IN THE COURT OF APPEAL

AT NAIROBI

(CORAM:NYARANGI, PLATT & GACHUHI JJA)

CIVIL APPEAL NO 31 OF 1987

VIRGINIA EDITH WAMBOI OTIENO..... APPELLANT

VERSUS

JOASH OCHIENG OUGO & ANOTHER ..... RESPONDENTS

(Appeal from a judgment of the High Court at Nairobi, Bosire J)

JUDGMENT

This appeal is from the decision of Bosire J by which he held that the first defendant and also the plaintiff have the right under Luo custom, to bury the deceased and to decide where the burial is to take place, and thereafter directed and ordered that the deceased's body be handed over to Joash Ochieng Ougo and Virginia Edith Wamboi Otieno jointly or to any one of them for burial at Nyamila village, Nyalgunga Sub-Location, Siaya District.

The nature of the action and the circumstances out of which it arises are set out in detail in her plaint which was filed in the High Court, Nairobi on December 29, 1986.

The plaintiff/appellant is aggrieved by the judgment of the High Court and has appealed on the grounds *inter alia* that the trial judge erred in rejecting the plaintiff's evidence and that of her two sons, in holding that the late S M Otieno (the deceased) expressed his wishes as to where he should be buried to Albert Ongango, in accepting the defendant's case despite material contradictions by the defendant's witnesses in their testimony and in finding that the first defendant became the head of the deceased's family after the death of S M Otieno. Further it was contended that the plaintiff did not discharge the burden of proof on the balance of probabilities that the deceased expressed his wish to her and to her witnesses as to where he desired to be buried and that it was an error for the judge to find in law and in fact that the deceased was governed by or subject to Luo customary law at the time of his death. The trial judge further misdirected himself in law and in fact in holding that the Luo customary law is applicable with regard to the burial of the deceased and in failing to find that the duty of burying the body of the deceased is on or lies with the plaintiff as the personal representative of the deceased and her family. Also in failing to hold that the Luo customary law relating to the family, home and burial of the deceased was repugnant to justice and morality, is inconsistent with or in conflict with the applied law and the written law of Kenya. He erred in holding that there are no authorities based on common law dealing with burial, in finding that the customary law relating to burial had been proved and that the defendants and their witnesses were competent of making legally binding Luo customs concerning burial of the deceased are present in the case and finally that the learned judge misdirected himself in law in concluding that the defendants had a cause of action against the plaintiff.

The dispute arose in a somewhat simple way. Silvanus Melea Otieno a prominent law practitioner in Nairobi died in or about December 20, 1986 of acute myocardial infarct, acute coronary occlusion and coronary heart disease. His body was placed at the City Mortuary Nairobi where it has been lying, having been additionally embalmed, pending today's judgment. A disagreement erupted between the parties to this action despite attempts to reconcile them as to who had the legal right to bury the body of the deceased and as to where the body should be buried. The plaintiff asserted that she wished to bury the body of her deceased husband at Upper Matasia, Kajiado District or Langata. The defendants, however, contended that they were entitled to claim the body of the deceased and to cause it to be buried at Nyalgunga Sub-Location, Central Alego, Siaya District. That being so, the plaintiff filed the suit, the subject-matter of this appeal. So, the facts are simple as, according to the parties the matter is monumental. To complete this short saga, we venture to observe that this is the third and final lap which will complete the march of events.

That leads us to what Mr Khaminwa said in his opening remarks which is that, the case is of public interest and importance and that he would canvass that the judgment of the High Court was contrary to equity, contrary to fair play and contrary to justice. Counsel started with his second ground of appeal, took the court through the evidence of Jairus Patrick Otieno, and of Wamboi Otieno, the appellant, whereupon Mr Khaminwa submitted that the learned judge did not correctly assess that evidence, did not make any findings on the credibility and that the trial judge misdirected himself on his finding that the witnesses were arrogant. Next, Mr Khaminwa referred to the testimony of Harry Mugo and that of Musa Muna and urged that the evidence of the two witnesses corroborated that of the appellant and her sons as to where the deceased wished to be buried. The complaint on the trial judge's views of the evidence of Rahab Muhuni and of Ole Tameno was that the judge did not say whether the two witnesses were truthful or not. It was submitted that the two were witnesses of truth but that Albert Ong'ong'o, Bishop Yahuma, Japheth Yathuma, Joash Ougo, Magdaline Ougo and Johanes Mayamba gave fabricated contradictory evidence as the temptation not to tell the truth was high. Mr Khaminwa told us not to place weight on what Adala Odongo said but to believe Godwin Wachira, Mama Koko, Jane Njeri Muchina, Timan Njugi, Juita Quade, Adema and of Edwin Muni law clerk in the firm of the deceased.

We were urged by Mr Khaminwa to hold that where a witness is shown to have deliberately made a false statement, such a witness is *prima facie* utterly unreliable and also that evidence that requires corroboration cannot corroborate. It was the appellant's case that Omolo Siranga was not close to the deceased's family, that what Tago told the court was incredible, that Professor Henry Oruka is not an expert witness on the Luo customs, and that the deceased whose family lived in Nairobi could not have been a party to custom of country folk and could not therefore be governed by the customs.

Mr Khaminwa contended that by virtue of section 3(1) (c) of the Judicature Act cap 8, the law which applied to this is common law, the residual primary law which courts here apply as the general law. Mr Khaminwa covered the rest of the grounds of appeal ie 8 to 16 and also the supplementary grounds by making submissions identical to these grounds. The submissions included the contention that if the appellant is to be denied the body of her deceased husband it would amount to discrimination against her as a woman thus violating her human rights and that in contemporary Kenya a woman of the appellant's standing has a right to bury her husband.

For the respondents Mr Kwach advanced his case on the basis first that the appellant has no cause of action under common law as the duty to bury a person lies with his executor and therefore that the appellant, being not an executor, has no obligation to bury the deceased. Secondly that the proviso to section 3(1) of the Judicature Act limits the application of common law to Kenya and thirdly that under section 3(2) of the Judicature Act, it is mandatory to be guided by African customary law and that where as here there is a conflict between common law and African customary law, the latter must prevail. Mr Kwach argued and submitted that the judge properly rejected the evidence of Wamboi who, in the view of counsel, had parted with truth in her claim that she washed the dead body of her deceased father-in-law. As for the main thrust of the plaintiff's case that the deceased expressed his wishes and told her to ensure that his dead body is not taken to Nyalgunga, Mr Kwach said that if that were so, the deceased was bound to discuss with his eldest son, Tairus Waiyaki. Mr Kwach urged us to bear in mind that Tairus Waiyaki, Dr Kiano and Dr Karanja each of whom was mentioned by the plaintiff's witness, were not called to

testify and so we should draw the inference that their evidence would have been adverse to the plaintiff's case. Also, that as a mater of custom, the ultimate resting place of the deceased had nothing to do with his wife and children, that once the judge rejected Wamboi Otieno's evidence as of no probative value there was nothing left for corroboration.

Mr Kwach praised the evidence of Albert Ogango, which in his view showed that the deceased knew where he would be buried, and asked us to accept what Dalia Odongo, a Christian and in the Mother's Union who said she believed in God and that spirits could haunt her and to hold that Omolo Siranga, Joash Ochieng and Magdalina Ougo all knew what they were talking about and that they told the truth.

Mr Kwach said the respondents' case was simply that the deceased, a Luo, was subject to and governed by Luo customary law that for one to qualify for burial outside his father's home one has to establish a home in accordance with custom and survive his father and so if one grew up without a hut and without a home, such one is presumed to be living in his mother's house, a category into which the deceased fell. Counsel submitted there is nothing repugnant about '*Magenga*' (the funeral fire), and that the clan is no more than stating the rules and that to set up a home is a phenomenon which involves one's father and in his absence an uncle. The court was asked to regard the evidence of Professor Henry Oruka as providing the juridical and philosophical basis of the evidence on customary procedure and to consider that a rebel does not decide on his burial, the dead takes no part in the decision the same having been ordained for everybody concerned irrespective of status, that the wishes of a widow and children are relevant if consistent with custom, otherwise they are irrelevant, and that the appellant having not led any evidence on customary law, could not argue that this court should discard the evidence of the respondents. Counsel argued that an issue of burial is determined by personal laws as provided under section 82(3) of the Constitution of Kenya, that the deceased died intestate and that this court should not rely on the views and wishes of the appellant who must take the Luo as she finds them, to strike out a custom which has not been shown to be detrimental to the welfare of the Luo, is not repugnant to justice, is not contrary to written law and under which the appellant ought not to have rights which other Luo widows could not ask for.

In considering this appeal, one must bear in mind the position of the deceased at the time. By all counts he was an able lawyer, possessed of sufficient funds to give effect to his decisions. Certain matters are reasonably plain in the evidence. The deceased was of the Luo tribe. He lived within the city of Nairobi with his family. He did not go to his home at Nyamila village Nyalgunga Sub-Location often but he maintained real contact with his relatives and attended several burials. He had no house at his home and had no land registered in his name at his home. He was a member of the Ger Union, Kenya. He was a Christian. His clan is known as Umira Kager. He died intestate. The appellant, her two sons and the several witnesses have maintained that in 1980, in 1981 and 1986 the deceased expressed the wish to be buried in Nairobi, not in Siaya or anywhere in Luo land. Before he died, the deceased was already a member of the Ger Union, had spoken to Owuor Tago of his intention to subdivide his farm at Ngong, give one portion to Tairus Waiyaki and the other to Oyugi and then go to his home district to retire there if the worst came to the worst and had requested his cousin Albert Ongang'o to prepare a grave for him (the deceased) next to his late father's grave. Add that circumstance to the deceased's advice to the appellant that Ger clan would oppose a will for burial elsewhere and to his membership of the Ger Union and it becomes clear that though the deceased may well have expressed wishes as to his burial to his family he could not have been wholly candid.

We think that he was undecided and as a result his family has been misled but as we shall presently show the findings of fact on this issue are immaterial. We think at this stage we should say that Luo customary procedures do not permit for expression of wishes such as the appellant mentioned. Under the particular custom, a Luo who wishes to be buried outside his father's homestead, takes steps to have a home elsewhere but acceptable under custom. One's father or in his absence, an uncle, would perform the ceremony known as '*Tudohem*' in the new place. If however the emigrant dies in the new area before or after the ceremony is performed and his parents survive him, the emigrant must return home for burial. We pause here. If the deceased, who knew about the attitude of his clan to burial matters, wished to be buried at Upper Matasia, one would have expected him to ask his father before he died, to approve the establishment of the deceased's home. The deceased's father, who was a Christian would not, according

to the evidence of Johanes Mayamba, also a Christian, have had to perform any ceremony but to consent to the deceased's wishes and as a consequence formally release the deceased from within his homestead and let it be known to the clan. Having not carried out any of the requisite customary procedures, the deceased did not have a home in the Luo tradition sense anywhere. It matters not that the deceased was sophisticated, urbanized and had developed a different life-style. It seems to us quite unsustainable on the grounds suggested by Mr Khaminwa that a different formal education, and urban life style can effect adherence to one's personal law.

There is a further consideration, namely whether or not common law applies to this case. It was the contention of Mr Khaminwa that the issues in this case were to be entirely governed by common law to the exclusion of the customary law of the deceased Otieno. On the other hand, it was the contention of Mr Kwach that the issues in the case were to be decided entirely by the customary law of the Luo tribe because Mr Otieno was a member of that tribe. At present there is no way in which an African citizen of Kenya can divest himself of the association with the tribe of his father if those customs are patrilineal. It is thus clear that Mr Otieno having been born and bred a Luo remained a member of the Luo tribe and subject to the customary law of the Luo people. The Luos are patrilineal people (see *Restatement of African Law*, Kenya, vol II, p 158). We are not dealing at this point with the case of a mixed marriage, of a Luo father and a mother of another tribe or race.

The common law comes in to this picture by virtue of the Judicature Act (cap 8). The provisions of section 3(1) of that Act are as follows:

> "3 (1) The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with:
> (a) the constitution;
> (b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;
> (c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on August 12, 1987, and the procedure and practice observed in courts of justice in England at that date;
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> but the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary."

The section 3 considers the position of African customary law in subsection (2):

> "(2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil case in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay."

The formal situation is that the common law and doctrines of equity as well as the statutes of general application which are relevant and the procedure and practice observed in courts of justice in England are to be applied to fill up what is not provided for in the written laws in conformity with the aims of the Constitution. But although the common law is a source of law by which the High Court and this court 'shall' exercise their jurisdiction, there is the proviso that they must be applied with care, first of all not at all if the circumstances of Kenya and its inhabitants do not permit, and secondly, subject to such qualifications as those circumstances may render necessary. This is to state the proviso in negative terms so as to bring out the real meaning of the words that the application of the common law applies 'so far only as the circumstances' permit. In practice for example almost the whole of the law of tort is common law which may be applied. But then it has been usual to take into account certain customs relating to cattle trespass as a qualification of the common law. On the other hand the superior courts are to be guided by African customary law. That is again a matter of considering the content of African customary

law in the light of the circumstances in the case, and where the customary laws are repugnant to justice and morality or inconsistent with the written law and the African customary law will not be applied, or possibly will be qualified.

Mr Khaminwa is right that on construing these provisions according to the normal meaning of the words used, the common law is a source which shall be applied in the exercise of the jurisdiction of the superior courts whereas the customary law is a source of guidance. There is no doubt that these provisions may be ingenious as Mr Kwach submitted, but that they present a problem to the courts when applying them. Fortunately for us the problem can be resolved, at least in the alternative.

On the first approach to the problem there is the general purpose of including common law, that of continuity. The agricultural and commercial basis to the economy of the emerging state required to be safeguarded as far as possible. The civil law had proceeded on the basis of common law and equity and that basis was to continue. There was an important change towards the common law at least in the Contract Act (cap 23) enacted in 1961. It replaced an applied law the Indian Contract Act 1872 which its English authors had hoped would improve the common law of contract. It was replaced by the common law as the title of the Act (cap 23) shows. Thus in 1963 it was the common law of contract which continued on. By 1967 when the Judicature Act (cap 8) was passed, the parliament of Kenya decided to continue that process. Thus it can be said that relationships in the sphere of finance, transport, and commerce continued, and the law of tort went on to provide vehicles and tractors, for example, and to preserve their possession, or provide compensation in case of loss. There were written laws as well which went hand in hand like the Sale of Goods Act (cap 31), the Bills of Exchange Act (cap 26), the Law Reform Act (cap 27) among others.

But continuity at one period may give way to a change in the laws in a succeeding period, and no doubt the substance of the common law and principles of equity will in due course be codified or repealed. But as they stood at the time when they were especially useful, there was little if any conflict as to their appropriateness to the circumstances of Kenya, and they are still reasonably relevant today, in the absence of comprehensively developed customary law in this area. But the British administration had preserved the personal laws of the people of Kenya. On the other hand, the customary law of crime was replaced, although there are those who would prefer the customary law values in punishment. There may well have been customs concerning trade. Whether ideas will come forward from these roots remains to be seen. The personal laws were the source of the jurisdiction of the African courts, from which appeals lay in stage to the Court of Review. These African courts decided disputes in accordance with the particular customs of the litigants. It was not possible to set out all the customs of any particular area or tribe, or harmonise them into general principles. That was attempted in the *Restatement of Customary Law*, Kenya, vols 1 and 2 by Cotran which are not in themselves final codifications of customary law. Nevertheless they cover the personal law relating to the family, marriage, divorce and succession, the latter topic including references to matters on burial. The *Restatements* cover a period of work from before independence until after independence and when compiled and published they led to the integration of the system of the courts. The operation of these personal laws is illustrated by the provisions of section 3(2) of the Judicature Act (cap 8).

Mr Kwach referred to the common law as the customary law of England. The judgment of Bosire J, he claimed, had re-asserted the proper place of the African customary laws which were in effect binding on the courts. In Mr Kwach's world customary law supervenes over common law. That said, we return to sub-section 2 of section 3 of the Judicature Act which provides:

> '(2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.'

Counsel addressed us on this provision and we feel bound to analyse it in relation to this appeal. Looking at the subsection, we ask ourselves: what does 'guided' mean? The word 'guided' which is not an

altogether easy term to understand in our judgment means led by something and so courts must have in mind as the guiding light, as the principal law. African customary law. If, however, there are circumstances pertaining to a case to which African customary law does not apply, a court should feel free to apply common or statutory law. The court having been guided by African customary law and having been satisfied about the other elements of the subsection is mandated:

> "to decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay."

That is a pointer to the necessity to be 'guided' substantially by African customary law.

The place of customary law as the personal law of the people of Kenya is complementary to the relevant written laws. The place of the common law is generally outside the sphere of personal customary law with some exceptions. The common law is complimentary to the written law in its sphere. Now suppose that exceptionally there is a difference between the customary and the common law in a matter of a personal law. First of all, if there is clear customary law on this kind of matter, the common law will not fit the circumstances of people of Kenya. That is because they would in this instance have their own customary laws. Then suppose by misfortune that in this instance those customs were held to be repugnant to justice and morality, and were thus discarded, there would be the common law to fall back upon, at least in a modified form. In this way these two great bodies of law, for that is what they truly are, complement each other. They may be different but the way to operate them is to use them as complementary to each other without conflict as laid down in section 3 of the Judicature Act (cap 8).

No one can say with anything like appreciation of the common law that it is nowadays the customary law of England, in the sense that the African customary law now exists in Kenya. The common law is, of course, based on the customs that sprang up several centuries ago. In *The Machinery of Justice* (3rd edn), Jackson explains (at page 10) that common law was a phrase used by cannon lawyers to distinguish the general and ordinary law of the Universal Church from particular rules. The judges were appointed to administer the law and custom of the realm, which meant that the judges built up their own set of principles, and rules. Their material consisted of general and local customs, and the periodical ideas of an age in which theology and law shared the harmony of intellectual effort. The different 'laws' that governed various parts of England tended to disapper. There emerged a general body of rules that were applied in the King's Courts at Westminister and carried through the realm by assize judges on their circuits. This part of the law was common and to be contrasted with anything that was particularly extraordinary or special, such as surviving local custom or Roman law. The essence of the common law was that it grew through judicial decisions recorded by lawyers. In so far as customs is said to represent the adherence of people to a course of action or mode of behaviour, and through such adherence to exemplify their consent to it, the decisions of the judges lay outside such adherence.

Professor Allen in his book *Law in the Making* (4th edn) p 119 explains:

> "We have seen that every student of the common law constantly has to reckon with the large customary element which it contains; but it is equally well-known to all legal historians nowadays that "custom of the realm" was a very large measure the custom of the country, not of the people .."

at p 120 he proceeds:

> "The cardinal fact in the settlement of our medieval law is the gradual domination of a permanent central tribunal over the jurisdiction of local courts … royal justice establishes approximate uniformity in essentials as against the bewildering diversity of local custom, and the supreme custom becomes the custom of the King's Courts. There is still great variety of usage in manor boroughs and localities; but in what may be called the working basis of a general system of justice royal courts carry on, and have ever since continued a perpetual process of reconciliation and harmonization, so that local divergencies, although always respected and often jealously safeguarded, do not impair the symmetry of the main fabric."

Such is the nature of the common law, in large part built up by the English judges, just as in large part they built up the doctrines of equity later on. African customary law may now be at the beginning of such a process. The main difference between the African customary law and the common law is that the former is still a set of individual rules adhered to by each tribe, whereas the common law is a synthesis of judicial general principles except for a small number of specific customs not yet integrated. Once customs have been overtaken by judicial decisions which have 'harmonised' them, customs as such cease to have effect. What occurred in the course of the development of common law was in some ways the kind of development which the late Minister Mr Mboya envisaged for customary law, when he addressed parliament on the case for a unified court's system, to which Mr Khaminwa referred. (*Republic of Kenya Official Report, House of Representatives First Parliament First Session* vol 1, part II, 24 July 1963, col 1484).

From this review it emerges that generally speaking the personal laws of Kenyans is their customary laws in the first instance. Common law is not the primary source, but it may be resorted to if the primary source fails.

This brings us to the case of *James Apeli and Enoka Olasi v Prisca Buluku* Civil Appeal No 12 of 1979. The dispute as to where the body was to be buried, was a dispute springing from the customs of the people of East Bunyore, where the deceased Simon Buluku was born and grew up. The dispute was never resolved. In its place, the wishes of the deceased became paramount. Reference was made to the English law and partly statute. It is difficult to see how the Burial Act 1857 of England could be relevant to the case before the court; the court went on to the consideration of a faculty granted by the Ecclesiastical Court and the licence from the Home Secretary. Adapting these matters by analogy it allowed the respondents to disinter the body to remove it from East Bunyore for burial in West Bunyore. The decision was subject to the discretion of the Minister of Health. This court is bound by this decision, but it can be distinguished on the main ground, that there was no real decision as to what the relevant customary law was and how it applied to the circumstances of that case. In the instant case, there can be no such prevarication; the issues are sharp and clear, and the customary law declared. The best that can be done with the case of the burial of Simon Buluku is to restrict it to its special facts relating to exhumation.

The result is that we cannot whole-heartedly accept Mr Khaminwa's thesis that *Buluku's* case supports the theory that common law is to be preferred to customary law. As far as one can tell, it was thought both laws common and customary had this in common that the wishes of the deceased though not binding, must so far as is possible, be given effect to. That may possibly be right for the circumstances of that case, but it is not right for the circumstances of this case. Accordingly, we have to attend to the evidence of the Luo customs in this case, and answer the issues raised on them.

But supposing in the alternative, that Mr Khaminwa had persuaded us that the common law had to be preferred to the customary laws of the Luos, would he have fared any better?

The argument and judgment in *Rees v Hughes* [1946] KB 517 disposes of any argument that at common law the wife had a duty to bury her husband, the converse of the rule that the husband was under a duty to bury his wife. Mr Gerald Gardiner (as he then was) tried to put the case of the wife's duty to bury her husband. He argued at p 521 that:

> 'The only change in the law that has resulted from modern legislation is that whereas a wife having no property was under no obligation to bury her husband, now that she may have property she is under that obligation.'

That was rejected. Scott LJ preferred the argument of Sutton KC to that of Gardiner. At common law, there was a public duty on the husband to bury his wife. That was because he acquired all her property, apart from the equitable doctrine of the wife's separate estate. The wife at common law had no power to dispose of property and only a limited power in equity. Hence if a woman covert dies her husband was bound to discharge that duty, at his own expense, up to a reasonable amount. But the converse could not arise. When a man dies possessed of personal property the duty of burying his body fell primarily on his personal representative and not his wife as such. The court pointed out to Mr Khaminwa during argument

that the converse would not hold good. But after the Married Woman Property Act 1882 the common law as regards the husband's duty ceased as well as the equitable doctrine of the wife's separate estate. The position of the married woman in England today has only emerged after the Administration of Estates Act 1925 and the Law Reform (Married Women and Tortfeasors) Act 1953 neither of which apply to Kenya. 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.

At common law before 1882 the wife would not have been able to take up letters of administration without the consent of her husband. It was after the Married Woman Property Act 1882, sections 1(2), 18 and 24, that a married woman could take up administration without the consent of her husband and to act in all respects in the matter concerning the intestate as if she were a 'female sole' (see 1 *Williams on Executors and Administrators* (14th edn) paras 238 and 733). It is not therefore the common law that Mr Khaminwa is really relying upon if he is relying upon the position of the appellant as a personal representative. The appellant as merely the wife has no case at common law. It is statute. Either one goes to the provisions of the Married Woman's Property Act 1882 which has been applied as a statute of general application in Kenya, (see *I v I* [1971] EA 278) or one goes to the Law of Succession Act (cap 160). It seems that after 1971 a married woman could take up the administration of her husband's estate under the Act of 1882; but no doubt whether that was in fact the practice. However she can certainly do so under the Law of Succession Act which is now a written law, which must be supplementary to the customary law. The married woman is the preferred choice by virtue of section 66 of the Law of Succession Act.

But the difficulty remains that the general rule in relation to administration is that a party entitled to administration can do nothing as administrator before letters of administration are granted. Section 80(2) of the Law of Succession Act provides that a grant of letters of administration, with or without the will annexed, shall only take effect as from the date of the grant. In contrast section 80(1) provides that 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. This means that in the case of an executor he may perform most of the acts appertaining to his office before probate including the bringing of a fresh action, because he derives title from the will and the property of the deceased vest in him from the moment of the intestate's death (see 1 *Williams on Executors and Administrators* (14th edn) paras 84 *et seq* and 230 *et seq)*. But an administrator is not entitled to bring as action as administrator before he has taken out letters of administration. If he does the action is incompetent at the date of its inception. The doctrine of the relation back of an administrator's title, on obtaining a grant of letters of administration, to the date of the intestate's death, cannot be invoked so as to render the action competent (see *Ingall v Moran* [1944] 1 KB, and the case which follow namely Burns v Campbell [1952] KB 15). This doctrine is as old as *Wankford v Wankford* [1702] where Powys J said:

> 'but an administrator cannot act before letters of administration granted to him.'

If a person like the appellant acts before the grant she will be a volunteer. In fact the appellant was prevented from acting. She has not yet gained letters of administration. Her application has been contested. While she may be the preferred choice in section 66 of the Law of Succession Act she has not yet received her grant and consequently cannot lawfully act in that predicament. She cannot legally claim the right to bury the body of her husband as his personal representative.

It follows that if the appellant relies on the common law itself it will not assist her. She is not yet able to sue as personal representative until the grant of letters of administration to her. (See 1 *William* (ibid) p 151). The appellant therefore can only rely on the customary law. It is of importance perhaps to understand that the married woman at common law was something of a chattel belonging to her husband. No doubt the idea was her protection but it was by statute that her position has changed radically in England so that she is now on a level of equality with her husband. The statutory process appears to have

begun in Kenya with the Law of Succession Act.

We return now to the customary law.

It is, we think, clear that the customs and customary procedures concerned with burial and establishment of a home among the Luo are rules of action which the Luo uniformly and voluntarily observe. So that the Luo have provided the rules for themselves and by reason of their observance, the rules of action constitute customary law within section 3(2) of the Judicature Act. In accordance with section 51 of the Evidence Act the witnesses called were sufficient to prove the customs as being persons who would be likely to know of their existence. The deceased would be subject to the Luo customary law if it is not repugnant to justice and morality or inconsistent with written law. This requirement should be interpreted liberally. Some of the customs which have to be tested in this way are:

1. Otieno was born and bred a Luo and as such under Luo customary law his wife on marriage became part and parcel of her husband's household as well as a member of her husband's clan. Their children are also Luo as well as members of their deceased father's clan.
2. On the death of a married Luo man the customs are that the clan takes charge of his burial as far as taking into account the wishes of the deceased and his family.
3. But a Luo who has not established his own home in accordance with customs will be buried at his father's home.
4. Under the Luo custom to which as we have said she is bound she has no right to bury her husband and she does not become the head of the family upon the death of her husband.
5. As with other African communities a man cannot change his tribal origin.
6. There are the burial rights some of which are obligatory and some are not.

There is nothing repugnant or immoral about any of the above customary laws. The evidence on '*magenga*' the shaving hair "*Tero Bur'* and other rites shows that the practices are innocent and are meant to underscore the deep loss to the clan, to distinguish the particular deceased from the other deceased who are not as prominent, and no doubt, the ceremony is intended to encourage members of a clan to aim high by doing good deeds to the community.

But it has been queried these customary laws are just. There is evidence that the customary laws applied generally in Luo land. To the extent that one who does not wish to establish a home in Luo land may with the consent and blessing of his father or in his absence an uncle set up a home elsewhere or even outside Luo land, the customary laws are just. This accommodates the rebel and frees him to continue life as he wishes. The mere fact that the deceased's father lived with him at his house in Langata is no evidence of the consent and blessing of the father for the deceased to establish a home in Langata or Upper Matasia. The appellant as the deceased's wife has to be considered in the context of all wives married to Luo men irrespective of their life-style who become subject to the customary laws. The fact that her marriage was a mixed one would not confer on her any special status under the Luo customary law. Dealing with the argument of discrimination in general, we would refer to section 82(3) and (4)(b) of the Constitution of Kenya which allows for discriminatory rules respecting burial. At the moment there is no evidence of hardship felt by this particular community.

Finally as for the argument that the Luo customary laws are inconsistent with the written law namely the Succession Act, cap 160, we are not persuaded that this is so. Section 66 of the Act as we have pointed out entitled the widow to be preferred as the personal representative for purposes of administration of the deceased estate, but that does not mean that the widow should not carry out the customs with regard to the burial of the deceased in conjunction with those who are responsible under customary law.

We are persuaded from our perusal of the evidence from a summary of the ebb and flow of the argument on this aspect of the case that there is nothing in the Luo customary law which a reasonable man in Kenya would find repugnant to justice and morality. Repugnancy to justice and morality is not the same thing as inconvenience or hardship. This whole matter appears to have been presented as a direct conflict between African customary law in general and the applied common law. It may have been seen that the gist of the action was to finally oust African customary law and then proceed to apply common law and written law

in all circumstances. However, that is not correct. This court is not required or expected to decide to give African customary law or common law any new place in our jurisprudence as we have already explained. Under section 3(2) of the Judicature Act the courts of the country must be guided by African customary law provided such law is not repugnant to justice and morality or inconsistent with any written law. The courts comply with that provision in proper circumstances. This courts comply with that provision in proper circumstances. This court had occasion as recently as February 14, 1986 in the case of *Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters* (1982-88) 1 KAR 946 to caution that common law and its applicability must be tampered and adjusted to the circumstances and views generally held in Kenya. We can therefore state in the course of developing a jurisprudence which ultimately will have a Kenya identity, the courts are enjoined to turn to African customary law as well as to the applied common law, to decision of the English courts and courts of Commonwealth countries. The elders, who are the custodians of African customary law, assisted by the intelligentsia by the church and other organizations owe it to themselves and to their communities to ensure that customary laws keep abreast of positive modern trends so as to make it possible for courts to be guided by customary laws.

We followed the argument on behalf of the appellant with the closest attention and we have carefully considered every point raised. We are respectfully of the view that the appellant's case took no account of the Luo customary law, and has no answer against the claims of the respondents.

The appellant's advocate confessed before us that he did not really understand the Luo customary law. Needless to say, it was his professional duty to carefully study and understand the Luo customary law and, if he thought it was in the appellant's interest, to call evidence. As matters now stand, the court has to confine itself to the evidence on record on customary law which was adduced by the respondents.

We find ourselves in agreement with the judge and we dismiss the appeal. It is ordered that the deceased's body shall be handed over to Joash Ochieng Ougo for burial at Nyamila Village, Nyalgunga Sub-Location, Central Alego, Siaya District. The decision in *Mburu's* case is consistent with this decision. It does appear to us that in the course of time parliament may have to consider legislating separately for burial matters covering a deceased's wishes and the position of his widow and so enabling courts to deal with cases related to burials expeditiously. It is now clear to us that it is not sufficient to write wills. There often are disputes about burials.

There will be no order as to costs.

Those are the orders of the court.

Dated and Delivered this 15th Day of May, 1987

J.O NYARANGI

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JUDGE OF APPEAL

H.G. PLATT

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JUDGE OF APPEAL

J.M. GACHUHI

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JUDGE OF APPEAL