

**IN THE COURT OF APPEAL  
AT NAIROBI**

**(CORAM: GATEMBU, M'INOTI & NYAMWEYA,**

**JJ.A.) CIVIL APPEAL NO. E328 OF 2025**

**BETWEEN**

**BISHOP SAMUEL ADEDE ONGOLA.....1<sup>ST</sup> APPELLANT  
RICHARD JAGERO.....2<sup>ND</sup> APPELLANT  
RAPHAEL OORO OMUSI..... 3<sup>RD</sup> APPELLANT  
JASHON OGWENO MISASA.....4<sup>TH</sup> APPELLANT  
MUSA WAKIAGA.....5<sup>TH</sup>  
APPELLANT  
GERISHON OKINDA.....6<sup>TH</sup> APPELLANT**

**AND**

**MARGARET ATIENO OWUOR.....1<sup>ST</sup>  
RESPONDENT MARTHA  
ODHIAMBO.....2<sup>ND</sup> RESPONDENT**  
*(Being an appeal from the Ruling and Order of the High  
Court of Kenya at Nairobi (Helene R. Namisi, J.) dated 31<sup>st</sup>  
October 2024*

**CONSOLIDATED WITH**

**CIVIL APPEAL NO. E393 OF**

**2025)**

**MARTHA ODHIAMBO.....APPELLANT**

**AND**

**MARGARET ATIENO OWUOR.....1<sup>ST</sup>  
RESPONDENT BISHOP SAMUEL ADEDE  
ONGOLA.....2<sup>ND</sup> RESPONDENT RICHARD  
JAGERO.....3<sup>RD</sup> RESPONDENT  
RAPHAEL OORO OMUSI..... 4<sup>TH</sup>  
RESPONDENT  
JASHON OGWENO MISASA.....5<sup>TH</sup>  
RESPONDENT MUSA  
WAKIAGA.....6<sup>TH</sup> RESPONDENT  
GERISHON OKINDA.....7<sup>TH</sup>  
RESPONDENT**

*(Being an appeal from the Ruling and Order of the High  
Court of Kenya at Nairobi (Helene R. Namisi, J.) dated 31<sup>st</sup>*

October 2024

*in*

**HCCC No. E011 of 2024)**

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**JUDGMENT OF THE COURT**

1. Japheth Odhiambo Owour, deceased, a polygamous Luo man died on 11<sup>th</sup> July 2024. Prior to his death, he resided with his

widows Martha Odhiambo (Martha) and Margaret Atieno Owour (Margaret) in his homestead situated on Title Number Rusinga/Kaswanga Wanyama/429 in Rusinga Central Kaswanga Sub-Location, Gunda Village. Upon his death, his widows had differences regarding his burial. While the body of the deceased was preserved at Umash Funeral Home, Nairobi pending burial, Martha, asserting to be the first wife of the deceased, filed suit against Margaret, described as the second wife, before the High Court at Nairobi.

2. In the suit, Martha pleaded that she was married to the deceased in 1958 under Luo Customary law; that the deceased subsequently married Margaret as a second wife; that following the death of the deceased, Margaret obtained the burial permit and was making arrangements to inter the body of the deceased without her knowledge or consent. She averred that “as the first wife of the deceased, she ought to be allowed to bury her husband as provided by Luo Customary Law.” She sought a declaration that as the first wife of the deceased, she has the legal right to unconditionally participate in her late husband’s funeral and burial arrangements; an order that she “be allowed to bury her husband...in accordance with the Luo customs”; orders of injunction to restrain Margaret from, among other things, moving the deceased’s body from the funeral home or interfering with, interring and/or burying the deceased’s body without her consent and participation.
3. Alongside the plaint, Martha filed an application dated 15<sup>th</sup> July 2024 for interlocutory injunction to restrain Margaret

from moving the body from the funeral home or burying the deceased without Martha's consent or participation.

4. Both parties were represented in the suit by counsel. Martha was represented by the firm of Gikunda Miriti & Company Advocates while Margaret was represented by the firm of Munyao-Kayugira & Company Advocates.
5. Following out of court negotiations, the advocates for both parties filed a duly signed consent letter dated 26<sup>th</sup> July 2024 requesting the High Court to mark the suit as settled on terms. The advocates appeared before the learned Judge of the High Court on 26<sup>th</sup> July 2024 when a rather comprehensive consent order was recorded as follows:

***"CONSENT***

***Kindly record the following consent:-***

***That by consent the suit be marked as settled on the following terms:-***

- 1. That burial date is set for the 2<sup>nd</sup> August 2024 at the deceased's homestead situate on Title Number, RUSINGA/KASWANGA WANYAMA/429 in Rusinga Central Kaswanga sublocation, Gunda Village.***
- 2. That the memorial service to be held on 31<sup>st</sup> July, 2024 at Maxwell SDA church Nairobi where the deceased fellowshipped.***
- 3. That the deceased's body to be preserved in the current status at Umash Funeral Home, Nairobi and will be moved on 31<sup>st</sup> July 2024 in the presence of the Plaintiff and Defendant, for***
  - a. Church/memorial service at Maxwell SDA Church, Nairobi.***
  - b. Transportation to the deceased's house at Outering, Nairobi.***
  - c. Return of the deceased's body to Umash Funeral Home Nairobi by or not later than 1900hrs on the 31<sup>st</sup> July, 2024.***
- 4. That the deceased's body to be air lifted on Kenya Airways (KQ) on 1<sup>st</sup> August 2024 in the company of the Plaintiff and the Defendant to Kisumu International Airport in the Morning of 1<sup>st</sup> August,***

**2024. Then**

**transported in the company of the Plaintiff and the Defendant and other family members by road to his home in Rusinga Central Kaswanga sublocation, Gunda Village for internment.**

- 5. That the Plaintiff and the Defendant being the deceased's wives, shall participate in the funeral preparations and burial of the deceased except for the specific roles assigned under Nso.10 below. The Plaintiff and the Defendant and their respective families shall jointly come up with the program and Eulogy for the deceased.**
- 6. The Plaintiff, the Defendant and their children shall have unrestricted access to the deceased's body at Umash funeral home or any other morgue that the deceased's body may be preserved.**
- 7. The deceased's body should not be disposed of in any way including by burial or Cremation unless with the consent of both Plaintiff and Defendant.**
- 8. The deceased's body be interred on a portion of the land to be hived off from both sides of the boundary demarcating the two households on ALL THAT parcel of land known as Title Number: RUSINGA/KASWANGA WANYAMA/429, being the deceased's homestead in Rusinga Central, Kaswanga sublocation, Gunda Village with the consent of the plaintiff and defendant. The hiving off of this area and its fencing be done before the body is moved from Nairobi.**
- 9. The Plaintiff, the Defendant and their children shall have and retain unrestricted access to the deceased burial site with the right to erect fences and create pathways for such access as would be most convenient.**
- 10. All bills and funeral expenses be settled as apportioned in the meeting held on 22<sup>nd</sup> July 2024 as follows:**
  - a. The Defendant shall take care of the deceased's coffin, dress, Funeral home expenses, church fees, transport to church service, outerring, back to the Funeral home, the airlifting of the body to Kisumu and transport from Kisumu to Rusinga Central, Kaswanga sublocation, Gunda Village. The Defendant shall also take care of the grave digging, construction and tiling.**
  - b. The Plaintiff secure one(1) bus to transport people from Rusinga to Kisumu and back home to Rusinga. The plaintiff shall also provide One (1) bus from the outerring home to Rusinga central, Kaswanga sublocation, Gunda Village.**

- c. The Defendant shall secure one(1) bus to transport people from from the outerring home, Nairobi to Rusinga Central, Kaswanga sublocations, Gunda Village.**
- d. The Plaintiff shall meet and foot catering, tents, seats and any necessary decoration expenses. She will also take care of the tombstone on the grave and general beautification of the grave.**
- 11. OCS Kaswanga Police Station be ordered to provide security from the arrival of the body at the Kisumu International Airport and the transport of the entourage to Rusinga Central, Kaswanga sublocation, Gunda Village to ensure a peaceful internment ceremony in the agreed location.**
- DATED THIS 26<sup>TH</sup> DAY OF JULY 2024”**

6. An order of the court in those terms was subsequently issued on 30<sup>th</sup> July 2024.
7. With every detail and concern of the parties in the suit addressed in the consent, one would have expected that the matter would have ended there. It did not. By an application dated 5<sup>th</sup> August 2024, Margaret applied to the High Court for orders: that a new burial date be set for the deceased and that the burial be conducted in compliance with the orders made on 26<sup>th</sup> July 2024; that in the meantime the body of the deceased be moved back to the funeral home; that Martha be found in contempt of the orders made on 26<sup>th</sup> July 2024; and that Martha be compelled to cease and desist from interfering with the burial of the deceased. In answer to that application, Martha filed a replying affidavit.
8. Martha also made an application dated 11<sup>th</sup> August 2024, seeking orders before the High Court to find Margaret in contempt of the orders made on 26<sup>th</sup> July 2024; an order to set aside the consent order made on the 26<sup>th</sup> July 2024;

and

an order that “the deceased be buried at his homestead situate on Title Number Rusinga/Kaswanga Wanyama/429 in accordance with Luo customs.”

9. By a notice of appointment dated 12<sup>th</sup> August 2024, Odhiambo

M. T. Adala Advocate gave notice that Martha and the appellants in **Civil Appeal No. E328 of 2025**, namely Bishop Adede Ongola, Jagero Ogweno, Raphael Ooro Omusi, Yashon Ogweno Misasa, Musa Wakiaga and Gerishon Okinda (the Elders) had instructed him to represent them for the purpose of filing an application for leave for the joinder of the Elders to participate in the suit as interested parties “for purposes of providing necessary and requisite clarifications and expansions of issues needed to inject and to promote substantial interests of justice.” Subsequently, the Elders through Odhiambo M. T. Adala Advocate filed an application dated 23<sup>rd</sup> August 2024 seeking leave to be joined as interested parties and for leave to give evidence, but that application was not determined.

10. By a notice of change of advocates dated 26<sup>th</sup> September 2024, Paul Munjla & Company Advocates came on record for Martha.

11. Having heard the applications dated 5<sup>th</sup> August 2024, and 11<sup>th</sup> August 2024, the learned Judge delivered the impugned ruling on 31<sup>st</sup> October 2024. In the ruling, the Judge identified two issues for determination. First, whether the consent order of 26<sup>th</sup> July 2024 ought to be set aside. Secondly, whether Martha and Margaret were in contempt

of the consent orders.

On the first issue, the learned Judge upon analysis of the facts

and the law pronounced that no valid reasons had been made out to justify the variation or setting aside of the consent orders. The Judge re-affirmed, “for the avoidance of doubt, the consent order of 26<sup>th</sup> July 2024 stands.”

12. On the matter of contempt, the Judge noted that both parties had “in one way or other acted in a manner that steps away from the consent” and that their “acts or omissions...are backdoor attempts at getting the court to review the consent orders in place” which the court declined to do.
13. Aggrieved by the decision in the ruling made on 31<sup>st</sup> October 2024: the Elders filed **Civil Appeal No. E328 of 2025** while Martha filed **Civil Appeal No. E393 of 2025**. The complaints in **Civil Appeal No. E328 of 2025** as set out in the Memorandum of Appeal are that the learned Judge: failed to appreciate and take into account the affidavits sworn by the Elders and in particular that under African Customary Laws and in particular Luo Customary Law, it is the duty and prerogative of the Elders of the Clan to determine the site of burial; that the Judge erred in finding that the consent was valid, legal and enforceable when the same went against public policy; that the errors and misdirection by the learned Judge have the effect of visiting serious injustice on the estate of the deceased.
14. Martha’s complaints as set out in the Memorandum of Appeal in **Civil Appeal No. E393 of 2025** are that the learned Judge: erred in failing to appreciate that the consent order dated 26<sup>th</sup> July 2024 was illegal and against public

policy for violating

Luo Customary Law; failed to appreciate that giving effect to

the consent would bring to bear a generational curse on descendants of the deceased; misconstrued and misinterpreted the law on setting aside consent orders; wrongly presumed that Martha, on account of her advanced age, was knowledgeable on Luo Customary Law.

15. The two appeals came up for hearing before us on 30<sup>th</sup> July 2025. **Mr. Adala** learned counsel appeared for the Elders, the appellants in **Civil Appeal No. E328 of 2025**, while **Mr. Simiyu** appeared for the Martha, the appellant in **Civil Appeal No. E393 of 2025**. Learned counsel **Mr. Ongoya** appeared with **Ms. Kayugira** and **Miss. Kioge** for Margaret. By consent, the two appeals were consolidated.
16. Learned counsel Mr. Adala for the Elders submitted that the learned Judge failed to heed the uncontroverted evidence that was presented before her showing that the consent dated 26<sup>th</sup> July 2024 was illegal, fraudulent and contrary to public policy and should have been set aside. Counsel urged that if the burial of the deceased has already taken place based on the illegal consent, this Court should order exhumation of the body of the deceased so that the same is buried in accordance with Luo customary law.
17. Learned counsel Mr. Simiyu for Martha submitted that the deceased was born and died a Luo; that upon his death, he should be buried in accordance with Luo customary law, which is the applicable personal law. It was submitted that to the extent that the consent provided for interment of the body of the deceased at the boundary of the homes of Martha and

Margaret, it contravened Luo Customary Law. It was

submitted that the law governing burial disputes in Kenya, as held in the case of **Virginia Edith Wambui Otieno vs. Ochieng' Ougo [1987] KLR 371** is the applicable personal law; that if a burial custom is not shown to be repugnant to justice and morality, it should be given effect. In that regard the case of **Edwin Otieno Ombajo vs. Martin Odera Okumu [1996] eKLR** was cited.

18. It was urged that according to Luo Customary Law, the body of a polygamous man ought to be interred behind the house of the first wife, on its right-hand side from the back of the house and non-observance of that requirement would invite a generational curse "chira" as noted in the case of **Mary S. Awino Ayoki & Another vs. Hellen Akello & 2 Others [2009] KEHC 4178 (KLR)**. In that regard, it was pointed out that paragraph 8 of the consent in particular providing for curving out of land for burial is against Luo customs and practice and is unlawful.
19. It was submitted that the learned Judge of the High Court ought to have set aside or varied the consent order for being illegal and contrary to public policy; that the consent was entered into by misapprehension of facts; that faced, as she was with "the frustration, trauma and anguish of not being involved in the funeral arrangements of her late husband" Martha was constrained to concede to threats and demands by Margaret to enter into the consent; that her consent was therefore obtained through coercions, unlawful demands and mistake." The case of **Samuel Wambugu Mwangi vs. Othaya Boys High School, Civil Appeal No. 7 of 2014** was

cited for the proposition that a consent order can be set aside if procured by fraud, collusion or any of the reasons that can justify the setting aside of the consent as in a contract.

20. In opposing the appeals, learned counsel for Margaret Mr. Ongoya submitted that the consent order specified the place of burial; that that order was never stayed and the burial proceeded in accordance with the consent and the deceased is peacefully lying in the grave and this Court should not disrupt that.
21. It was submitted that the circumstances when a court may interfere with or set aside a consent are limited and the burden lies with the person applying to set aside to bring themselves within those principles. Cited were decisions in **Erick Gakuya Mwathaita vs. Maganjo Joshua Kago [2017] eKLR; Brooke Bond Liebig vs. Mallya [1975] EA 266.** In the present case, counsel submitted, none of the factors that require to be established, such as fraud, were proved.
22. It was submitted that the consent was recorded with the concurrence of the advocates for the parties and is binding on them. See **Syprose Awino Nyangwara vs. Gladys Were [2019]KEHC 195(KLR).** It was submitted for Margaret that it was demonstrated that the Elders, the appellants in E328 of 2025, were afforded multiple opportunities to advise Martha on the applicability of Luo Customary Law in relation to the deceased's internment and Martha nonetheless voluntarily consented to the terms of

the consent dated 26<sup>th</sup> July 2024 and the Court ought to uphold it.

23. It was submitted that Margaret and Martha being the deceased's 2<sup>nd</sup> and 4<sup>th</sup> wives respectively bore the closest and most direct entitlement to determine the place and manner of the deceased's interment in keeping with the decision of this Court in the case of **San vs. GW [2020] KECA 46 (KLR)** where it was held that the law only recognizes the persons who are closest to the deceased to have the right to bury the deceased.
24. Moreover, counsel urged, there is no hard and fast rule under Luo customary law that requires that burial must be outside the house of the first wife and there is therefore no basis for interfering with the consent. That all relevant facts were considered by the learned Judge and there was no value that the joinder of the Elders would have added. Furthermore, the deceased was separated from his first wife and neither Martha nor Margaret was the first wife; and that all subsequent wives had equal rights.
25. It was pointed out that the deceased was in fact interred on 9<sup>th</sup> June 2025 at the burial site agreed upon jointly in adherence to the consent order; that in the circumstances the consent order was fully executed, and the consolidated appeals are therefore overtaken by events and are an academic exercise.
26. We have considered the appeal and the rival submissions. Although counsel for the appellants in their written and oral submissions addressed the Court at length on application of Luo customary law to burial disputes, what was before the

learned Judge of the High Court for determination was the question whether grounds existed to warrant the setting aside

of the consent. The issue before the Judge was not to determine the place where the deceased would be buried. That was already compromised between the widows, Martha and Margaret, who were the only protagonists in the suit when negotiations were had and the consent entered. In our view, the Elders were late in seeking to join in the suit as interested parties after the suit had been compromised in its entirety.

27. What the learned Judge of the High Court was called upon to decide was whether the consent was liable to be set aside. Flowing from the impugned decision of the High Court in that regard, the issue for determination by this Court is whether the learned Judge of the High Court erred in declining to set aside the consent dated 26<sup>th</sup> July 2024.

28. The impugned decision of the learned Judge of the High Court involved exercise of judicial discretion. This Court can only interfere with such decision in limited circumstances. Madan, JA succinctly stated the principles in the case of **United India Insurance Company Limited Kenindia Insurance Company Limited & Oriental Fire & General Insurance Company Limited vs. East African Underwriters (Kenya) Limited [1985] eKLR** thus:

***“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case.***

***The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took***

***account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations***

***of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”***

29. However, in the case of ***Kibira v Independent Electoral & Boundaries Commission & 2 Others (Petition 29 of 2018) [2019] KESC 62 (KLR)***, the Supreme Court of Kenya cautioned that “discretionary power is to be exercised in a manner that is not capricious or whimsical, and that judicial officers to whom this power is donated should exercise the same judiciously.”
30. In considering and declining to set aside the consent entered by Martha and Margaret, the learned Judge was correctly guided by the legal principles that: consent orders or judgments have contractual effect and can only be set aside on grounds that would justify setting aside a contract (See ***Flora Wasike vs. Destimo Wamboko [1985] KECA 149 (KLR)***); and that a consent entered into by counsel is binding on the parties and cannot be varied or set aside unless it is established that it was obtained by fraud or by an agreement contrary to the policy of the court. See ***Brooke Bond Leibig Limited vs. Maliya [1975] EA 266***.
31. Having reviewed the material before her against those principles, the learned Judge stated as follows:
- “I find no valid reason to set aside or vary the consent order that was made by the parties in court, represented by their advocates. A change of mind alone is not one of the reasons that can make a court of law set aside or vary a consent order of the parties.”***
32. The overarching complaint by the appellants against that finding is that the consent is unlawful, is against public policy

and violates Luo Customary Law. Our attention was however

not drawn to any provision of the law that would have prevented Martha and Margaret, as the widows of the deceased, from agreeing on the place where their late husband's body would be interred. In **Martha Wanjiru Kimata & Another vs. Dorcas Wanjiru & Another [2015] eKLR**, Achode, J. (as she then was) endorsed the view that "when it comes to the disposal of the body of a married man or woman, the spouse should play a leading role." Buttressing the importance of amicable resolution of burial disputes, the Judge in that case decreed that nothing would be easier in burial disputes than for parties to strike an amicable agreement as to the place of burial. That, it would seem is the spirit that Martha and Margaret embraced in this matter.

33. In as far as the claim that the consent violated public policy, the pronouncement by **Ringera, J.** (as he then was) in the case of **Christ for All Nations v Apollo Insurance Company Limited [2002] 2 EA 351** though expressed in the context of arbitration offers guidance on the concept of public policy; the need to demonstrate that the impugned actions are inconsistent with the Constitution or other laws; or is inimical to national interests of Kenya; or that it is contrary to justice.

34. In the case of **San vs. GW [2020] KECA 46 (KLR)** this Court expressed that:

***"...the law only recognizes the persons who are closest to the deceased to have the right to bury the deceased. Those persons have been identified as the spouse, children, parents and siblings, in that order."***

35. With that in mind, and considering that Martha and Margaret were the only parties to the suit when they settled it, it is

difficult to fathom, how an agreement between them, the widows of the deceased, on the place of burial of their late husband is said to violate public policy. As already stated, the Elders were seeking to join a suit that was already disposed by the consent. We reiterate that what the learned Judge was dealing with was the question whether grounds had been established to justify the variation or setting aside of the consent. There was no trial before the Judge over the place of burial where the evidence of the Elders and their contribution would perhaps have been useful.

36. Besides the foregoing, as already noted, it was pointed out that the deceased was interred on 9<sup>th</sup> June 2025 at the burial site agreed upon in accordance with the consent order. In the same vein, we note from the record that following delivery of the impugned ruling of the High Court on 31<sup>st</sup> October 2024, Martha made an application to this Court to stay that ruling pending the hearing and determination of her appeal. She however withdrew that application and an order to that effect made by the Court on 22<sup>nd</sup> January 2025. There was nothing thereafter that prevented the carrying into effect the terms of the consent. There is merit therefore in the submission by Mr. Ongoya that the consent order having been fully executed, the appeals are overtaken by events and are in effect moot.

37. In the end, we are not persuaded that the appellants have demonstrated that the Judge misdirected herself in law; or that she misapprehended the facts; or that she took account of considerations of which she should not have taken account; or that she failed to take account of

considerations of which

she should have taken account, or that her decision, albeit a discretionary one, is plainly wrong.

38. The appeals fail and are hereby dismissed. Considering that the matter involves family members, each party will bear its own costs of the appeals.

**Dated and delivered at Nairobi this 13<sup>th</sup> day of February 2026.**

**S. GATEMBU KAIRU, FCIArb, C.Arb.**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**