operated locally and later advised to have further treatment abroad. He went to London on three occasions between June and November, 1994 and returned to Kenya on 3rd December, 1994. He was admitted to Nairobi Hospital on 4th December and discharged on 6th December, 1994. On 8th December 1994 the deceased executed his will, six days before his death, whereby he appointed his wife (the respondent) as his sole executrix. He also expressed therein his wish as to his burial place and made only one declaration concerning the marital status of the first appellant to which I will refer later. This will was pleaded by the appellants themselves who alleged it was a fraud and the deceased had no mental and physical capacity to dictate and/or execute a will. I may say (as I do) here and now that despite these allegations there was not a shred of evidence in support of any of these pleas. The will is properly executed and duly witnessed.

The first and foremost question for consideration, in my judgment, is the question on whom does the duty to bury the deceased fall? More than fifteen years ago in the case of James Apeli and Enoka Olasi vs. Prisca Buluku, Civil Appeal No. 12 of 1979 (unreported), this Court considered the law applicable. In his judgment Sir Eric Law at P.6 stated:-

“The English law on the subject is succinctly summarised at P. 57 of Williams and Mortimer on Executors Administrators and Probate (London, Stevens and Sons, 1970) as follows:-

“The Corpse

There can be no property in a dead body. A person cannot dispose of his body by will. After death the custody and possession of the body belong to the executors until it is buried(emphasis supplied).

Directions as to burial

If the deceased has left directions as to the disposal of his body, though these are not legally binding on his personal representative, effect should be given to his wishes as far as this is possible The duty of disposing of the body falls primarily on the executor (emphasis supplied).”

Later, at p. 8 in his judgment, he continued:-

“Are these principles which can be applied in Kenya? In my judgment yes, though of course, they have to be modified to suit local conditions.”

That is not all. Less than ten years ago, once again, this Court in the already celebrated case of Virginia Wambui Otieno v. Joash Ochieng Ougo and Omolo and Siranga [1982-88] 1 KAR 1049, Nyarangi, J.A (as he then was) delivering the judgment of the court, after a long and careful review at P. 1058 stated as follows:-

“Now where a married woman dies leaving an estate and a man dies leaving an estate, the burden of burying both of them falls upon their personal representatives. The categorical conclusion is that the wife never had any duty at common law to bury her husband. That was always the duty of his personal representatives. While the wife would no doubt be consulted as to the type of burial to be undertaken, it was the duty of the personal representative to bury the body of her husband within the means of the estate.” (Emphasis supplied)

It must be obvious by now that the duty to bury the deceased is on the executor. The next logical question then is who in the present case is the executor? S.2(1) of the Succession Act, Cap.160 defines and executor as follows: -

“Executor means a person to whom the execution of the last will of a deceased person is, by the testator’s appointment, confided.”

And S. 80(1) of the Succession Act, Cap. 160 provides:-

“A grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such.”

Accordingly, in my judgment, the respondent answers the description of an executor she having been appointed by the deceased as such in his will. But two objections are raised. First, it is submitted that the respondent has not yet obtained a grant of probate. That, I think, is quite untenable. The two provisions above referred to make it quite clear that that is not necessary. So does the case of Kothari v. Qureshi 1967 EA 564 wherein at P. 566 it is stated:-

“Where a person dies leaving a will appointing an executor, the person so appointed as executor represents the estate of the deceased testator as from the date of the death of the testator, unless the executor renounces the executorship, and if he had intermeddled in the estate he cannot renounce executorship.” (emphasis supplied)it is elementary law that an executor’s title dates from the death of the deceased and springs from the will not from the grant of probate.”

In Meyappa Chetty vs. supramarian Chatty (1916) 1 A C 603 Lord Parker of Waddington delivering the judgment of the Privy Council stated at P. 608:-

“It is quite clear that an executor derives his title and authority from the will of the testator and not from any grant of probate”.

Secondly, it is urged that the will has been challenged and that until the challenge fails the executorship is in abeyance. That, in my judgment, cannot per se be correct having regard to the statutory provisions and the case law above cited. I know of no authority (and none was cited) in support of the proposition that when there is a challenge to a will the executorship remains in limbo until the challenge fails. If anything, in Volume 17 of Halsbury’s laws of England (fourth Edition) at paragraph 730 it is stated that ‘an executor may generally do before probate all things which pertain to the executorial office.’

Accordingly and, as there was no real dispute before us as to the site of the burial, the appellants having indicated at the hearing that they had no objection, I find myself in agreement with the trial judge in ordering that the remains of the deceased be reposed to the respondent, the second appellant and Yusuf Kipkorir Kaitany or to any two of them for interment at any suitable site on the portion of 20 acres on Belgut Farm Kaptaren Village Mutei Location Keiyo district (occupied by Yusuf Kipkorir Kaitany) in accordance with the rites of Presbyterian Church of East Africa. I would not allow Alhaj Chepkaitany, the father of the deceased who owns the said farm, to resile from his agreement given before the death of the deceased upon which he relied and acted upon by incorporating the site in his will as his wish as to the place of burial.

For the reasons above stated I would dismiss the appeal but, in the circumstances of this case, make no order as to costs on the appeal.

That disposes of the appeal insofar as I am concerned. Whatever else I may now say is, therefore, unnecessary and perhaps obiter dicta but it becomes necessary for me to consider the other issues adumbrated because a member or two of the Court may be doubtful or of a different opinion than myself on the issue I have decided.

That leads me to the question of the first appellant’s marriage with the respondent. Was that marriage under the Islamic Shari’a dissolved by a divorce/ The learned judge held as follows:-

“In the absence of the registration of the alleged divorce I am unable to determine on the scanty evidence before me that there was in fact a valid divorce in accordance with the Islamic shari’a”.

This matter, in my judgment, is not, strictu sensu, open to the respondent to pursue. While the appellants not unnaturally accept this finding the respondent has not cross-appealed under rule 90 of the Rules of this Court to be able to challenge it. If the issue was open I would (as I do) find that there was a divorce.

It must be remembered that this is not a matrimonial suit and the deceased is no longer available to testify on this issue which of necessity must be determined on a consideration of the totality of the evidence adduced. There is a considerable body of evidence which, in my judgment, establishes on a balance of probability that there was a divorce. There is no evidence of conjugal union between the first appellant and the deceased since 1972 and no children of this marriage since. The conduct of the first appellant and that of her children, the deceased's open change of his religion from Islam to Christianity with no evidence of any protest from the first appellant, and her conduct and the marginal role she played at the time of the deceased's return from London all point to the first appellant and the deceased not being a wife and husband. Saidi Kaittany, a witness on behalf of the respondent but a brother of the deceased, stated that he heard the deceased when he was called for reconciliation by his father in 1972 tell the first appellant that she was no longer his wife. Above all in his will the deceased in clause 7 thereof states:-

“I declare for the avoidance of doubt that in as much as I am divorced from my first wife SAKINA CHEPSAAT SAGALA she was generously provided for at the time of the divorce.”

This is a testamentary declaration by the deceased of considerable significance which must be given due weight.

I am, therefore, inclined to think that upon a careful consideration of the evidence as a whole the first appellant was divorced from the respondent, and that having regard to all the circumstances of the case it is inconceivable that the first appellant did not know of it.

The marriage between the appellant and the deceased was, in addition, also terminated because of apostasy. Both witnesses on this point Mohammed Shee Bwana (PW 11) and Ali Mohammed Shee (DW 1) agreed that when the deceased converted to Christianity he became APOSTATE and because of that his marriage with the first appellant was automatically dissolved. There was some difference as to the effective date of the dissolution of the marriage. Since there is a complete prohibition of a muslim woman marrying a non-muslim and then if a muslim man married to a muslim woman renounces the Islamic faith the marriage is dissolved at the time of renouncing the Islamic faith. It was contended that the marriage is only dissolved if the husband informs the wife.

It was urged that it would be unfair to hold the marriage dissolved if the wife was never informed of the apostasy. Miss Ali for the appellants quoting a passage at P11 from a code of Muslim Personal Law by Dr. TANZIL ur Rehman invoked the rules of justice, equity and good conscience to mitigate the rigour of the Islamic Sheria. But Miss Ali for the appellants would have done better to quote the passage appearing a little later from that treatise at P. 12 which reads thus:-

“The problem:

In principle, one may not disagree with the proposition laid down above but the question is “who will do it”? If the judges of our Courts in Pakistan do possess the requisite learning in the Quran, Hadith and the Fiah literature with adequate knowledge of the 'Arabic language, they will certainly be competent, but the difficulty is, to say the least, that most of them do not even know the 'Arabic language.

Mr. Justice Wahiduddin Ahmad, probably, being conscious of this practical difficulty, observed, “in my judgment, this is a path not free from danger and must be avoided. It was for this reason that the Privy Council as early as 1897 disapproved of this tendency and discouraged the Courts of law to put their own construction on Qur'an in opposition to the express ruling of Muhammadam Commentators of great antiquity and high authority”.

The learned judge on this issue made his finding as follows:-

“I am satisfied on the evidence of the two eminent muslim scholars and on Authorities referred to that the muslim marriage between first plaintiff and the deceased became void on 30.5.76 when

deceased was baptized and confirmed as a member of St. Andrews PCEA Church.”

With respect, I fully agree.

It only remains for me to enter three caveats with regard to this judgment. First, I make no mention anywhere of Customary law. Assuming, but without deciding, that customary law applied to all we ruled almost at the commencement of the hearing of the appeal that it was not open to the appellants to rely upon it. No custom was pleaded and custom is not uniform or universal. Nor is the court able to take judicial notice of custom. This is not one of those rare cases where an unpleaded issue can be said to have been properly left for the decision of the Court. In fact and indeed, the learned judge did not make a finding on this or rely upon any custom.

Secondly,

‘it is the business of Judges to send into the world, not doubts but decisions” per Sir William Scott, Lindo vs Belisario [1795] 1 Hagg. Cons. 216 at p. 220.

And as was said by Hamilton, J. in Lanston Monotype Corporation Ltd. Vs Anderson [1911] 2 KB 15 at P. 23:-

“If a judge may doubt, whose business is to decide, and if a Judge, whose business is to enforce Acts of Parliament , may express regret when he does so”.

I desire to express neither doubts nor regrets in deciding as I have done. Thirdly, this judgment was prepared entirely without the benefit or advantage (which I highly value) of considering the judgments of both my Lords through no fault on their part. If this relegates me to the status of a loner I shall, in the words of Asquith, L. J., ‘face that consequence with such fortitude as a I can command”.

I would dismiss the appeal with no order as to costs.

Dated and delivered at Nairobi this 21st day of August 1995.

A.A. LAKHA

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JUDGE OF APPEAL

R. O. KWACH

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JUDGE OF APPEAL

J.E. GICHERU

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JUDGE OF APPEAL