



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 98 OF 2017**

**JERUSA BASWETI OGEISIA ..... PLAINTIFF**

**VERSUS**

**JENIFER NYAMOITA ACHOKI ..... 1<sup>ST</sup> DEFENDANT**

**CHARLES OGEISIA MONGARE ..... 2<sup>ND</sup> DEFENDANT**

**J U D G M E N T**

1. In the instant suit the plaintiff is the mother in law of the 1<sup>st</sup> defendant and the mother of the 2<sup>nd</sup> defendant. The husband of the 1<sup>st</sup> defendant one Samson Achoki Mongare Ogeisia (now deceased) was the first born son of the plaintiff. The plaintiff is the registered proprietor of land parcels **West Mugirango/Bogichora/323** and **970**. At the time of his death sometime in April 2017, Samson Achoki Mongare Ogeisia (deceased) was residing with his family in land parcel **West Mugirango/Bogichora/323** but he had been using land parcel **West Mugirango/Bogichora/970** for cultivation and was growing food crops thereon including tea.

2. Following the death of Samson Achoki Ogeisia, the plaintiff states the defendants had intentions of interring his remains on land parcel **West Mugirango/Bogichora/323** where he had been residing and had a home. The plaintiff was opposed to this arrangement on the grounds that she had allocated both the deceased and the 2<sup>nd</sup> defendant land parcel **West Mugirango/Bogichora/970** and hence was of the view that the deceased should be buried on that parcel of land as she had apparently allocated land parcel 323 to her other two children, Job Ogeisia and Dinah Ogeisia and had retained her homestead "**Emonga**" thereon.

3. The plaintiff in the premises filed the instant suit vide a plaint dated 25<sup>th</sup> April 2017 seeking judgment against the defendants for:-

**1. A declaration that the plaintiff's decision as sole/absolute proprietor of LR No. West Mugirango/Bogichora/323 is proper, right and that the defendants and all other persons are bound to respect her decisions on matters touching on her said land.**

**2. A permanent injunction restraining the defendants whether acting by themselves through their servants, employees, relatives, agents and/or otherwise from interring on, dealing or interfering with or dealing in howsoever manner with the plaintiff's LR No. West Mugirango/Bogichora/323.**

**3. Costs of and incidental to the suit.**

**4. That the court be pleased to grant any other and/or further remedy as it may deem fit to grant in the interest of justice.**

4. Simultaneously with the plaint the plaintiff filed a Notice of Motion application under a certificate of urgency under the provisions of Order 40 Rule 1 and 2 and Order 51 Rule 1 seeking inter alia an order:-

**“That this Honourable court be pleased to grant a temporary injunction restraining the defendants/respondents whether acting by themselves, their employees, servants, agents and/or any other person(s) acting on their behalf or authority from interring on 28<sup>th</sup> April 2017 or any date thereafter, the remains of Samson Achoki Ogeisia – deceased or dealing in or within whatsoever manner or interfering with the plaintiff/applicant’s LR No. West Mugirango/ Bogichora/323 pending interpartes hearing and determination of the application.”**

5. The court on perusing and reviewing the application granted an interim order at the ex parte stage and at the interpartes hearing of the application on 23<sup>rd</sup> May 2017 the parties agreed to dispense with the hearing of the interlocutory application in favour of hearing the main suit on its merits. The parties were granted leave to amend their pleadings as appropriate before the hearing of the suit.

6. The defendants in a joint defence and counterclaim deny that the plaintiff had allocated to the late Samson Achoki Ogeisia (deceased) and the 2<sup>nd</sup> defendant land parcel **970** and that the deceased burial ought to take place on the said land. The defendants aver that the plaintiff holds land parcel **West Mugirango/Bogichora/323** in trust for the estate of the deceased and the 2<sup>nd</sup> defendant and for her own benefit. The defendants aver that they have constructed their homes on the portions allocated and/or shown to them by the plaintiff in land parcel **323**. The defendants further aver that they have each occupied and fenced off distinct portions of land parcel **323** where they have constructed their houses. The defendants further aver that the deceased, Samson Achoki Ogeisia had resided on the portion allocated to him for over 20 years and apart from constructing his matrimonial home thereon he had effected developments thereon as he had planted tea which he was plucking and had planted trees which were now mature. The defendants aver that the plaintiff having been registered owner of land parcel **323** and **670** as beneficiary from her husband, she could only hold the land as trustee for members of her family who included the late Samson Achoki and the 2<sup>nd</sup> defendant who are her children. The defendants through the counterclaim seek a declaratory order that the plaintiff holds the portions of land parcel **323** that the defendants occupy and use in trust for the defendants. The defendants further seek an order of injunction against the plaintiff and/or her servant and agents from interfering with their occupation and use of the aforesaid portions.

7. The real gist of the present suit is a burial dispute pitting the plaintiff and her children regarding the burial site of her son Samson Achoki Ogeisia who is now deceased and whose body is presently lying at the mortuary awaiting the determination of the instant suit. The expeditious hearing and determination of the suit cannot therefore be overemphasized and it is against that background that the court fast tracked the hearing of the suit. The suit was heard before me on 10<sup>th</sup> July, 2017, 2<sup>nd</sup> August 2017, 10<sup>th</sup> October 2017, 12<sup>th</sup> October 2017 and 18<sup>th</sup> October 2017. The plaintiff called 3 witnesses in support of her case while the defendants also called 3 witnesses in addition to their own testimonies in support of their defence.

**8. The Evidence by the Parties;**

The evidence by the plaintiff who testified as PW1 was to the effect that she is the registered proprietor of land parcels **West Mugirango/ Bogichora/323 and 970**. She acknowledged the 1<sup>st</sup> defendant, Jeniffer Nyamoita Achoki, as the wife of her son Samson Achoki (now deceased) and further that the 2<sup>nd</sup> defendant was also her son. The plaintiff testified that she has apportioned and allocated land parcel **West Mugirango/Bogichora/970** to both Samson Achoki (deceased) and the 2<sup>nd</sup> defendant who took possession and have been using the said land. She stated she could not remember the year when she allocated her two sons the land but she stated they have planted tea leaves on the land which they harvest.

9. The plaintiff further testified that she has two other children, Job Ogeisia and Dinah Ogeisia who she has allocated land parcel **West Mugirango/Bogichora/323**. She also stated she has retained a portion for herself as “**Emonga**” in land parcel **323**. The plaintiff admitted there are houses in land parcel **323** and that the defendants occupy some of the houses. She further stated she was the one who built the houses for her children. The witness stated that in June 2017 the 2<sup>nd</sup> defendant’s children damaged her house on land parcel **323** with the intention of harming her. The witness further stated that one Wilfred Onyancha Mongare a step brother of her husband without any invitation by her came to her land parcel **323** and apportioned the same into 2 portions, one for her deceased son and the other for the 2<sup>nd</sup> defendant. The plaintiff stated that although she had apportioned land parcel **970** to the deceased and the 2<sup>nd</sup> defendant, she had not physically subdivided the land between them. She admitted that no house has been constructed in land parcel **970** and further that all her children including the deceased were brought up in land parcel **323**. The plaintiff stated that she did not want the deceased to be buried on land parcel **323** but on land parcel **970** which she had allocated to him and was ancestral land.

10. PW2, Josephine Moraa Ogeisia, is the plaintiff’s daughter and she testified that the deceased was her brother and that his body was still at the mortuary as her mother has objected to him being buried on land parcel **323**. She testified that her mother had allocated him (deceased) and the 2<sup>nd</sup> defendant land elsewhere where the deceased had planted tea, bananas and other crops and that is the place he should be buried. In her evidence, she stated that the deceased had resided on parcel **323** all his life and that he had five children with the 1<sup>st</sup> defendant. She further stated her deceased brother was taking care of the tea and was harvesting the tea on land parcel **323** as her mother had moved out of the land in 1991 and only came back in 2013/2014. The witness could not tell when her mother allocated her brothers the parcel of land at Sironga (Parcel **970**) as she was not present when she did so and neither did she know anyone who was present. The witness affirmed that her two brothers were exclusively using land parcel **970** which they had fully developed as they had planted tea, bananas, maize and trees.

11. PW3, Onyancha Mogeni Ogeisia is the son of the plaintiff’s co-wife, one Obonyo Ogeisia who was the 1<sup>st</sup> wife of the plaintiff’s husband, Ogeisia Mongare. His evidence was to the effect that the deceased, Samson Ogeisia should be buried in parcel **970** and not parcel **323** since parcel **970** was the ancestral land and as per Gusii Custom the deceased being the eldest son, he should be buried where his father was born which was at the Marindi land parcel **970**. The witness affirmed that Samson Achoki resided at land parcel **323** until he died. He further testified that the plaintiff had informed him she had allocated land parcel **970** to Samson and Charles in 1997 although they had not built any house on the parcel of land.

12. PW4, Nyachiro Mongare is the younger brother to the plaintiff’s husband and hence an uncle to the defendants. He testified that the plaintiff and all her children reside on land parcel **323**. He further testified his brother, the plaintiff’s husband had land at Marindi which he shared between his two wives, Obonyo and the plaintiff. It was his further evidence that the deceased should be buried at the ancestral land at Marindi (parcel **970**) as that is where he was born. He stated it would be against Abagusii Custom for the deceased to be buried on parcel **323** when there is land at the ancestral home at Marindi (land parcel **970**).

13. Under cross examination, the witness maintained that the deceased should be buried on the parcel of land he was allocated by his mother since that was where he had been born as he was the 1<sup>st</sup> born. The witness stated that it was the deceased mother who told him he had allocated him and Charles the land at Marindi. The witness further stated that under Abagusii custom where one has a parcel of land and he dies before he has built thereon, a house must be built on the land before he can be buried on the land.

14. DW1, Jeniffer Nyamoita Achoki the 1<sup>st</sup> defendant is the wife of the deceased, Samson Achoki and the plaintiff is her mother in law while the 2<sup>nd</sup> defendant is her brother in law. The 1<sup>st</sup> defendant stated she was married to the deceased in 1980 and that she has since then resided on land parcel **323** at Makairo with her deceased husband. She stated she did not know who had constructed the house she had been married into. She denied that her husband was formally allocated land parcel **970** at Marindi by the plaintiff stating that the plaintiff is the one who had allowed her to make use of the land for farming. She stated that whatever produce she would get from the land she would share with the rest of the family

including with the plaintiff. The witness stated further that her husband was blind from the time he married him and it was thus her who was carrying out the farming activities on land parcel **970**.

15. DW1 further stated that she and her deceased husband had resided and were using land **323** since the date of her marriage in 1980 upto the time of her husband's death. She stated that sometime in 2014 land parcel **323** was subdivided into 3 portions for the 3 sons of the plaintiff Samson, Charles and Job allegedly on the instigation of Job's wife who wanted all the sons to be shown their respective portions for necessary utilization. DW1 stated that the plaintiff took her husband and the 2<sup>nd</sup> defendant to the D.O's office and the D.O sent Wazee to demarcate the land. The land was apportioned by the Wazee and the three sons were each shown their respective portions. The witness stated that no one raised any objection to the apportionment. The witness further stated PW3 and PW4 have never been involved in issues involving the plaintiff's family. DW1 further recalled there had been a dispute between the plaintiff and PW3 relating to land parcel **970** which PW3 had encroached into prompting the dispute to be referred by the plaintiff to the elders. The witness recalled that she started utilizing land parcel **970** when her mother in law went to stay with the 2<sup>nd</sup> defendant at his farm in Nakuru and from that time has planted tea, bananas, maize, nappier grass and trees. She testified neither her nor her late husband has had any issue with her mother in law until her husband died. She maintained that her husband should be buried on land parcel **323** where she has lived and has a house.

16. Under cross examination by Mr. Obure advocate for the plaintiff, DW1 stated she was married to her late husband under Abagusii Customary Law and she would therefore be required to observe the Abagusii Customary rites during his burial. Inter alia the witness stated thus in her testimony:-

**“I am married under Abagusii Customary Law and all the customary rites have been observed. In burying my husband, I will be required to sweep the house and will pour the rubbish into the grave as a sign of respect. If the court orders burial at Marindi land I will have to build a house/hut before he can be buried. A married man is required to be buried beside his house. Parcel 323 was subdivided into 3 portions for Samson, Charles and Job (all brothers). The plaintiff was left an “Emboga”.**

17. DW1 clearly stated that she and her husband had not agreed to move to land parcel **970** and was emphatic that the deceased home was in parcel **323** and that is where he should be buried. DW1 further clarified that although PW3 was the oldest son in the Ogeisia family he did not participate in the affairs of the plaintiff's homes. For instance he was not present when land parcel **323** was being partitioned amongst the plaintiff's sons. She stated PW3 did not appear to be in good terms with the sons of the 2<sup>nd</sup> house and that could explain why he never got involved in their affairs.

18. DW2, Charles Mongare Ogeisia in his evidence reiterated that the plaintiff was his mother and the deceased, the late Samson Achoki, was his brother. He stated that his mother does not want his deceased brother buried on land parcel **323** although the deceased and his sons have all built their houses on land parcel **323** and have resided thereon all their lives. He stated that his brother built his house in the plot in the 1980s and he himself built his house in the year 2000 in the same plot and his mother never raised any objection. He further stated his mother, the plaintiff, was staying with him at his Nakuru farm from 1991/92 upto 2015 when she moved back to the suit property and during all that time there was no problem regarding the occupancies in relation to the suit property.

19. DW2 further stated that sometime in 2014 there was some misunderstanding between his late brother and his mother relating to the usage of land parcel **323** resulting in the matter being referred to the area D.O who directed the elders to subdivide land parcel **323** amongst the plaintiff's 3 sons and that subdivision was duly done and each of the sons including the deceased was shown their respective portions. The witness denied that he was allocated land parcel **970** by his mother at anytime stating that it was his deceased brother who had been using land parcel **970** where he had planted tea bushes. He denied that he and the 1<sup>st</sup> defendant wanted to bury his deceased brother forcibly on land parcel **323** averring that it was on parcel **323** the deceased had lived all his life and it is where he had established his home. The deceased sons also had their houses on parcel **323**. He maintained that as the deceased home was on parcel **323**, under Abagusii custom he ought to be buried there and not on parcel **970** as the

plaintiff desires. He however conceded that if the deceased had no home, he could be buried on parcel **970**.

20. DW3, Milka Kerubo a wife to the brother of the plaintiff's late husband corroborated the evidence that it was the deceased who had been using land parcel **970** but had no house on the land. She reiterated that under Abagusii Custom a dead person is buried where his home is situated.

21. DW4, Ongere Nyakundi Onyancha, a senior chief Bogichora location and a relative of the plaintiff's family being a grandchild of the plaintiff customarily (the plaintiff's husband and DW4's grandfather were cousins) testified that he had dealt with a dispute relating to the plaintiff's family. He testified that the plaintiff wanted DW2 to give a portion of his land at Nakuru (where she had stayed for a long time) to her ostensibly for the benefit of her son, Job. DW4 summoned DW2 to discuss the issue of him sharing a portion of his Nakuru parcel of land with the plaintiff but the Wazees who heard the dispute determined that the plaintiff had no right over the 2<sup>nd</sup> defendant's land at Nakuru as the land was solely purchased by the 2<sup>nd</sup> defendant. The Wazees advised the plaintiff to instead subdivide the land she owned amongst her children. The plaintiff was not satisfied with the elders decision prompting the matter to be referred to the D.O for arbitration. It was following this reference that the D.O directed the plaintiff to have land parcel **323** subdivided amongst her sons which direction was effected by the elders following delegation of the task to them by DW4.

22. The senior chief affirmed that all the three sons of the plaintiff had their houses on land parcel **323** and further stated that he had no knowledge that the plaintiff had subdivided her land at Marindi (land parcel **970**) between the deceased and the 2<sup>nd</sup> defendant. Further he stated that he was not aware that the plaintiff had allocated land parcel **323** to Dinah Ogeisia and Job Ogeisia the children that the plaintiff got after her husband's death. The chief further stated thus:- **"In Abagusii if a person has a house and he dies he is buried where his house is"**.

23. The chief under cross examination by Obure advocate denied being biased against the plaintiff and maintained the subdivision of the plaintiff's land parcel **323** amongst her sons was consensual and that the plaintiff participated and never raised any objection. The chief stated that he authorized a member of the family one Onyancha Mongare to oversee and supervise the subdivision of land parcel 323 as per the D.O's directions.

24. DW5, Wilfred Onyancha Mongare the step brother of the plaintiff's husband testified as the final witness for the defence. His evidence was to the effect that Samson Achoki (deceased) had visited his home at Marindi and informed him he wished to have their land subdivided and since the mother did not want the Wazee of Nyumba Kumi to be involved the matter was referred to the D.O who summoned all the parties to his office. The D.O directed the plaintiff to have the land subdivided amongst her children and the plaintiff had no objection. The plaintiff's land parcel **323** was appropriately subdivided into 3 portions for her three sons, Samson Achoki (deceased), Charles Ogeisia (2<sup>nd</sup> defendant) and Job Ogeisia. The witness confirmed that the subdivision was carried out such that each son got a portion where their respective houses were situated.

25. Regarding Abagusii Customary rites relating to burial of a deceased person, the witness stated that where a person dies without a home a house known traditionally as **"Ekenyesambo"** is built for him so that he can be buried. He stated thus:

**"If an Abagusii man who is married but has no house on his land dies, a house is built on his land so that he can be buried. This house is called "Omucii"."**

The witness stated that the deceased had a house at the Makairo land (parcel 323) and therefore he would not need to have a house built before he is buried as it was for a person who had no house for whom an **"Omucii"** is constructed.

26. Following the close of the trial the parties filed final written submissions. The plaintiff filed her

submissions on 21<sup>st</sup> October 2017 while the defendants filed their submissions on 15<sup>th</sup> November 2017. Having reviewed the pleadings, the evidence and the parties submissions, the singular issue for determination in this suit is **where should the remains of Samson Achoki (deceased) be interred?**

27. The salient facts in this matter are not in dispute. It is not disputed that the deceased (Samson Achoki) is the son of the plaintiff. It is also not disputed that the 1<sup>st</sup> defendant is the wife of the deceased and that she and her deceased husband have resided and have had their matrimonial home on **LR No. West Mugirango/Bogichora/323** since they were married. It is also not in dispute that the deceased was exclusively using land parcel **West Mugirango/Bogichora/970** for farming but did not reside thereon. There is evidence that before he died, the deceased had requested his mother to have land parcel **323** apportioned amongst the three sons and that through the intervention of the D.O the land was informally apportioned by the elders amongst the three sons of the plaintiff. The plaintiff has contended that she had allocated to the deceased and the 2<sup>nd</sup> defendant land parcel **970** and it is on that basis she states that the deceased ought to be buried on parcel **970** and not on parcel **323** where his residence is.

28. The 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant have vehemently denied that land parcel **970** had been allocated to them arguing that the deceased was merely using the land as one of the family assets. The defendants' evidence that the deceased was using the land (**970**) for the benefit of the entire family and that whatever produce that the deceased was getting therefrom was shared amongst the family members was not controverted. Indeed the plaintiff did not tender any evidence to demonstrate that she had consciously made a decision to allocate the deceased and the 2<sup>nd</sup> defendant land parcel **970** with the intention that the deceased was required to relocate from parcel **323** where he had established his home. No member of the family had any knowledge that the plaintiff had allocated the land to the deceased and the 2<sup>nd</sup> defendant. The land as at the time of the deceased death was still registered in the plaintiff's name. If the plaintiff had made a decision to allocate the land to the deceased and the 2<sup>nd</sup> defendant, there was nothing that prevented her from legally transferring the land to them to vest rights of ownership of the land in the deceased and 2<sup>nd</sup> defendant's names. There was also nothing that prevented the plaintiff from requesting the deceased to relocate to parcel number **970** during his lifetime. The plaintiff's decision that the deceased should be buried on land parcel **970** in my view appear to have been belatedly made and has the hallmarks of being an afterthought brought about by the unfortunate demise of the deceased. While the plaintiff may well have intended to allocate land parcel **970** to the deceased and the 2<sup>nd</sup> defendant, my view having regard to the facts and circumstances of this case is that such intention was not manifested during the lifetime of the deceased.

29. The plaintiff has through her counsel submitted that the plaintiff being the registered absolute proprietor of land parcels **323** and **970** has unfettered right to decide and determine on which parcel of land the deceased who is her son should be interred. The deceased being a son of the plaintiff has a beneficiary interest over the land held in the name of his mother. Thus even though the plaintiff is the registered owner of land parcels **323** and **970** her rights of ownership are subject to her children's beneficiary interest and in that regard the plaintiff can be said to hold the land on her own behalf and in trust for her children. As the registered owner of the subject land, the plaintiff has the right to determine how to allocate and/or distribute the land to her children. The issue however is whether she can properly seek to exercise that right after one of the beneficiaries has died so as to determine where such beneficiary should be buried.

30. The primary issue before me is to determine where the late Samson Achoki should be buried. Burial in the majority of Kenyan tribes is a communal affair undertaken in accordance with the customary rites of the various communities. In the instant suit, I am not called upon to determine land rights respecting the plaintiff's family members. Such a time would arise if the suit related to succession and/or if any of the parties had sued claiming an interest and/or right of entitlement over the land to the exclusion of some other person.

31. The defendants have submitted and I am in agreement with them that the applicable law in determining the issue of the burial site before the court is the Abagusii Customary Law relating to burial of deceased persons. Both the plaintiff and the deceased as well as the defendants are Kisii and therefore

the Gusii Customary Law applicable to deceased's persons would apply. Section 3(2) of the **Judicature Act**, Cap 8 Laws of Kenya enjoins the courts to be guided by African Customary Law in Civil cases where the parties are subject to or are affected by the custom.

32. Section 3(2) provides thus:

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

33. Both the plaintiff and the defendants have led evidence and are agreed that an Abagusii man who dies and has a home is buried within his homestead. Where such a person, dies without having established a home an **“Egesamo”** or **“Omucii”** is constructed so that he can be buried next to it. The point of departure between the plaintiff and the defendants is that the plaintiff asserts she had allocated the deceased land (parcel 970) and that is where he ought to be buried after an **“Egesamo”** or **“Omucii”** is built. The defendants contend the deceased had married and had established his home on land parcel 323 and that is where he should be buried in accordance with Abagusii Customary Law. For my part, I find nothing repugnant to justice and morality or inconsistent with any written law regarding the Abagusii Customary burial rites. The community has for time immemorial practiced these burial rites and I believe they serve a good purpose in enabling the community to come to terms with the death and the loss of loved ones. It is not my intention to disturb the practice which has been well entrenched amongst the Abagusii and I have not been shown why I should do so.

34. The defendants counsel has referred me to an extract of an article by one Robert A. Levine on **“Gusii Funerals: Meaning of Life and Death on an African Community”** where at page 28 he notes as follows:

**“Gusii funerals take place at the home of the deceased. Each action, from dying to posthumous sacrifice has a customary location regarded by Gusii (in 1976 as earlier) as an essential part of the ritual. The domestic setting has the same kind of relation to a Gusii funeral that the tradition design of a church, mosque or synagogue has to the rituals that take place there: Where the performance takes place is central to its meaning. In this case, however, it is the same house where life has been lived that is the explicit source of meaning at death.”**

35. In the same article, the author at page 29 observes that a Gusii homestead belongs to a man and that the house itself is divided into two rooms: **“enyomba”** which is the woman's room and **“eero”**, her husband's room. He further notes in the article thus:-

**“...Enyomba as the woman's room is considered the left side of the house; a woman is supposed to die in her normal sleeping place there, lying on her left side, and be buried outside it just beyond the yard. Eero is considered the right side of the house, and a man is supposed to die there (though he normally sleeps in his wife's area), lying on his right side, and be buried outside it beyond the cattle pen. (Right is said to be the man's side because he holds his spear on his right hand.) In burial, the woman should remain lying on her left side and the man on his right side. Thus, the conceptual divisions of the house and adjacent external spaces into right and left sections identified with male and female spouses regulates the places and positions of proper death and burial for those spouses.”**

36. From the foregoing, it is evident that a homestead plays a central role in burials amongst the Abagusii. A married Abagusii man with a homestead is supposed to be buried next to his house in accordance with the custom. Only a person who dies without a house, usually unmarried persons, who would have an **“Egesamo”** constructed so that he could be buried beside it. Normally married men would be expected to have homes where they would be buried when they die.

37. In the present case, Samson Achoki (deceased) was married and had a house on land parcel **323** in which he had resided with his wife, the 1<sup>st</sup> defendant for over 35 years. It would, in my view, be a travesty of justice to require that he be relocated in his death from his parents' land where he had established a home and had resided all his life. Though the plaintiff is the registered owner of land parcel **323** as well as land parcel **970**, it is my finding that the deceased had a beneficial interest in land parcel **323** and a right of use over land parcel **970**. The plaintiff has no basis to demand that the deceased be buried on land parcel **970** while all along the deceased had resided on land parcel **323** where he had established his home. The plaintiff holds the two parcels of land in trust for herself and her children and is not entitled to exclude the children from the use of the portions of land they have occupied and have been using. The deceased accordingly is entitled to be buried on land parcel **West Mugirango/Bogichora/323** next to his house in accordance with Abagusii Customary Law.

38. Having held and found that the deceased had a beneficial interest over parcel **323**, it is my further finding and holding that the deceased should be buried on the said land parcel **West Mugirango/Bogichora/ 323** and not parcel **970**. Accordingly, I find no merit in the suit by the plaintiff and the same is hereby dismissed. There is merit in the defendants counterclaim in so far as the burial place of the deceased is concerned. The deceased has a right to be buried in land parcel **West Mugirango/Bogichora/323** under the Abagusii Customary Law and I so order. For the avoidance of doubt, by determining the burial place of the deceased, I have not determined any ownership rights respecting the parcels of land **323** and **970** presently registered in the plaintiff's name. That would have to await appropriate proceedings in that regard in another forum.

39. This suit involves one family. Indeed the mother and her children. The suit no doubt was brought in an attempt to settle what otherwise is a lingering succession/ownership dispute where the mother sought to settle the ownership and/or distribution of land through a burial dispute. Ownership of land and/or distribution of land cannot be done in the guise of a burial dispute. The considerations are totally different in determining ownership of land and determining a burial site. In this case, I have determined the burial site for the deceased which necessarily does not confer any ownership rights over the subject parcel of land.

40. Although I have resolved the issue of a burial dispute in favour of the defendants, this is a matter where I am constrained not to award costs and I order that each party bears their own costs of the suit.

41. The court order issued on 25<sup>th</sup> April 2017 restraining the burial of Samson Achoki Ogeisia (deceased) on land parcel **West Mugirango/ Bogichora/323** is hereby discharged and vacated and burial is hereby ordered to be carried on in the said parcel of land.

42. Orders accordingly.

**JUDGMENT DATED, SIGNED and DELIVERED at KISII this 19<sup>TH</sup> DAY of JANUARY, 2018.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

N/A for the plaintiff

Kibungo for Nyamurongi for the 1<sup>st</sup> and 2<sup>nd</sup> defendants

Ruth court assistant

**J. M. MUTUNGI**

**JUDGE**