



**Muchiti & 2 others v Lihondo & another (Civil Appeal E137 of 2024)
[2025] KEHC 15215 (KLR) (22 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15215 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E137 OF 2024
S MBUNGI, J
OCTOBER 22, 2025**

BETWEEN

**TEBULA MUCHITI & OTHERS 1ST APPELLANT
EDWARD LIHONDO 2ND APPELLANT
SUSAN KHAKO 3RD APPELLANT**

AND

**ROSE KHAVAYI LIHONDO 1ST RESPONDENT
BENSON SHIKURI 2ND RESPONDENT**

(Being an appeal from the judgment of Hon. J.R. Ndururi delivered on 1st August 2024 at Kakamega in the Chief Magistrate Court, Succession number E120 of 2024)

JUDGMENT

INtroduction

1. The plaintiff, who is the respondent herein, had filed a claim at the lower court seeking orders that they be allowed to receive the remains of the deceased (Richard Lihombo Muraje) and a permanent injunction to restrain the Defendants from laying any claim to the remains of the deceased.
2. The plaintiff was the deceased's first wife, while the 2nd plaintiff, Benson Shikuri, was the deceased's youngest son. The 1st defendant was the second wife. The 1st plaintiff avers that she was married to the deceased in 1971, while the 1st defendant was married in 1987. They both lived in separate homesteads, and the deceased died on 3rd July 2024 at the Moi teaching and Referral home in Eldoret, and the defendants are the 2nd wife. He two sons wanted to bury the deceased in their home at Soysambu, which she claimed was contrary to their customs. The sons contented that they lived with the deceased



- for the last 20 years until his demise, and that he had left a will where he had expressed his wishes as to where his remains were to be interred, which was at his home in Soysambu and not Muleche.
3. The trial court upon analysis the parties case and their submissions stated that although the deceased lived in Soysambu he had buried his two sons at Muleche which was his ancestral land and most of his family lived in that land and despite his wishes to be interred at Soysambu, the court considered the Luhya customs and the constitutional application on family unit and held that the deceased be interred in the 1st wife's homestead in Muleche where both the deceased wives were to be involved in the burial preparation
 4. The appellant respondent herein, being dissatisfied with the judgment of the learned magistrate Hon. J.R. Ndururi (SPM) IN the KAKMEGA Chief Magistrate court civil suit no E120 of 2024, appealed against the whole of the judgment based on the following grounds;
 - a. That the learned magistrate erred in law and fact in failing to consider the deceased's wishes as pertained to his burial, as stated by the defendant's witnesses and the will.
 - b. That the learned Magistrate erred in law and in fact in failing to consider the deceased's wishes, superseded the Isukha customary law, which gives the 1st wife or his family the right to bury her deceased husband.
 - c. The learned magistrate erred in law and fact in directing that the deceased's body be released to the plaintiff for burial at his ancestral home in Virehembe sub-location.
 - d. That the learned magistrate erred in law and fact in failing to record, consider and evaluate evidence by defendants and their witnesses, failed to consider issues for determination and submissions. The trial court determined the matter based on its own assumptions, expectations and imagination. The trial court misconceived the law and applied the wrong principles.
 - e. The learned magistrate erred in law and in fact in failing to consider all relevant issues in totality in arriving at the finding on the relationship between the parties and the deceased.
 - f. That the learned trial magistrate made a finding against the weight of evidence.
 5. They pray that the appeal be allowed and the judgment of the trial magistrate delivered on 1st August 2024 be set aside and or quashed, and the same be substituted with an order allowing the Appellants to bury the remains of the deceased.
 6. The appeal was canvassed by way of a written submission. At the time of writing the judgment, only the appellant had filed their submission.

Appellant's Submissions.

7. The appellants, in their submissions dated 27th January 2025, raised two issues for determination. The first issue is whether the court ought to respect the deceased's wishes as pertained to his burial site. They quoted Article 44 (1) of *akn ke act 2010 constitution the constitution* on the right to participate in their cultural life of their choices and in respecting the wishes of the deceased expressed during his lifetime.
8. They relied on the case of Johnstone Kassim Mumbo & 2 others vs. Mwinzi Muumbo & another and Jacinta Nduku Masai vs. Leonida Mueni Mutua & 4 others (2018) eKLR.
9. They contended that the deceased had separated with the 1st wife for the last 17 years and they never reconciled.



10. They further stated that the deceased on 21st May, 2019 drew a will expressing where he wished to be buried.
11. On whether the deceased's wishes superseded the Isukha customary law, they quoted case of Johnstone Kassim Mumbo & 2 others vs. Mwinzi Muumbo & another, stating that custom is not mandatory where the wishes of the deceased are clear and further stated that the 1st respondent had admitted to have been issued with a letter dated 17th March 2017 by the Assistant chief at Virehembe sub-location in stopping the wedding between the deceased and the appellant and later the priest wrote another letter dated 27th March 2017 which showed that the 1st respondent had separated from the deceased 16 years ago and never reconciled .
12. The appellants avers that they took care of the deceased for the last 20 years and catered for his medical expenses until his demise, and cited the case of Samuel Omino Wambui vs. COO & another, Kisumu Civil App. No. 13 of 2011 where the court emphasized the need to assess the conduct of the person wishing to bury a deceased towards the deceased before his demise .

Brief of the evidence.

13. PW1 was Benson Shikuri, who was the deceased and the 1st plaintiff's son. He testified that the 1st defendant was his stepmother, while the 2nd and 3rd defendant were his step-siblings born out of wedlock, as his father, the deceased and the 1st defendant had no biological children. He adopted his statement dated 10th July 2024 and aver that his mother, the 1st plaintiff, and his father got married in 1971 while the 2nd defendant married under the customary law I 1987. He testified that according to the Isukha traditions, the deceased was to be buried by the eldest wife.
14. During cross-examination, he claimed that his father paid the dowry for his mother and that he relocated to Soysambu and stayed with the second family, and would come to their homestead once in a while, and that after his demise, the 2nd family denied them access to the body and demanded to bury him.
15. PW2 was the deceased's 1st wife and stated that the 2nd defendant was her co-wife. She relied on her statement dated 11th July 2024 and prays for access to bury her husband.
16. During cross-examination, she stated that the deceased was born in Virhembe and later relocated to stay with the 2nd defendant, although she was against the marriage. She claimed that the deceased used to visit her home when there was a funeral, and that it had been almost 20 years since he had relocated, and she never went to the 2nd wife's home at Soysambu.
17. PW3 was a neighbor and clansman, Peter Lihamba Oleyo, testified that the 1st plaintiff was the deceased 1st wife, while the 1st defendant was the 2nd wife. He adopted his recorded statement. He testified that he is a Luhya man from the Isukha tribe, and according to the customs, he is to be buried by the eldest wife.
18. During cross-examination, he avers that he knew the deceased, who was also a Maragoli and ought to be buried in accordance with the Maragoli culture. He testified that the land in Isukha belonged to the deceased and, as such, ought to be returned to be buried in Isukha.
19. DW1 testified that the deceased was her husband, while the 1st plaintiff was his first wife. She admitted that she had initially lived with the deceased in Virhumbe and that she still has a house there, although she has removed to Soysambu, where she stays with her son and daughter, and admitted to attending burials. In re-examination, she confirmed that the 1st plaintiff tried to stop their wedding after they parted 17 years ago and that the deceased had made a will before he died.



20. DW2 was Wilson Katabachi, who adopted his witness statement dated 23 7 2024. During cross-examination, he confirmed that the deceased was his friend, a neighbor and acknowledged that the deceased left a will and claimed that he and the deceased's brother Joseph were present at the drafting of the will and that it was stamped by the chief on 22 5 2019. On re-examination, he stated that the deceased asked him to read the will before giving it to the deceased.
21. DW 3 was Wycliffe Simiyu Masinde. He testified that he was a retired chief and adopted the recorded statement dated 24th July 2024, stating that he was familiar with the will and that he stamped and signed it. During cross-examination, he denied being given any money to stamp the document, nor that he stamped it after the deceased's demise or forged the document.
22. The defence closed its case, and the trial court, after analysing the case, allowed the claim by the 1st plaintiff that allowed her to inter the remains of the deceased in his ancestral home that he had shared with the 1st plaintiff, the 1st wife in Muleche, hence the appeal by the respondents.

Analysis and determination

23. This being a first appeal, the duty of this court is well settled. In the case of Abok James Odera T A A. J. Odera & Associates –Vs- John Patrick Machira T A Machira & Co. Advocates (2013) eKLR, the court of appeal held about the duty of the first appellate court that: -

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”
24. From the grounds of appeal, evidence, and submissions on record, the following issues arise for determination:
 - a) Whether the trial court erred in failing to consider the deceased's wishes as expressed in his alleged will and by witnesses.
 - b) Whether the deceased's wishes, if established, supersede Isukha customary law regarding burial.
 - c) Whether the trial court properly evaluated the evidence and applied the correct legal principles.
 - d) Whether the trial court's decision to order burial at Muleche was against the weight of evidence
25. In this case, the learned trial magistrate found that although the deceased made his wishes to be buried at Soysambu area where he resided with the 2nd wife, he held that the isukha customary law superseded the deceased wishes and gave a judgment that he be buried at Muleche where his first wife resided with the rest of his family and that the appellant were at liberty to visit the homestead
26. The Appellants contended that the trial court ignored the deceased's express wishes to be buried at Soysambu, as evidenced by his will dated 21st May 2019 and corroborated by DW2 and DW3. The Respondents, on the other hand, disputed the will's claim by alleging that it was customary practice that a deceased should be buried at the first wife's homestead and even called an expert witness to support their claim.
27. The evidence of DW1 1st Appellant established that the deceased had lived with her at Soysambu for 20 years, having separated from the 1st Respondent 17 years prior. DW2 and DW3 confirmed the existence of a will, stamped and signed by a retired chief, expressing the deceased's wish to be buried at Soysambu.



The trial court, however, gave little weight to the will, focusing instead on Isukha's customary law and the deceased's connection to Muleche, where he had buried two sons.

28. In the case of Ruth Wanjiru Njoroge –Vs- Jemimah Njeri Njoroge & Another [2004] eKLR, Ojwang J (as he then was) held thus:

“In the Social Context prevailing in this country, the person who is first in line of duty in relation to the burial of any deceased person is the one who is closest to the deceased in legal terms. Generally, the marital union will be found to be the focus of the closest chain of relationships touching on the deceased. And therefore, it is only natural that the one who can prove this fundamental proximity in law to the deceased has the colour of right of burial, ahead of any other claimant.”
29. What is unrebutted is that the deceased, until his demise, lived with the 1st appellant for a period of 20 years in Soysambu together with her two children. It was also evident that he had separated from his 1st wife 17 years ago, and they never reconciled, showing that in terms of proximity, the appellants were the closest to the deceased in this case.
30. The appellants, Dw2 and Dw3 confirmed that the deceased executed a written will on 21st May 2019, witnessed and stamped by the area chief, wherein he expressly directed that his body be buried at his home in Soysambu. This evidence was uncontroverted.
31. On whether this court should consider the wishes of the deceased as per his written will or the customary law, the guiding principle is that a deceased person's wishes though not binding in law, should be given due consideration so far as they are not contrary to custom, public policy, or law.
32. In *Johnstone Kassim Mumbo & 2 Others v Mwinzi Muumbo & Another* [2019] eKLR, the Court held that: “The right to choose one's place of burial is an extension of human dignity and autonomy; the courts should, where possible, give effect to the expressed wishes of the deceased unless there exist compelling reasons not to.”
33. Under Article 44(1) of *akn ke act 2010 constitution the Constitution*, every person has the right to participate in the cultural life of their choice. This provision also encompasses the right to depart from custom where one so chooses, reflecting the autonomy and dignity protected under Article 28 of *akn ke act 2010 constitution the Constitution*.
34. Therefore, where a deceased person has clearly expressed his wishes regarding his burial, those wishes must ordinarily prevail unless they conflict with public policy or the rights of others, which was not demonstrated in this case.
35. In *Jacinta Nduku Masai v. Leonida Mueni Mutua & 4 Others* [2018] eKLR; The court prioritized the deceased's written wishes over customary law, provided the evidence was credible and undisputed.
36. The second issue for determination by this court is whether the deceased's wishes superseded Isukha's customary law. The trial court relied heavily on Isukha customary law, as testified by PW3, which mandates that a deceased man be buried by his first wife on ancestral land. The court noted that the deceased had buried two sons at Muleche, reinforcing its significance as his ancestral home. However, the Appellants argue that customary law is not absolute where the deceased's wishes are clear, citing *Johnstone Kassim Mumbo & 2 Others v. Mwinzi Muumbo & Another* [2018] eKLR
37. In *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & Another* [1987] eKLR, the Court of Appeal recognised that while customary law governs burial disputes, it may be displaced by clear and proven conduct of the deceased contrary to that custom. I do note that this decision predates the 2010



Constitution, which emphasises individual rights under Articles 27 and 44. More recent jurisprudence, such as *Eunice Minoo Mwasya v. Philip Muthiani Mwasya & Another* [2021] eKLR suggests that customary law must be balanced with constitutional principles and the deceased's intentions. *akn ke act 2010 constitution The Constitution's* recognition of cultural rights under Article 44(1) includes the right to express one's wishes regarding burial, provided they are reasonable and not repugnant to justice.

38. The trial court's application of Isukha customary law, in my view, was not inherently wrong, as it was supported by PW3's testimony and the deceased's historical ties to Muleche, his ancestral home, and where his first wife resided. However, the court failed to balance this with the deceased's express wishes and his 20-year residence at Soysambu, where he had established a new homestead with the Appellant and her two children. The deceased's separation from the 1st Respondent, as evidenced by the letters of 17th and 27th March 2017, further weakens the customary claim that the first wife has an absolute right to bury him. It was evident that the deceased and the 1st respondent were not on speaking terms and only interacted during funerals. According to her testimony, she heard that the deceased was sick, and she never visited him, showing that the two were estranged.
39. I find that the trial court erred in prioritising Isukha customary law without sufficiently considering whether the deceased's wishes, as expressed in the will, could override custom, especially given the constitutional framework and evolving jurisprudence on respecting the wishes of the deceased.
40. On whether the trial court properly evaluated evidence, this court notes that the trial court's judgment focused on the deceased's ancestral ties to Muleche, which was his ancestral land and the application of Isukha customary law. However, it did not adequately address the Appellants' evidence, particularly the will that he had written on 21st May 2019, indicating where he wished to be buried and the deceased's lifestyle in the last 20 years. The court's reliance on the burial of the deceased's sons at Muleche as evidence of his intent was reasonable but incomplete, as it ignored the will and the deceased's long-term residence at Soysambu.
41. In *Samuel Omindo Wambui v. COO & Another* [2011] eKLR, the court considered the deceased's lifestyle and relationships before death as relevant factors in determining burial rights. The appellants' evidence showed that they cared for the deceased, catered for his medical expenses, and were closest to him until his demise.
42. The trial court's finding that both wives should be involved in burial preparations was a fair attempt to reconcile the parties' interests. However, by ignoring the deceased's wishes and prioritising customary law without sufficient justification, the decision was against the weight of evidence.
43. Accordingly, this Court finds that the trial court misapprehended the law, failed to give effect to the deceased's testamentary intentions, and ignored the probative value of the appellants' evidence.

Conclusion

44. Having carefully considered the pleadings, the evidence, and the applicable law, this Court finds merit in the appeal.
45. The deceased's express wish to be buried at his home in Soysambu, as stated in his will dated 21st May 2019, should be respected and enforced in accordance with *akn ke act 2010 constitution the constitution* and the cited judicial precedents in this Judgment.
46. Consequently, the judgment of the learned magistrate delivered on 1st August 2024 in Kakamega Chief Magistrate's Court Succession Cause No. E120 of 2024 is hereby set aside and substituted with the following orders:



- a) The deceased, Richard Lihombo Muraje, shall be interred at his Soysambu home in accordance with his wishes expressed in his will dated 21st May 2019.
- b) Both families, the 1st wife and the 2nd wife, shall be at liberty to participate in the burial arrangements.
- c) This being a family dispute, each party shall bear their own costs, considering the nature of the dispute and the need to preserve family unity.
- d) Right of Appeal 30 days explained.
- e) The file is closed.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 22ND DAY OF OCTOBER, 2025.

S.MBUNGI

JUDGE

In the presence of:-

CA: Angong'a

Parties absent though aware of the ruling date, the Court Assistant to publish the Judgment forthwith in the CTS.

