



**Otipa & 3 others v Otipa & 2 others (Civil Appeal E003 of 2025)
[2025] KEHC 13662 (KLR) (1 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 13662 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E003 OF 2025**

AC BETT, J

OCTOBER 1, 2025

BETWEEN

**AUGUSTINE OSUNDWA OTIPA 1ST APPLICANT
STEPHEN BARASA OTIPA 2ND APPLICANT
MARGARET AUMA OTIPA 3RD APPLICANT
JUSTINE OTIPA OFISI 4TH APPLICANT**

AND

**SELPHA MAYENDE OTIPA 1ST RESPONDENT
FLORENCE MAKOKHA OUMA 2ND RESPONDENT
PATRICK WASWA OTIPA 3RD RESPONDENT**

*(Being an appeal from the ruling of Honorable J. Atanga Thomas Obutu,
Senior Principal Magistrate at the Senior Principal Magistrates' Court at
Mumias in Civil Case No. E042 of 2024 delivered on 18th December 2024)*

JUDGMENT

Background

1. The present appeal arises from a long-running dispute concerning the burial of the remains of the deceased Joseph Osundwa Otipa. Following his demise, a disagreement arose among the family members regarding the rightful burial site.
2. The 2nd and 3rd Respondents, who are the widow and daughter of the deceased, moved the court in Civil Case No. E042 of 2024 seeking orders to have the deceased interred on L.R. No. E/Wanga/Eluche/2286 being his ancestral home.



3. On the other hand, the Appellants in this matter, also family members of the deceased, wished for the burial to take place on L.R. No. E/Wanga/Eluche/808.
4. The said L.R. No. E/Wanga/Eluche/808 which was originally registered in favor of a third party had been subdivided into four parcels, namely L.R. No. E/Wanga/Eluche/2296, 2297, 2298, and 2299. These newly created parcels were thereafter transferred to third parties, among them the 3rd Respondent, who is a son to the deceased.
5. Before his death, the deceased had instituted a suit at the Environment and Land Court claiming ownership of L.R. No. E/Wanga/Eluche/2297 excised from L.R. No. E/Wanga/Eluche/808, but lost. He had appealed to the Court of Appeal in Kisumu, where the matter remained pending at the time of his death.
6. The burial dispute culminated in two separate suits filed in the subordinate court, which were later consolidated. On 5th September 2024, Hon. Marcella Onyango ordered that the deceased be buried in accordance with customary practices, specifically at the home of the 1st wife, provided the burial was not conducted on the disputed land.
7. However, subsequent attempts by the Appellants to inter the deceased on L.R. No. E/Wanga/Eluche/2298 and 2299 led to further conflict. The 3rd Respondent, being the registered proprietor of those parcels, was not a party to the earlier suits and sought protection of his property rights.
8. He filed an application dated 9th December 2024 seeking orders of injunction barring any interference with his two parcels of land namely L.R. No. E/Wanga/Eluche/2298 and 2299 and for the burial to take place on L.R. No. E/Wanga/Eluche/2286.
9. Upon hearing the application, the trial court found merit in the application and granted the orders as prayed. Consequently, the deceased was buried on L.R. No. E/Wanga/Eluche/2286 as directed by the trial court.
10. Being aggrieved by the decision of the learned Magistrate, the Appellants lodged a Memorandum of Appeal in which they set down the grounds of appeal as follows: -
 - “ 1. That the learned magistrate erred in law and in fact by failing to consider that the suit before him was determined by the court of higher jurisdiction and failed to respect its jurisdiction and the jurisdiction of the superior courts before dealing with the case.
 2. That the learned magistrate erred in law and in fact by failing to allow the appellants with the rights of appeal.
 3. That the learned magistrate erred in law and in facts by failing to consider that the high court had issued judgment dated 6th December 2024 directing that the deceased to be disposed in the premise East/Wanga/Eluche/2298 and 2299 sub-division from premise East/Wanga/Eluche/808 where the traditions customs of the deceased was laid by himself.
 4. That the learned magistrate erred in law and in facts by failing to consider that issuing the order directing disposal the deceased to the premise East/Wanga/Eluche/2286 was defiling the judgment issued by the court of higher jurisdiction and its direction.



5. That the learned magistrate erred in law and in facts by failing to consider that despite of the 1st objector being the son to the 2nd objector and the suit No. E42 of 2024 was filed by the 2nd objector who was her mother, was supposed to enjoined the suit either in application of review of the judgment or enjoined in appeal No. E 153 of 2024 if he had wished to be heard in this suit.
6. That the learned magistrate erred in law and in facts by failing to consider that the jurisdictions of the lower court cannot overturn the issue that has been determined by the high court.
7. That the learned magistrate erred in law and in facts by failing to consider that the dispute before him was basically the burial and some issues concerning the traditions customs of the deceased was supposed to be considered before issuing judgment.
8. That the learned magistrate erred in law and in facts by failing to consider that the 2nd objector being the 1st wife of the deceased and he pleaded to be handed the body of the deceased for burial in her home, the body was supposed to be buried in her home as she had claimed.”

11. The court issued directions that the appeal be canvassed by written submissions.

Appellant’s Submissions

12. The Appellants submitted that the trial magistrate erred in law and fact by issuing orders on 18th December 2024, contrary to the judgment of the High Court dated 6th December 2024 in Appeal No. E153 of 2024, which had directed that the deceased, Joseph Osundwa Otipa, be buried on parcels No. L.R. No. E/Wanga/Eluche/2298 or 2299 in accordance with Luhya customs. They argued that the subordinate court was functus officio and lacked jurisdiction to entertain a fresh application on a matter already determined by a superior court.

Respondent’s Submissions

13. The Respondents submitted that as the first appellate court, this Honourable Court is mandated to re-evaluate the evidence and make an independent finding, citing *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA 123 and *Kurian Chacko v Varkey Ouseph* AIR 1969 Kerala 316. They argued that the appeal lacks merit since the orders appealed from were lawful injunctions issued to protect the 3rd Respondent’s peaceful possession of land parcels L.R. No. E/Wanga/Eluche/2298 and 2299. It was their position that the 3rd Respondent holds an absolute and indefeasible title under Sections 24 and 26 of the *Land Registration Act*, and thus had the legal right to seek court protection. Reliance was placed on *Dr. Joseph N.K. Ng’ok v Justice Mojjo Ole Keiwua & 2 Others* C.A. No. 60/1997, where the Court of Appeal emphasized the sanctity of title under Section 23 of the now-repealed Registered *Land Act*.

14. The Respondents further submitted that the 3rd Respondent was not a party to the proceedings leading to the High Court judgment the Appellants rely on, and therefore could not be bound by it. They relied on *Stella Nasimiyu Wangila & another v Raphael Oduor Wanyama* (2016) eKLR and *Jemimah Wambui Njoroge v Philip Mwangi* (2001) eKLR; and contended that courts cannot issue orders against persons not joined to the proceedings. They argued that the application before the lower court was not res judicata as it raised fresh issues concerning the 3rd Respondent’s right to property, which had not been previously adjudicated.



15. On the prayer for exhumation, the Respondents submitted that it was legally and factually unjustified. They relied on *Republic v Minister for Justice & Others ex parte Kebo & Another* (2004) 1 KLR 431, where Ojwang J. emphasized that courts should not issue orders in vain. They argued that the Appellants had not indicated where the body would be reburied, and that all the parcels they claimed were under dispute.
16. They further submitted that the deceased was already buried on parcel L.R. No. E/Wanga/Eluche/2286, which is undisputed, ancestral, and registered in his name, and that exhuming him to a disputed area was both illogical and contrary to public interest.
17. They also relied on *Wangari Mwai v Kenya Medical Training College* [2021] eKLR to argue that exhumation is only permitted in exceptional circumstances, which had not been demonstrated. Section 137 of the Penal Code was cited to emphasize that the unlawful disturbance of a body is a criminal offence.
18. They concluded by citing *Re Matheson (deceased)* [1958] All ER 202, submitting that courts must act to preserve the dignity and assumed wishes of the deceased. They prayed that the appeal be dismissed with costs.
19. The other parties did not put in their submissions.

Analysis and Determination

20. This being a first appeal, the court should with judicious alertness re-evaluate the evidence, consider arguments by parties, apply the law thereto, and make its independent determination of the issues in controversy. See *Selle & another v. Associated Motor Boat Co. Ltd & others* [1968] EA 123.
21. The Memorandum of Appeal was drawn by a layman. The citation is not clear and the grounds of appeal longwinded albeit comprehensible. I have therefore taken the liberty to re-arrange the citation for ease of reference. Base on the Memorandum of Appeal and the parties' written submissions, the issues raised are as follows:-
 - (a) Whether the trial court was functus officio and lacked jurisdiction to hear and determine the 3rd Respondent's application dated 9th December 2024.
 - (b) Whether the trial court erred in allowing the 3rd Respondent's application.
 - (c) Whether the appeal has merit.
22. The Appellants herein urge the court to set aside the ruling of the lower court made on 18th December 2024 by Hon. T.A. Obutu, which issued a permanent injunction barring the Appellants from interfering with the land parcel L.R. No. E/Wanga/Eluche/2298 and L.R. No. E/Wanga/Eluche/2299 by interring the remains of the deceased thereon.
23. The trial Magistrate had further directed that the deceased Joseph Otipa Osundwa's remains be buried in his ancestral land L.R. No. E/Wanga/Eluche/2286.
24. I do note that the ruling by the Hon. T.A. Obutu was made after this Honourable court had already dismissed an appeal against a decision disallowing an application for review of its judgement.



25. In her judgement, the Hon. Onyango had stated as follows:-
- a) That the body of the deceased Joseph Otipa Osundwa be released to his wives, Selpha Mayenda Otipa and Margaret Auma Otipa, who should jointly with their children of the deceased organize for his burial.
 - b) That the wives of the deceased to proceed to bury the deceased at the home of the 1st wife as per customs.
 - c) That in the event they decide to have the deceased buried on the land parcel E/Wanga/Eluche/808, then they should ensure that he is not interred on the portion that has a dispute, being E/Wanga/Eluche/2297.
 - d) That on the issue of the funeral expenses, the same will be catered for by the two houses in conjunction with the children of the deceased and relatives.
 - e) That the mortuary expenses are to be shared equally by the widows of the deceased.
 - f) That this being a family dispute, I will proceed to direct that each party bears their costs.”
26. The then Appellants, being dissatisfied with the ruling of the Hon. M.A. Onyango, appealed against the orders declining review of her judgement.
27. They urged the court to set aside the orders contending that they were blurred as they did not indicate the exact location where the deceased’s remains ought to be interred, given the fact that the deceased, Joseph Otipa Osundwa, had already sold the parcel comprised in L.R. No. E/Wanga/Eluche/808, which was currently non-existent at the time of his demise.
28. They urged that the court in its judgment had excluded L.R. No. E/Wanga/Eluche/2297, as it was the portion that was the subject of proceedings before the Court of Appeal.
29. That left the two parcels L.R. No. E/Wanga/Eluche/2298 and 2299, which they maintained, belonged to the deceased’s son, Patrick Waswa Otipa the 3rd Respondent in this appeal who was not a party to the original suit.
30. This court in its judgment dated 6th December 2024, upon analysing the parties’ evidence and the impugned judgement by Hon. Marcella Onyango dated 24th June 2024 found that the Appellants had not presented enough evidence to justify review of the judgement of the court and dismissed the appeal.
31. This court stated that the Appellants had an option of appealing the decision, but having opted for review and failed to satisfy the conditions for review as envisaged by Order 45 Rule 1 of the Civil Procedure Rules, dismissed the entire appeal.
32. On 9th December 2024, which was three days after the dismissal of appeal, the 3rd Respondent filed a Notice of Motion application in the trial court file seeking an injunction to restrain anyone from interfering in any way with L.R. No. E/Wanga/Eluche/2298 and L.R. No. E/Wanga/Eluche/2299.
33. In addition, he prayed that his deceased father remains, be interred in his ancestral land, being land parcel L.R. No. E/Wanga/Eluche/2286.
34. He averred that he was the absolute registered owner of the land parcels L.R. No. E/Wanga/Eluche/2298 and L.R. No. E/Wanga/Eluche/2299. The 1st and 2nd Respondent did not oppose the



application. It is evident that the 1st and 2nd Respondent did not want the deceased to be buried on the land formerly known as L.R. No. E/Wanga/Eluche/808.

35. In a ruling delivered on 18th December 2024, the trial court asserted that it was not functus officio stating that it was not rewriting a judgment but dealing with an application and further that the matter was not Res judicata as it had not yet been canvassed by the court.

36. The trial court in its ruling dated 18th December 2024 gave the following orders:-

- a) That a permanent injunction restraining the respondents, their agents, servants, or assignees from interfering in any way whatsoever with the applicant's land parcel No. East Wanga/Eluche/2298 and East/Eluche/2299 are issued.
- b) That the respondents under the judgment of the court and directed by the order of this court to bury the remains of the late Joseph Otipa Osundwa on his ancestral land No. East/Wanga/Eluche/2286.
- c) That the OCS Shianda police station provides security and ensures compliance with the court order.
- d) Each party to bear their costs in this matter, being a family dispute.

The Respondents then moved promptly and executed the order of the court giving rise to the present appeal.

36. I have carefully reviewed and considered the trial court's record, the parties' submissions, and the evidence before the trial court.

37. Before I deal with the issues placed before me, I reiterate that the application dated 9th December 2024 was instituted by the 3rd Respondent, who, despite being a son of the deceased, was not a primary party to the initial suit. His name only came up in connection with the ownership of the land.

38. The Appellants contended that since the 3rd Respondent was not a primary party to the suit herein, his role in these proceedings is limited, considering he never applied to be enjoined as an interested party.

39. An interested party is defined in the Mutunga Rules as hereunder:-

“A person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation”. (emphasis added).

40. Further, in *Judicial Service Commission v Speaker of the National Assembly and Attorney General* [2013] eKLR, Odunga J. (as he then was) held as follows:-

“*The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2012, defines an interested party as ‘a person or entity that has an identifiable stake or legal interest in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation’.

From the foregoing, it is clear that an interested party, as opposed to an amicus curiae or a friend of the court, may not be wholly indifferent to the outcome of the proceedings in question. He is a person with an identifiable stake or legal interest in the proceedings, hence may not be said to be wholly non-partisan as he is likely to urge the court to decide favourable of his stake in the proceedings.”



41. Given the foregoing, it is evident that an interested party is not a primary party to a suit in the strict sense of the word. Still, it is a person with an identifiable stake or legal interest in the proceedings before the Court, although he may not be directly involved in the proceedings.
42. In this case, it was common ground that the land where the Appellants seek the deceased to be interred is registered in the name of Patrick Waswa. He therefore has an identifiable stake in the case as he has a legal interest to protect.
43. That being said, Article 159 (2)(d) of *the Constitution* provides that justice be administered without undue regard to procedural technicalities. The trial court therefore did not err in its decision to allow the 3rd Respondent to be allowed as a party to the suit at the point it did. The Appellants had not enjoined the 3rd Respondent despite the fact that he was a necessary party.
44. The 3rd Respondent averred that contrary to the court order by Hon. Marcella Onyango on 24th June 2024, he never consented for their deceased father's remains to be interred in his land being L.R. No. E/Wanga/Eluche/2298 and 2299.
45. He maintained that he was the absolute owner of the land and had not approved for the Appellant to bury his father on his land.
46. Upon perusal of the trial court evidence dated 27th May 2024, I established that the deceased daughter, Florence Makokha Ouma, testified that her step mother who was the deceased's 3rd wife, had been buried on L.R. No. E/Wanga/Eluche/2286 which belonged to the deceased and that it was his wishes to be buried in the same parcel of land.
47. It is evident from the court's record that L.R. No. E/Wanga/Eluche/2298 and 2299 belonged to the 3rd Respondent, Patrick Waswa Otipa.
48. Under the *Land Registration Act*, a registered proprietor has the right to hold land as the absolute and indefeasible owner subject only to certain overriding interests like public rights of way or easement, or a customary trust under Section 28 (b) of the Act. The Appellants did not allege nor prove the existence of a customary trust in respect to L.R. No. E/Wanga/Eluche/2298 and 2299. It is also not clear how Patrick Waswa Otipa came to be registered as the owner of the said land. What is clear from the certified true copy of the register is that the deceased, Joseph Osundwa Otipa, has never, at any one time been the registered owner of all that parcel of land originally comprised in L.R. No. E/Wanga/Eluche/808 either before or after the title was closed on subdivision and parcels L.R. No. E/Wanga/Eluche/2298 and 2299 transferred to the Respondent. However, according to the 1st Appellant, the deceased bought the land and had lived in it for forty eight (48) years.
49. From the witness evidence, the deceased owns the parcel of land comprised in L.R. No. E/Wanga/Eluche/2286 where his 3rd wife and his parents had been buried.
50. Other than the claim by the Appellants that they lived with the deceased in L.R. No. E/Wanga/Eluche/2296, 2297, 2298 and 2299, there was no evidence that the deceased owned the parcels of land. What is clear is that the deceased owned L.R. No. E/Wanga/Eluche/2286, where he was buried after the impugned order from the trial court.
51. The general principles that govern burial disputes are well settled. Whereas it is expected that a deceased persons kith and kin can agree on the place and mode of interment. Where they fail, then the court has jurisdiction to determine the dispute and in doing so, the court shall apply the parties' customary law, common law and/or the will of the deceased. In the case of Samuel Mungai Mucheru & 3 others v.



Ann Nyathira [2014] eKLR, it was held that “courts should give priority to the wishes of the deceased as far as is practical”. (Emphasis ours)

52. Amidst a dispute as to who should bury the deceased or the site of interment, it was held by Cherere J in the case of Dinah Odhiambo Oyier v. Hellen Achieng & 3 others [2017] eKLR that where parties:-

“... have shown that they cannot now agree on that issue, it is desirable and, indeed imperative, in the circumstances of this case, for this court to intervene and direct as to the deceased’s place of burial.”

53. Section 3 (2) of the *Judicature Act* provides as follows:-

“The Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labour Relations Court 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.”

54. It is however imperative to note that Section 3(1) of the *Judicature Act* stipulates that the jurisdiction of the 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 the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date:

Provided that the said 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.”

55. When interpreted collectively, where a custom is found to be repugnant to law or morality or inconsistent with any written law or contrary to *the Constitution*, then the law shall supersede the customary law.

56. The evidence before the lower court was clear that the deceased who was a polygamous man had buried his parents and second wife on L.R. No. E/Wanga/Eluche/2286. Despite the trial court directing that the remains of the deceased be buried in the house of the 1st wife as per Luyhia customs, the parties did not agree as the 3rd Respondent is adamant that he does not want the remains of his father interred in the two parcels of land registered in his name. This court is not seized with the jurisdiction to interrogate how the 3rd Respondent came to be registered as proprietor of the parcels of land on which the Appellants claim their homes are erected or to direct that the remains of the deceased be exhumed and interred on his land.



57. After carefully considering the appeal, I find that the burial dispute metamorphosed into a land dispute that seeks to draw the court into issues beyond its jurisdiction, notably, the Appellant's claim that the deceased ought to be buried on the land that was previously registered as L.R. No. E/Wanga/Eluche/808 which is disputed by the 3rd Respondent. There is no doubt in my mind that what the parties are embroiled in is a land dispute clothed as a burial dispute.
58. Land disputes are the preserve of the Environment and Land Court under Article 162 (2) of *the Constitution* which states:-
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
- (a) ...;
- and
- (b) the environment and the use and occupation of, and title to, land.”
59. To give effect to Article 162 (2), the Environment and Land Court was established. The Appellants should have filed a suit for declaration of trust in the Environment and Land Court to determine their rights over the disputed parcels of land. In the case of *In re William Oyola Ligoo alias William Oyola Ligoo (Deceased) (Miscellaneous Succession Application 2 of 2022) [2022] KEHC 479 (KLR)*, Aburili J. considered a matter whose core issue was land and had this to say:-
- “The applicant was also said to be having his rightful share in parcel No. 3146 & 3143. The applicant raised so many other issues of trust over the disputed parcel No. 3187, which issues the succession court has no jurisdiction to determine and the trial court correctly so pointed out. That being the case, and as there is an ELC case pending before court, the applicant is better placed to raise those issues in that court or file a substantive suit before the Environment and Land Court as this court cannot determine those issues for want of jurisdiction.”
60. In many cultures, and more so in the African culture, the concept of ensuring the dead rest in peace is deeply rooted and exhumation is seen as disturbing their peace. It is essential to balance the need for exhumation with the respect for the dead. In *HCK v. EJK [2008] KEHC 3895 (KLR)*, Onyancha J. had this to say:-
- “From time immemorial it has been the natural desire of most men that after their death, their bodies should not only be decently and reverently interred, but should also remain in the grave undisturbed. This view should and is indeed respected by societal institutions including the courts of law. Occasions, however arise when unforeseeable circumstances make it desirable or imperative that a body should be disinterred for good reasons. While the court would usually be slow to make orders for disinterment, it nevertheless will not hesitate to do so in suitable cases. The court will, on the other hand, avoid placing any fetters on its discretionary power to do so. That is to say, the court will without fear make orders for disinterment whenever the circumstances of the case make it desirable or imperative to do so. This, in my view, is the tenor of the case of *Re Matheson (deceased) [1958] 1 All ER, 202.*”
61. Alas, Joseph Osundwa Otipa has not been able to rest in peace due to protracted litigation among his family members and although the Appellants maintain that their custom dictates that he be buried



where he had established his home, the 3rd Respondent, who holds title to the said land has adamantly refused. In the face of his refusal, this court has no jurisdiction to compel him.

62. Guided by the above, there is no need for the court to interfere with the ruling dated 18th December 2024 by the trial court directing that the deceased's remains be interred on L.R. No. E/Wanga/Eluche/2286.
63. However, there is an issue I wish to point out. The Appellants raised an issue of jurisdiction; they opine that the trial court in its judgment dated 18th December 2024 failed to respect the decision of the superior court directing the deceased's remains to be interred in the premises L.R. No. E/Wanga/Eluche/2298 and 2299.
64. In this court's judgement dated 6th December 2024, the court addressed itself only on the issue that was germane before it being an appeal against the orders of Hon. Marcella Onyango in which she declined to review and set aside her judgment which directed how the deceased would be buried, who should meet the funeral expenses, and by whom he should be buried but did not make an express order as to where he should be buried save to issue a caveat that it should not be on the portion under dispute L.R. No. E/Wanga/Eluche/2297.
65. That being said, I find no need for the deceased remains to be disturbed, and the deceased should be left to rest in peace.
66. In the upshot, I do dismiss this appeal, save that I order that each party bears their costs of this appeal as this is a family matter.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 1ST DAY OF OCTOBER 2025.

A. C. BETT

JUDGE

In the presence of:

Justine Otipa Ofisi (4th Appellant)

Margaret Auma Otipa (3rd Appellant)

Nechesa Maina for Respondents

Court Assistant: Polycap

