



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(Coram: Law, Miller & Potter JJA)**

**CIVIL APPEAL NO. 12 OF 1979**

**BETWEEN**

**APELI .....APPELLANT**

**AND**

**BULUKU.....RESPONDENT**

*(Appeal from the High Court at Kisumu, Cotran J)*

**JUDGMENT**

This is an appeal by two brothers of a deceased person against a decision of the High Court of Kenya sitting at Kisumu (Cotran J) ordering that the respondent, who is the widow of the deceased, be allowed to remove the remains of her late husband, which have been interred in the place where he was born in East Bunyore Location, and to re-inter them in Bungoma District at a place where the respondent and the deceased had bought land and established a home. The respondent widow was the plaintiff in the High Court suit, and the appellants, who were then unrepresented, were the defendants. I cannot do better than set out the facts and relevant law in the same way as they were set out in the judgment of the learned judge. He said:

This is an unusual case. By her plaint dated December 21, 1978, the plaintiff who is the widow of Simon Buluku, seeks the sanction of this Court, to enable the remains of her late husband to be removed from Ebosioli Village, Eburnagwe sub-location East Bunyore location for burial at her home in Bungoma District. The defendants are Simon Buluku's full brothers."

Simon Buluku died at Kenyatta National Hospital on September 20, 1978 aged 56. He was born and brought up at Ebosioli village in East Bunyore. He first married under customary law a lady who does not figure in these proceedings because it appears that he divorced her before he married the plaintiff. From the first lady, he had a son Wycliffe, and three daughters. He married the plaintiff on January 6, 1957 at the Church of God Chapel in Kima, Bunyore and the evidence clearly shows that they were both practising Christians and active members of the Church of God. By this marriage there are four surviving sons and 2 daughters who are all minors. From 1957 until 1963, the plaintiff and her husband, Simon, lived at the family home at Ebosioli. Simon then bought a piece of land in West Bunyore, some 10 miles from Ebosioli. He built a home and lived there with his family. He also established a business in Kisumu. In 1971, he bought a 75-acre sugar plantation in Bungoma and it clearly emerges from the evidence that he intended to move there when he completed building a house at the farm. The plaintiff says that between the purchase of the farm from 1971 until 1978 when the house was finally completed, she and

her husband spent a lot of time in Bungoma. She says they finally moved there in July 1978. In September, 1978, Simon became very ill. He spent some time at the New Nyanza General Hospital and the Victoria Hospital at Kisumu. He was then moved to Nairobi where he died at Kenyatta National Hospital on September 20, 1978.

It is clear that from the moment he died at Nairobi, there was a sharp controversy in the family as to where Simon was to be buried. His wife, the plaintiff, and Wycliffe his eldest son, wanted him to be buried at his new home in Bungoma. His brothers, the defendants, wanted him to be buried at his father's home and his original home in Ebosiroli, Bunyore. The controversy was not resolved at Nairobi. But it was decided to move the body initially to Bunyore because it was felt that Simon's ageing and sick mother would want to see it before burial. At any rate, the body was brought from Nairobi to Ebosiroli on September 23, 1978.

On the following day, September the 24th there was a big family "baraza" to discuss the venue of the burial. It is clear that the plaintiff and Wycliffe were alone in taking the view that Simon's body should be taken for burial at Bungoma. The rest of the family, supported it seems by other local village elders and the Chief and Assistant Chiefs of the area, took the view that Simon must be buried at his ancestral home in Bunyore. Matters in fact got out of hand, so much so, that Wycliffe went and called the police, to stop the burial of his father at Bunyore. But all to no avail. The police, obviously encouraged by the Chief and Assistant Chiefs, would not interfere; the plaintiff, who says she was manhandled and insulted, fainted and went to hospital and Simon's body was buried at Bunyore. When the plaintiff left hospital a few days later, she again tried to persuade the defendants to allow her to remove the body to Bungoma. They refused. Hence this action.

Both sides claim that customary law is on their side. The plaintiff, supported by other witnesses, says that traditionally under Bunyore customary law, where a man has established his own home he is buried at his own home and not at his father's home. Indeed they say it would be contrary to custom to bury him at his father's home because that would prevent the performance of further customary ceremonies after burial. The defendants, also supported by witnesses, say that there is no such hard and fast rule and all depends on the circumstances. In this case, they say that Simon had not definitely established his home in Bungoma and was still in the process of moving there, that Bungoma was far away, that his mother was still alive and wanted him buried in Bunyore and that Simon was an important man in the area and it was the particular wish of the whole of his wider family group that he should be buried in Bunyore. In any event, they now say it has been done and it would be unthinkable to remove his remains at this late stage.

If matters had stood there I confess I would have been extremely reluctant to order the removal of the body since I apprehend that it is the natural desire of most men that after death their bodies should be decently and reverently interred and should remain undisturbed.

But there is another aspect which, at the end of the day, has swayed me to the side of the plaintiff and her immediate family. It is this. When the husband was almost dying at the Victoria Hospital in Kisumu, the plaintiff says that he told her that it was his specific wish that he should be buried in Bungoma. The plaintiff's brother, Adamson Buliro, was there and he gave evidence to the same effect. I fully accept that this was the wish of Simon and I am not surprised that this was his wish. After all he had left his father's home at Ebosiroli in 1963 – 15 years ago – and had started establishing a permanent home in Bungoma ever since 1971. Even if he had not finally gone there in July 1978, as the wife claims, it is crystal clear that it was his intention that Bungoma should be his permanent and final home. I also feel that although the parties in this case are generally subject to African customary law and I am therefore enjoined by section 3(2) of the Judicature Act (cap 8) to be "guided" by that law, it would be relevant to consider what the English Law is on the subject and whether it is suitable for application in Kenya "subject to such qualifications as Kenya circumstances may render necessary" under section 3(1) of the Judicature Act.

The English law on the subject is succinctly summarized at page 57 of T. 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 and, when it is buried in ground which has been consecrated according to the rites of the Established Church, it remains under the protection of the ecclesiastical court of the diocese, and cannot be removed from the grave or vault or mausoleum in which it has been placed except under a faculty granted by the ecclesiastical court. If the removal is for reburial in consecrated ground the faculty may be unconditional. If to unconsecrated ground, the faculty was formerly refused because unconsecrated ground would not be under the protection of the court. Since the Burial Act 1857 a faculty may be granted in such cases subject to the obtaining of a license from the Home Secretary under that Act.

Except in cases where a body is removed from one consecrated place of burial to another by faculty as above mentioned, or, it would seem under a coroner's order, it is unlawful to remove any interred body without the licence of a Secretary of State, and the conditions contained in any licence which is obtained must be strictly observed.

#### 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 that is possible. If the deceased has left no testamentary or clear directions as to his body, it is entitled to Christian burial. The duty of disposing of the body falls primarily on the executor.”

A comparatively recent case where the above principles were applied is *Re Matheson* [1958] 1 All ER 202. In that case, Dr Matheson died in 1946 and his remains were interred in a consecrated Churchyard. The decision as to the place of interment was made by his widow. In 1956 the widow decided that her own remains after her death should be cremated, and she desired, if it were possible, to have Dr Matheson's remains disinterred and cremated, and that her own ashes after her death should be placed with those of her late husband. The widow died before she was able to present a petition for a faculty authorizing her to remove Dr Matheson's remains from the Churchyard for cremation, and a petition was presented by Dr Matheson's son with the object of carrying out his mother's wishes. The Liverpool Consistory Court (Mr Chancellor Steel) granted a faculty subject to condition that it should not be acted on until a licence from the Secretary of State had been obtained. In doing so, Mr Chancellor Steel said:

“Having reached the conclusion that there is no legal obstacle in the way of the faculty being granted, I now come to the difficult task of deciding whether, as a matter of discretion, it would be granted. As I have said, the primary function of the court is to keep faith with the dead. When a man nears his end and contemplates Christian burial, he may reasonably hope that his remains will be undisturbed, and the court should ensure that, if reasonably possible, this assumed wish will be respected. In all these cases the court must and will have regard to the supposed wishes of the deceased. I say supposed wishes because it can rarely, if ever, happen that the circumstances giving rise to the application can have been contemplated, still less discussed, in the lifetime of the deceased.”

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.

We have no Christian ecclesiastical courts in Kenya, and therefore no one to grant a “faculty” but there is no reason why the High Court of Kenya should not exercise general jurisdiction in a matter such as this and grant the order applied for whether or not we call it a “faculty”. I have stressed earlier that the parties in this case are practising Christians who married in Christian form. Furthermore, although no personal representative has been appointed yet, the plaintiff tells me that she has applied for letters of administration through a Kisumu Advocate and there is no reason to think that this will be refused.

I cannot, as did Chancellor Steel, make the “faculty” or “order” conditional upon consent being obtained

from a Secretary of State. But by analogy, it seems to me that the functions of a Secretary of State in England in regard to this matter are analogous to those of the Registrar General in Kenya under the Births and Deaths Registration Act (Cap 149). He and his registrars are responsible for the issue of burial permits and it is an offence to “bury, cremate or otherwise dispose of the body of any deceased person” without a permit (see sections 18 and 19). Mr Omondi, who appeared for the Registrar General as *amicus* in this case assures me that if I made the order sought for, there would be no difficulty from his Department in enforcing it.

Apart from these technical rules, which as I have stated, can be overcome by adapting them to Kenya conditions, it seems to me that the most important rule is to give effect, so far as possible, to the wishes of the deceased. In *Re Matheson*, Chancellor Steel, had to resort to the “supposed” wishes of the deceased. I do not have to do so in this case because I have held as a fact that it was the particular wish of Simon Buluku to be buried at Bungoma. In the result, I hold that whether one looks at the matter from a customary law point of view or the general law of Kenya, the wishes of the deceased, though not binding, must, so far as is possible, be given effect to. Where those wishes are not contrary to custom nor contrary to the general law or public policy or safety, as in this case, the High Court has a general discretion to order the removal of the remains from one place to another. I am persuaded that I should make such an order in this case and therefore order as prayed for in the plaint, that the plaintiff be allowed to remove the remains of her late husband, Simon Buluku, for burial at her home in Bungoma District.

It will be noted that in the course of his admirable and learned judgment, Cotran J commented that he could not make his order conditional upon consent being obtained from a Secretary of State, as is the case in England. On this appeal, the appellant brothers had the advantage of being represented by Mr Khaminwa. He drew the attention of this court to section 146 of the Public Health Act (Cap 242), which was not brought to the attention of the learned judge, although an advocate representing the Registrar General of Births and Deaths of the Republic appeared at the trial as *amicus curiae*. Section 146 aforesaid reads as follows:

“146 (1) Subject to the provisions of section 147 of this Act, it shall not be lawful to exhume any body or the remains of any body which may have been interred in any authorized cemetery, or in any other cemetery, burial ground or other place without a permit granted in manner hereinafter provided.

(2) Such permit shall be granted only to the legal personal representative or next of kin of the person buried, or to his or their duly authorized agent.

(3) Such permit may be granted by the Minister in respect of any body interred in any cemetery or burial ground or any other place.

(4) The permitting authority may prescribe such precautions as he may deem fit as the condition of the grant of such permit, and any person who exhumes any body or the remains of any body contrary to this Act, or who neglects to observe the precautions prescribed as the condition of the permit, shall be guilty of an offence and liable to a fine not exceeding one thousand five hundred shillings:

Provided that nothing herein contained shall be deemed to affect the right of a magistrate to order the exhumation of a body or the remains of a body for the purpose of holding an inquiry into the cause of death of any person.”

The only other powers to order the exhumation of a body which I can trace in the laws of Kenya are those contained in section 388(3) of the Criminal Procedure Code, which empowers the Attorney-General to direct that a body be disinterred for the purposes of an inquiry into the cause of a particular death, and in section 387(2) of that Code, which empowers a magistrate holding an inquest to cause a body to be disinterred. We are not concerned in this appeal with the cases in which the Attorney-General or a magistrate can order that a dead body be disinterred, but it is clear beyond peradventure that, apart from those cases, no dead body wherever interred in Kenya can be exhumed without a permit granted by the

Minister for the time being responsible for matter relating to health. Mr Khaminwa submitted that in these circumstances the learned judge's order, the subject of this appeal, was made without jurisdiction and must be set aside. With respect, I would not go so far. In my view, the learned judge had jurisdiction, but his order should have been made conditional upon the grant of the essential permit. I have no doubt, from the tenor of his judgment, that he would have made an order in those terms, had his attention been drawn to section 146 of the Public Health Act. That is a matter which can be corrected in the order made in this appeal.

Mr Khaminwa also attacked the learned judge's decision as being contrary to customary law and to public policy. As will be seen from his judgment, the learned judge heard evidence as to the relevant customary law from both sides. He appreciated that he had to be "guided" by that law, in accordance with section 3(2) of Judicature Act (Cap 8), and I have no reason to think that he in any way misapprehended or misapplied the customary law expounded to him. He also adverted to considerations of public policy. It is only when he says that:

"the High Court has a general discretion to order the removal of the remains from one place to another"

that I venture to disagree with him. That discretion, in my view, is not general or absolute; it must always be subject to the Minister granting a permit. To give effect to this, I would order that paragraph (1) of the decree be amended by adding at the end thereof, after the words "Bungoma District", the words

"conditionally upon a permit to this effect being granted by the Minister under section 146 of the Public Health Act,"

and I would add the same words at the end of his judgment as reproduced in this judgment. In all other respects I would dismiss this appeal, and I would order the appellants to pay to the respondent one-half of her costs of this appeal.

**Miller JA.** I have had the benefit of reading the draft judgment of Sir Eric Law in this appeal. I agree with it and have nothing useful to add.

**Potter JA.** I have had the benefit of reading the draft judgment of Sir Eric Law in this appeal. I agree with it and have nothing useful to add.

**Dated and delivered at Kisumu this 14th day of January , 1980.**

**E.J.E LAW**

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**JUDGE OF APPEAL**

**H.E MILLER**

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**JUDGE OF APPEAL**

**K.D POTTER**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**