



**Kudha & 2 others v Adhola & another (Civil Appeal  
E220 of 2024) [2025] KECA 824 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KECA 824 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL E220 OF 2024  
HA OMONDI, F TUIYOTT & LK KIMARU, JJA  
MAY 9, 2025**

**BETWEEN**

**ARKIPO ORWA KUDHA ..... 1<sup>ST</sup> APPELLANT**

**KENNETH KAUNDA ..... 2<sup>ND</sup> APPELLANT**

**MATILDA BETHA ADHOLA ..... 3<sup>RD</sup> APPELLANT**

**AND**

**PATRISIA AJUMA ADHOLA ..... 1<sup>ST</sup> RESPONDENT**

**ST ELIZABETH LWAK MORTUARY ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at  
Siaya, (Ogembo, J.) dated 12th July, 2024 in HCCA No. E007 of 2024)*

**JUDGMENT**

1. “In burial disputes, the two questions that will always arise are, who has the right to bury the deceased and the place of burial...”. Three factors frequently take centre stage in burial disputes in Kenya’s family law landscape namely: the deceased person’s wishes, the duty imposed on those closely related to the deceased during his lifetime to bury him; and the customary practices of the ethnic community he hails from.
2. The live but sometimes subtle rivalry, garnished with competing interests between wives in a polygamous household, often find their ultimate arena upon the death of the very man whose attention was a source of unbridled competition in his life time. The position of the first wife vis-a-vis any other subsequent wife is usually tested and questioned, especially when the modern meets tradition. Nelson Sylvester Adhola Kudha (referred to as the deceased) married Patrisia Ajuma Adhola, (Patrisia), the 1<sup>st</sup> respondent, in the year 1955, under Luo customary law which permits polygamy. They lived together at his father’s home in Asembo Kayoo; and were blessed with ten offsprings. According to Patrisia in



the year 1985, they set up their own home on land parcel No. Siaya/Omia/Malo/4245. He thereafter married Matilda Betha Adhola (Matilda), the 3<sup>rd</sup> appellant herein, who bore him 5 children; then later on he married Phoebe Awuor as the 3<sup>rd</sup> wife, with whom he had 4 children; and later on, married his 4<sup>th</sup> wife, Rebecca Oluoch with whom he had six children.

3. Ultimately, on 26<sup>th</sup> October 2023, Nelson died while at the home of Matilda. Patrisia being the senior in the lineup, naturally expected to be the one with the final say on matters of burial; and in deference to Luo custom, she had no doubt that Nelson would be buried at her homestead. However, Matilda was totally opposed to this, contending that she was closest to the deceased who had spent more years living with her in her home; and as fate would have it, dying in her homestead. She had already moved the deceased's body to St Elizabeth Lwak Mortuary, and together with her brother-in-law Arkipo Orwa Kudha (Arkipo), being the 1<sup>st</sup> appellant, her son Kenneth Kaunda, the 2<sup>nd</sup> appellant, had made arrangements for the burial to take place at her homestead; insisting that Patrisia had stopped living with the deceased in 1970; and eventually ceased being a wife in 1979 following divorce proceedings, which culminated in the issuance of a decree nisi.
4. Given the prevailing post death state of affairs, Patrisia complained that the appellants:

“... without any consultation or consent from me went ahead and took a burial permit and started organizing the burial. I have been excluded from the decision making and planning for my husband's burial as the burial date and the venue was decided by the respondents without my participation nor involvement yet I am the deceased's first wife;... according to the Luo Customary laws the deceased should be buried in the first wife's home contrary to the arrangements of the 1<sup>st</sup> and 2<sup>nd</sup> defendant/respondents who are planning to bury the deceased in the 2<sup>nd</sup> wife's home who is the mother to the 2<sup>nd</sup> defendant/respondent herein; ...I have tried raise my opinion at the last family meeting as the eldest member of the family and I observed that my opinion was not needed as the 1<sup>st</sup> defendant claimed to be in charge of the decision making” .
5. She thus sued the appellants for orders to have the remains of the deceased preserved at St Elizabeth Mortuary, Lwak pending hearing and determination of the matter; the appellants be prohibited from burying the deceased; for the body of the deceased to be released to Patrisia for the purposes of burial at the matrimonial home; that the burial permit be issued to the Patrisia; and that the Officer Commanding Aram Police station be directed to supervise implementation of the orders.
6. The appellants filed a counterclaim seeking orders allowing Arkipo and Matilda to lead the family in the burial arrangements; and determine the date, location and burial site which they described as the matrimonial home in Ongielo village; an order directing Patrisia to meet the cost of preserving the body from the date of filing suit until the date that the determination of the suit; and that St Elizabeth Mortuary, Lwak be directed to release the remains of the deceased exclusively the appellants, for the purpose of conducting a befitting farewell ceremony; and an order prohibiting Patrisia by herself and/or agents from disrupting the burial ceremony. Matilda also sought orders allowing her to hold in trust on behalf of the rightful beneficiaries, all the personal effects belonging to the deceased; and that the Officer Commanding Ongielo Police station or the nearest police station be directed to ensure enforcement of the orders.
7. The suit was heard in the Magistrate's court at Madiany; and dismissed. Patrisia then appealed to the High Court on several grounds; and in allowing the appeal, the learned judge set aside the trial court's judgement and decree; directed that the deceased's body be released to Patrisia for burial at Kudha



- (which was held to be the deceased's matrimonial home), and that the deceased's burial permit, which was in the custody of the Matilda to be surrendered to Patrisia to facilitate the burial of the deceased.
8. The evidence presented through the lenses of Patrisia at the trial, and which the 1<sup>st</sup> appellate court evaluated and analysed was based on the claim that her marriage to the deceased was celebrated according to Luo Customary law which permitted the deceased to have several wives; and they all initially lived in the ancestral home, where the wives, including Matilda each had a house built by the deceased. That at some point in the course of their relationship, Patrisia and the deceased separated, but reunited in the year 2015 during the traditional wedding of their daughter Florence Adhola.
  9. It was Patrisia's contention that Matilda orchestrated a purported divorce between her and the deceased, because she wanted to be the only wife; a move which according to Patrisia, the deceased was not comfortable with and largely treated haphazardly; and that in any event, she had not been served with any decree absolute. That subsequent to the divorce proceedings which took place in 1979, the deceased gave her a parcel that she resides on to date; that the deceased also bought her 43 iron sheets to construct her house. Patrisia considered herself the de facto first wife of the deceased as a decree absolute was not issued.
  10. It was her contention that the deceased had been ill for a long time since 1995 when he was assaulted by a mentally challenged man; that before the assault, they all resided in one home then she moved to her current home. She confirmed that the deceased's ancestral home was at Kajosiah where she had a home built, but which she left and that the church built her a home in Ngukah.
  11. With regard to the alleged will, it was Patrisia's contention that the same was written while the deceased was already ill; and she only got to know about the will after he had filed the divorce case in court; and that the deceased being sick for long, was not in a good state of mind; pointing out that said will was attested the by the 1st appellant's son. The respondent further testified that the deceased had 14 children who took care of him yet the Will purported to cater only for one household leaving out the rest.
  12. The 1<sup>st</sup> respondent's witnesses all testified that under customary law when a polygamous man dies, he is buried in the homestead of the first wife. Wilson Hayanga Okodo, who testified as PW2, described Patrisia as his god-sister; and stated that in 1989 he was informed that Patrisia had established a home in Mikayi where she stayed with the deceased; he had never heard about a divorce between the deceased and Patrisia; and as far as he knew, the deceased had never requested for a dowry refund, which is what would have signified a complete customary dissolution of the marriage; He also pointed out that the deceased attended all dowry negotiations and payments for Patrisia's daughters at their home; and whenever he visited, he would find the deceased at Patrisia's home. According to PW2, he once visited the deceased when he was ill and found him at the latter's home.
  13. PW3 Michael Okungu Onjoma, a neighbour of the deceased at Ngukah since 1985, testified that occasionally he would see the deceased within Patrisia's compound; and that the deceased lived happily and peaceful with Patrisia. He confirmed that the deceased was ill for a long time at his ancestral land in Ong'ielo where he stayed with his 2<sup>nd</sup> wife, while he stayed in Nguka where Patrisia's home was located. He explained that a polygamous man would build himself a 'duol' (small cubicle within the homestead), where he would spend his time; and even have meals, then decide where to spend the night; he was aware that the deceased was being taken care at his 10 by 10 unit that as he once visited him in the year 1995.
  14. Tobias Ongar Ayiko, PW4, a cousin to the deceased testified that they fellowshipped together with the deceased at Church of Christ; and that although the deceased was being cared for at Ong'ielo during



his long-term illness where he resided with the Matilda, it was the first wife who ought to bury the deceased irrespective of the flames of affection having waned off.

15. Arkipo, the 1<sup>st</sup> appellant, and a brother to the deceased, testifying as DWI confirmed that the deceased and Patrisia were married on 19<sup>th</sup> November 1955 according to Luo Customary Law, and the couple cohabited at their ancestral home in; Kajosiah Kudha; then later in 1962, the deceased married Matilda, whom he described as the surviving widow; that the deceased then entered into a marriage with 3<sup>rd</sup> wife Phoebe at his ancestral home; and they were blessed with four issues, but they later separated and 3<sup>rd</sup> wife remarried. The deceased then married a 4<sup>th</sup> wife Rebecca (now deceased), who took possession of Patricia's house at the ancestral home.
16. According to Arkipo, in 1971, Patrisia, out of her own volition, relocated from the ancestral home and established her home at Nguka; that 10 years after their divorce, the deceased, out of concern over the welfare of the children he sired with her, gave Patrisia a parcel of land which was developed through the assistance of her children and the Church of Christ in Africa; and the deceased only went to Patrisia's home in relation to his children with her, i.e. when their child died and when their daughter was getting married.
17. He produced a copy of Chamber Summons in divorce suit No.41 of 1978; that he attended the divorce suit on several occasions; also produced deceased's written declaration expressing his preferred place of burial; and a Decree Nisi in the divorce suit. On cross examination he stated that although he did not have a decree absolute for the divorce, the lived reality was that Patrisia did not participate in activities within the homestead as a wife, and there was no relationship between her and the deceased after the divorce; and Patrisia's house was constructed by the church.
18. That in 1991, the deceased relocated from his ancestral home at Kajosiah Kudha, alongside Matilda; and they founded their matrimonial home in a location known as Ongielo village. That in the year 1995, the deceased was attacked by a mentally ill man, resulting in his hospitalization for three months and during this time, he was being cared for by Matilda; that he handled the deceased's treatment needs, visits and care with Matilda; and that he and Matilda were the closest to the deceased and took care of him.
19. According to Arkipo, the deceased had crafted a handwritten will in form of a letter stating his preferred place of burial; that throughout his illness, the deceased resided at his homestead in Ongielo with Matilda; and following the demise, his family held a meeting at his matrimonial home where Patrisia, her sister and daughter insisted on a different burial location for the deceased. It was his contention that Matilda had been solely with the deceased since 1970.
20. Arkipo's evidence found endorsement in the testimony of DW2, Kenneth Kaunda, the first-born son of the deceased and Matilda, who described how during the 20-year period when the deceased was ill, his primary caregivers were Arkipo, himself and his mother; that Patrisia was absent from the life of the deceased during his lifetime, and only visited the deceased once in his homestead; and that he provided financial support to take care of the deceased through finances. That he was present when the deceased expressed wishes of his place of burial to be his established home in Ongielo village.
21. Matilda Betha Adhola the second wife of the deceased, and being the one who lived with the deceased at Ongielo, confirmed that by the time she got married to the deceased in 1962, he was already in a marriage with the Plaintiff. Matilda's contention is that Patrisia and the deceased eventually divorced, even though a decree nisi issued, but not made absolute, the deceased never stepped into Patrisia's house, which in any event, was built by the church; and he only went to her home on matters pertaining to his children; that out of concern over the welfare of the children they shared, the deceased provided



Patrisia with a piece of land in Nguka where she established a home with the support of a church. That in 1991, after establishing their matrimonial home in Ongielo with the deceased she took care of the deceased while he was hospitalized; and that the 1<sup>st</sup> respondent did not participate in the affairs of the deceased during his life time; and the deceased eventually had a written declaration specifying his preferred place of burial as Ongielo village; that although Patrisia would sometimes visit the deceased in the hospital, she never spent the night with him.

22. The trial court found that marriage between Patrisia and the deceased was not legally dissolved as a decree absolute was never obtained, and that the two legally remained as husband and wife; however, the learned magistrate was of the view that divorce is not only a procedure of filing a decree nisi, but is a broader perspective pertaining to intentions and conduct of the affected parties, pointing out that not only had the pair expressed an intention to live apart, they actually had lived apart for over 50 years, and on account of this, they were in fact divorced; that Patrisia could not leverage on the children's significantly close relationship with their father, to advance her claim that she too was close to the deceased; that the deceased established a home in Ongielo during his lifetime, and lived there with Matilda who took care of the deceased from March 2021 to October 2023 when he was bedridden, thus demonstrating the key role she played; and rendering her the closest wife to the deceased.
23. While acknowledging that the couple were governed by Luo customs, drawing from past decisions, the trial court observed that there were exceptions to the rule of a first wife's right to bury the husband and stated thus:

“Even if the Luo customs dictate that a deceased ought to be buried at the first wife's home, I find the instant case to fall under the exception to the rule. The deceased established a home in Ongielo where he resided with the 3<sup>rd</sup> Defendant. This Court cannot direct that the deceased be buried in a place he never established as his home.”

24. The trial court found that the document relied on did not meet the requirements of what would legally constitute a will, but it nonetheless was an expression of the deceased regarding his final resting place; and the claims that the deceased was not in a stable frame of mind, were not substantiated. The learned magistrate dismissed Patrisia's claims, and found in favour of Arkipa's team stating that the deceased wished to be buried in Ongielo, where he had established a home; and resided with Matilda whom he was closest to. In allowing the counterclaim, the trial magistrate was very specific that:
- a. Matilda Betha Adhola, the 3<sup>rd</sup> Defendant herein, in the Counterclaim to lead her family in organizing and determining the date, location and burial site of the late Nelson Sylvester Adhola Kudha, the deceased herein, at his matrimonial home in Ongielo Village.
  - b. The Defendants in the Counterclaim herein to sign and retain all the relevant documents regarding the burial of the deceased and appoint any assistance they may require in the process.
  - c. The Plaintiff to meet the cost of preserving the deceased's body at St. Elizabeth Lwak Mortuary, the Interested Party herein, from date of filing of this suit on 1<sup>st</sup> November 2023 until the date of this judgment.
  - d. An Order for St. Elizabeth Lwak Mortuary, the Interested Party herein, to release the remains of the Deceased exclusively to the Defendants for the purpose of conducting a fitting farewell ceremony.
  - e. An Order prohibiting the Plaintiff, their servants, or agents from causing any disruption or disorder during the period when the Defendants will be conducting the burial of the Deceased.



- f. All personal effects of the deceased be held in trust by Matilda Betha Adhola, the 3<sup>rd</sup> Defendant herein, on behalf of the rightful beneficiaries.
  - g. Officer Commanding Ongiello Police Station and/or Officer Commanding the nearest Police Station be authorized to enforce compliance and/or help enforcement of the Honorable Court's Orders issued herein.
25. Aggrieved by this outcome, Patrisia appealed to the High Court at Siaya setting out grounds which we condense as being a misinterpretation of the evidence regarding the effect of the purported divorce, breathing life to an invalidated document which purportedly expressed the deceased's wishes; and pronouncing the younger wife who ordinarily lived with the deceased, as the bona fide party to conduct interment and burial rites.
26. The learned judge identified the issue in dispute as being basically who between the appellant and the 3<sup>rd</sup> respondent had the right to bury the remains of the deceased in her home. The learned Judge agreed with the trial court that in the absence of a decree absolute, then the divorce was not concluded; noted that the deceased bought land at Nguka on which Patrisia's home is located, well after he had obtained decree nisi, as a demonstration that he was fully aware that the 1<sup>st</sup> respondent was his wife; and in remaining as the deceased's wife, she retained the position as the first wife. Further that there was evidence that the deceased had established the home for Patrisia with the help of the church, and that her witnesses who were well advanced in years, being over 80 years old, were persons versed in Luo Customary Law out of prolonged use of the same, though not experts as envisaged under Section 48 of *Evidence Act*.
27. The learned judge observed that the deceased attended functions at Patricia's home involving their children; and that when the deceased was ailing, Patrisia visited him in hospital as well as at Matilda's home; and was of the view that whereas not much affection was shared between the 1<sup>st</sup> respondent and the deceased, the whole family knew and accepted the fact that the 1<sup>st</sup> respondent remained the first wife and that the 1<sup>st</sup> respondent's home was also the deceased's home.
28. On the issue of the Will the trial judge was of the opinion that there was no appeal on the finding of the lower court that the same was not a Will as provided for in law as the same was never attested to by more than two competent witnesses, and that there being no property in a dead body a person cannot dispose of his body by will in any event.
29. The learned judge went on to find that the 1<sup>st</sup> respondent had proved her case on a balance of probabilities, and as the first wife and had the right to bury the deceased in her home according to Luo Customary law, and directed that:
- a. That the body of the deceased Nelson Sylvester Adhola Kudha, be released to the appellant (Plaintiff in the lower court) to inter the remains at their matrimonial home at Kudha.
  - b. That the burial permit in custody of 1<sup>st</sup> defendant/respondent, be surrendered to the appellant to facilitate the burial of the deceased.
  - c. That the Officer Commanding Aram Police Station be ordered to supervise the enforcement of this order.

Observing that this was a family dispute, and in the spirit of fostering some form of harmony, the learned judge ordered each party to bear its own costs, but directed Patrisia to pay to the mortuary, costs for preserving the body.



30. The appellants aggrieved by the decision of the trial court filed its memorandum of appeal challenging the judgment of the High Court on 12 grounds of appeal some of which are repetitive and we thus condense them into the following:
- a. The learned judge erred by allowing the respondent's appeal but dismissing the appellants' counterclaim in the trial court,
  - b. the learned misdirected himself by failing to properly consider the totality of and weight of the evidence adduced by the appellants as well as disregarding the written submissions filed in support of the appellants' counterclaim, binding judicial precedent and settled jurisprudence with regard to the legal principle on the key aspects that will always arise in burial disputes,
  - c. the learned judge misunderstood the evidence on record and introduced extraneous or irrelevant matters specifically a burial place at Kudha which was not even pleaded by any party in the lower court; and misdirecting himself in, delving on and diverting court's focus to, addressing and making determination mainly on Customary Law which was not an issue for determination between the parties, thereby failing to consider relevant material before it that could have influenced the outcome on who had the right to bury the deceased,
  - d. the learned judge failed to appreciate that the persons who testified in support of the 1<sup>st</sup> respondent claims to bury the deceased based on customary law, did not meet the legal criteria of expert witnesses; and did not consider the provisions in sections 48 and 51 of the [Evidence Act](#),
  - e. the learned judge erred in law and fact by ignoring the provision of section 82 of the [Evidence Act](#) to enable him appreciate as proof and prima facie evidence that the 1<sup>st</sup> respondent separated with and has not been in the life of the deceased as evidenced, on the strength of the chamber summons application filed in Divorce Suit No. 41 of 1978 in District Magistrate Court at Bondo,
  - f. the learned judge erred in law by failing to properly carry out its duty as a first appellate Court by failing to reconsider the evidence, evaluate it and subsequently draw its own conclusions on the issue of who was closest to the deceased during his lifetime and has the right to bury the deceased.
31. Through their counsel Mr. Arika, the appellants submit that the court erred by failing to find that Matilda had the right to bury the deceased, the place of the deceased's burial being Ongielo village; and finally, that the people closest to the deceased who ought to bury him are the appellants. The appellants argue that all the parties agree that the place called Kudha was erroneously termed in the judgment as the deceased's matrimonial home is actually his ancestral home properly known as Kajosiah Kudha's Home, where the 10x10 unit of the deceased was located; the appellants contend that the deceased's matrimonial home is in Ongielo Village where his 10x10 unit house is located.
32. The appellants point out that Patrisia in her own testimony admitted that she left the ancestral home and built her own home at Nguka; that the deceased left the 3<sup>rd</sup> appellant as the only widow who had been caring for the deceased, and that the 1<sup>st</sup> respondent never stayed with nor gave care to the deceased when he was ailing and given these facts the trial court failed in factually ignoring the evidence on record and failing to hold that the 3<sup>rd</sup> appellant had the right to bury the deceased.
33. The appellants submit that the 1<sup>st</sup> respondent's witnesses in the trial court were not expert witnesses and fault the learned judge for finding that the 1<sup>st</sup> respondent produced expert witnesses just because the said witnesses were advanced in age.



34. In opposing the appeal the 1<sup>st</sup> respondent through her counsel Mr. Amondi submits that the place called “Kudha” erroneously termed in the instant judgment as the deceased’s matrimonial home is the deceased’s ancestral home popularly named “Kajosiah Kudha’s Home” located within Rarieda Sub-County at Omia– Malo, East Asembo; he urges us to find that by the tenor of the judgment it is prima-facie visible and does not require any detailed examination to establish that the intention of the learned Judge when referring to the deceased’s matrimonial home was the parcel No. Siaya/Ohia Malo/4240 located at Nguka village in Nyilima, Rarieda Sub-County where the deceased bought and constructed a home with his 1<sup>st</sup> wife the 1<sup>st</sup> respondent in August 1985; that this is probably a clerical error or otherwise an error apparent in the face of the record which could have been cured through rectification under section 99 of the Civil Procedure Act or an application for review under Order 45 Rule 1(b) of the Civil. We are thus urged to cure the said defect under section 3(2) of the Appellate Jurisdiction Act Cap 9 Laws of Kenya as stated in Vallabhdas Karsandas Raniga vs. Mansukhlal Jivraj and Others [1965] EA 780, where it was held that:

“Section 3(2) of the appellate jurisdiction Act confers on the Court of Appeal the same jurisdiction to amend judgments, decrees and orders that the High Court has under Section 99 of the Civil Procedure Act, making it unnecessary to look to the inherent powers of the court. The words “at any time” in Section 99 clearly allow the power of amendment to be exercised after the issue of a formal order....“Slip orders” are made to rectify omissions resulting from the failure of counsel to ask for costs and other matters to which their clients are entitled.....A court will only apply the slip rules where it is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given or, in the case of a matter which was overlooked, where it is satisfied, beyond doubt, as to the order which it would have made had the matter been brought to its attention.”

35. This being a second appeal this Court is fully alive to the edict of section 72 (1) of the Civil Procedure Act, that restricts this Court only to consider matters of law in a second appeal, and only to consider facts if it is demonstrated that the two courts below considered matters, they should not have considered or failed to consider matters they should have considered. We reiterate what was stated by this Court in Charles Kipkoech Leting vs. Express (K) Ltd & Another [2018] eKLR that:

“Our mandate is as has been enunciated in a long line of cases decided by the Court. See Maina vs. Mugiria [1983] KLR 78, Kenya Breweries Ltd versus Godfrey Odongo, Civil Appeal No. 127 of 2007, and Stanley N. Muriithi & Another versus Bernard Munene Ithiga [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters, they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of Martin versus Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 where in, it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.”

36. The main issues in this appeal revolves around who is entitled to bury the deceased? The crux of the appellants’ appeal is that the 3<sup>rd</sup> appellant was the one to bury the deceased as she is the one who lived with the deceased; took care of him in his old age and illness until the time of his demise, whereas the



1<sup>st</sup> respondent opted to move out of the ancestral home, and built her own home showing no closeness or affection whatsoever to the deceased.

37. The 1<sup>st</sup> respondent on the other hand argues that throughout the period that the deceased began experiencing health issues in 1995, alongside her children, she participated in taking care of the deceased in terms of visitation, which according to the 1<sup>st</sup> respondent demonstrated closeness to the deceased. She relied on the photographs showing those visitations. The respondent also agrees with the trial judge that in the absence of a decree absolute, the divorce proceedings were never concluded and as such the deceased and 1<sup>st</sup> respondent remained legally married, that the deceased resided in his 10x10 unit within the 1<sup>st</sup> respondent's homestead and as such the court was correct in finding that the 1<sup>st</sup> respondent has the right to bury the deceased.

38. As we stated right at the outset, in burial disputes, the two questions that will always arise are, who has the right to bury the deceased and the place of burial. Customary law as the applicable personal law regulating burial disputes versus modern liberalism embracing Western ideals and the Christian faith often form the crux of burial disputes in Kenya. See *Virginia Edith Wamboi Otieno vs. Joash Ochieng Ougo & Another No.4*, (1987) KLR 407 (the SM case) and *Kandie & 2 Others vs. Beatrice Jepkemoi Cherogony* (2002) 2 KLR 613.

To prove custom, by virtue of section 51 of the *Evidence Act*, evidence of its existence must be called to provide the juridical and philosophical basis- that was the ratio decidendi in *Nyariba Nyankomba vs. Mary Bonareri Munge* [2010] eKLR where the High Court held that:

“Time and again, it has been stated that in cases resting purely on customary law it is absolutely necessary that experts versed in the customs be summoned to testify so as to assist the court reach a fair verdict since the court itself is not well versed in those customs and traditions”.

39. We are also urged to consider that this court in *SAN vs. GW* [2020] eKLR stated:

“Apart from these factors, courts have also been unanimous as far as we can tell from decided cases that, both laws, common and customary, have one thing in common, in so far as burial is concerned; that the wishes of the deceased, though not binding, must so far as is possible, be given effect, so long as those wishes are not contrary to custom or to the general law or policy. See *Apeli vs. Buluku* [1980] eKLR and *Samuel Mungai Mucheru & 3 Others vs. Ann Nyathira* [2014] eKLR.”

40. We need not belabor the point that the learned judge rightly found that the divorce process having been incomplete, resulted in the conclusion that Patrisia did retain her position as 1<sup>st</sup> wife of the deceased. It is also drawn to our attention that the other consideration is that the person claiming the right to bury the deceased must be one who is demonstrated to have been close to him or her during his or her lifetime. Regarding this last limb, the Court of Appeal in *Samuel Onindo Wambi vs. COO & Another Kisumu Civil App. No. 13 of 2011* (2015) eKLR expressed the following view:

“...A person's conduct to a deceased person can extinguish the right of that person of burying the remains of the deceased. The appellant did not show any family closeness with the deceased when she was alive. Though he said that he used to visit the deceased and that he mobilized his siblings to build a house for her at Kibos there was no credible evidence to prove so. (sic). The fact that he was the deceased's first-born son did not give him an automatic right to bury her even if Luo customary law dictates so. The court has to consider all the circumstances of the case and the justice of the case...In this case, besides the fact that



given the father and his family's treatment of the deceased he is not deserving of the right to bury the deceased's remains".

41. The fact that the deceased conducted his personal affairs under Luo custom is not contested. The learned judge was keenly aware of the incontrovertible evidence that before his death, the deceased had been separated from the 1<sup>st</sup> respondent for a long period of time and that throughout that period, he was married and lived in the same compound (different houses) with the 3<sup>rd</sup> appellant in their home in Ongiello Village. Whereas under ordinary circumstances, it would have been easy to say that the 1<sup>st</sup> respondent ranked higher in order of right to burying the deceased, we pause to consider this - did the learned judge err in failing to consider whether the conduct of Patrisia and the deceased while alive extinguished her right to bury the deceased, as to render the burial to fall within one of the exceptions?
42. Since both parties are in agreement that the divorce was never concluded for want of a decree absolute, what would one make of the deceased's conduct that even after the decree nisi had issued in the divorce cause, he bought land in his name for Patrisia to establish her home at Nguka? From the evidence of the respondent's witnesses, under Luo custom amorous tendencies alone would not be the yardstick to determine where a polygamous man is laid to rest; the favourite wife syndrome may dance itself lame during the lifetime of the source of such deep affection and the object of such affection, but in death, the light dims; and rank and file principle takes prominence.
43. We are alive to the principles set by this Court (differently constituted) in *San vs. GW, Civil Appeal No. 1 of 2020* at Kisumu, that:

"In burial disputes, the two questions that will always arise are, who has the right to bury the deceased and the place of burial...

...The wishes or a will on how the deceased's remains will be disposed of upon death are not, as a general rule binding because, in the first place, there is no property in a dead body and secondly, because a dead person cannot take part in the decision of his or her own burial. There must, however, be compelling reasons for not heeding the expressed wishes of the deceased...

...The third aspect of this dispute is 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. The other consideration is that the person claiming the right to bury the deceased must be one who is demonstrated to have been close to him or her during his or her lifetime.

..... There being no controversy on the law to be applied, and bearing in mind, without straying into factual matters, we are satisfied that both courts below properly directed themselves on the law; that there are exceptions to the custom that the deceased ought to be buried at the first wife's home; and that this dispute presented such an exception. The deceased expressed the desire to the appellant, his children, his sister and his stepmother to be buried in Bungoma.

Upon his death, all the clan members were made aware of the burial plans to take place in Bungoma to which they consented. Both courts having found, as a fact, that the Bungoma home was established in accordance with customs of the Luo, we are equally persuaded that they applied the right principles and ultimately reached the correct determination, that the deceased's wish did not contradict the customs of his community, nor was contrary to general law, public policy or safety. We add that, it is highly unlikely that, after 26 years of



absence from the appellant and the Nyalenda home, the deceased would suddenly develop love for them and wish in his final days to go back but only for burial!

- a. Apart from the aforesaid 26 years of separation, the appellant played no role in the deceased's life when he was bedridden, not even a visit to the deceased during the 2- year period when he was beset by illness.
- b. In Samuel Onindo (*supra*) it was explained that a person's conduct towards a deceased person while alive could extinguish his or her right to bury the deceased. Since the appellant did not show any closeness towards the deceased after their separation and grounds, she did not show any sympathy towards him when he was ailing, it was only just that the deceased's wishes and choice of where he was to be buried were to be honoured."

Unlike the foregoing cases, the years of separation were interspersed with periodical interactions by both spouses; the deceased maintained some level of contact with Patrisia, beyond treating her as an estranged wife, or one for whom no relationship existed. He still participated in activities within her home, recognizing her as the mother of his children, attending the traditional engagement ceremonies of his daughters and receiving dowry, buying land and building materials for her to set up a home, and no amount of judicial craft can change the fact that the deceased's conduct was simply a reflection of an older man so besotted with his younger wife; and not a totally estranged spouse.

44. Apart from that, the learned judge noted that Patrisia's conduct had to be counted in her favour, she welcomed the deceased whenever he went to her home, joined him in social ceremonies; and visited him when he was ill. This situation is so distinguishable from the one envisaged in the Samuel Onindo case (*supra*), that it would be difficult to find that the learned judge departed from well tested jurisprudence; or that he failed to take into account certain relevant factors, as to warrant our interference.
45. Where is the deceased to be buried? PW2 aged 82 years old and PW3 aged 88 years maintained that feelings of affection were not what would determine a polygamous man's resting place, that even when the flames of love had been lost, as long as there was no divorce, the honours rested firmly with the first wife. The appellant's counsel argues that the two witnesses are not experts in Luo customs; and we agree, yet in the absence of any other source (it is significant that neither party considered it prudent to call an expert in Luo Custom or even cite texts on Luo custom such as Paul Mboya's text *Luo kitigi gi Timbegi* meaning: Luo: Customs, Tradition and Beliefs [Mboya:1986; (1938)], then it was only apt that the learned judge recognized the value of these witnesses' testimonies, not as expert witnesses, indeed the learned judge was fully aware that they fell short of that mark, but in accepting their evidence as a useful guide, he observed that given their ages, they were "witnesses versed in Luo Customary Law out of prolonged use of the same and not experts as a result of any technical training envisaged under section 48 of the *Evidence Act*." It is our considered view, that faced with the lack of adequate resources, this was the most rational approach that was taken which we cannot fault.
46. As regards the place of burial, it is agreed by the parties that the trial judge erred in finding that Kudha was the deceased's matrimonial home; both parties agree that Kudha was the ancestral home and we concur that the same was merely an error that can be corrected by this court via the 'slip rule'. The import and operationalization of the powers to review under the Slip Rule was explained by the Court in *Sanitam Services (E.A.) Limited vs. Rentokil (K) Limited & Another* [2019] eKLR as follows:

"As we have stated, the Supreme Court while considering a slip rule under a provision of the *Supreme Court Act* found that the slip rule did not confer upon any court jurisdiction or



powers to sit on appeal over its own judgment or to extensively review such judgment as to substantially alter it.

The Court of Appeal Rules, particularly Rule 35 thereof allows for correction of errors in the same manner and in a similar situation as the said provision of the *Supreme Court Act*. The slip rule does not allow or permit a court to give an order which alters the judgment or orders made earlier. It is for purposes of correcting clerical errors and giving effect to the judgment of the court.”

47. The Supreme Court on its part in the case of Fredrick Otieno Outa v. Jared Odoyo Okello & 3 Others [2017] eKLR pointed out that the errors to be corrected under the Slip Rule must be those that are so obvious and whose correction cannot lead to any controversy or a change in the substance of the judgment. In that regard, the Court while referring to section 21(4) of the *Supreme Court Act* stated that:

“This Section as quoted, embodies what is ordinarily referred to as the “Slip Rule”. By its nature, the Slip Rule permits a Court of law to correct errors that are apparent on the face of the judgment, ruling, or Order of the Court. Such errors must be so obvious that their correction cannot generate any controversy, regarding the Judgment or decision of the Court. By the same token, such errors must be of such nature that their correction would not change the substance of the Judgment or alter the clear intention of the Court. In other words, the Slip Rule does not confer upon a Court, any jurisdiction or powers to sit on appeal over its own judgment, or, to extensively review such judgment as to substantially alter it. Indeed, as our comparative analysis of the approaches by other superior Courts demonstrates, this is the true import of the Slip Rule.”

48. The preceding evaluation and analysis of the evidence persuades us that the learned judge intended to refer to Nguka Village, and particularly parcel No. Siaya/Ohia Malo/4240 located at Nguka village in Nyilima, Rarieda Sub – County where Patrisia’s home was established. Ultimately, the outcome is that there is no basis upon which to interfere with the learned judge’s decision, and this appeal is dismissed. Each party shall bear its own costs.

**DATED AND DELIVERED AT KISUMU THIS 9<sup>TH</sup> DAY OF MAY, 2025.**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

**L. KIMARU**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

