



**Ontweka & 3 others v Ondieki (Civil Appeal E692 of 2023)  
[2024] KECA 11 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KECA 11 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL E692 OF 2023  
LA ACHODE, F TUIYOTT & PM GACHOKA, JJA  
JANUARY 25, 2024**

**BETWEEN**

**JOSEPH ONTWEKA ..... 1<sup>ST</sup> APPELLANT  
ELISHA ONTWEKA ..... 2<sup>ND</sup> APPELLANT  
STANLEY ONTWEKA ..... 3<sup>RD</sup> APPELLANT  
DAVID ONTWEKA ..... 4<sup>TH</sup> APPELLANT**

**AND**

**ZIPPORAH MASESE ONDIEKI ..... RESPONDENT**

*(An appeal from the judgment and decree of the High Court of Kenya at Nairobi, Family Division (E.K. Ogola, J.) delivered on 5th July, 2023 in HCEA No. E048 of 2023)*

**Customs and religious practices do not automatically attain a higher place than the rights of the person with the most proximate legal and familial bonds with the deceased.**

Reported by Robai Nasike Sivikhe and John Ribia

***Customary Law** – customary law viz a viz constitutional and statutory law – burial rites – the religious, customary, statutory and constitutional underpinning of burial rites – hierarchy of religious, customary, statutory and constitutional provisions on burial rites – whether customs and religious practices automatically attained a higher hierarchy over the burial rights of the person with the most proximate legal and familial bonds with the deceased – Constitution of Kenya, 2010, article 11.*

***Common Law** – application of common law – common law principles on the status of a corpse – the place of the wishes of the deceased in determining place of burial and burial rites under common law – what was the place of the wishes of the deceased with regard to their place of burial, in performance of burial rites? – whether the wishes of the deceased, with regard to their burial place, could be disregarded.*



*Customary Law – Gusii Customary Law – burial customs – where there was a dispute regarding the place of burial of a person who owned two homesteads – whether the deceased ought to have been buried at his paternal homestead or a place where he had set up a matrimonial home.*

### **Brief facts**

During his lifetime the deceased constructed a family home situated in Kamulu, Mavoko Town and he also had a home in Kiango, Kisii County. The deceased's wife, the respondent, wanted to bury him at Kamulu whereas his brothers, the appellants wanted to bury him at Kiango, Kisii County.

The 4<sup>th</sup> appellant had procured a burial permit intending to transport the deceased's remains to Kiango, Kisii County. As a result, the respondent filed a suit where she prayed for an order of permanent injunction against the appellants restraining them from interfering, removing, interrining, transferring, or burying the deceased's remains in Kisii County and further that the deceased's remains be released for burial at Kamulu. According to the respondent, the matrimonial home was the best place to bury the deceased as she would take care of the grave. The appellants argued that since the deceased and his family subscribed to Gusii customary law, he ought to be buried based on those cultural rites by his brothers. The trial court found that the deceased never wished to be buried in Kamulu, contrary to the respondent's assertions. The trial court held that the deceased ought to be buried in Kiango, Kisii County in light of article 44 (1) of the Constitution.

Aggrieved by those findings, the respondent filed an appeal to the High Court. The High Court found that the deceased had not declared his wish as to his final resting place as no evidence had been provided by any of the parties to prove the same. The judge set aside the judgment of the trial court and ordered that the deceased be buried in his Kamulu home and that the appellants were free to participate. He also ordered that the Gusii customary law be observed. Aggrieved, the appellant instituted the instant second appeal.

### **Issues**

- i. What was the place of the wishes of a deceased person, with regard to their place of burial, in performance of burial rites?
- ii. Whether the wishes of a deceased person, with regard to their burial place, could be disregarded.
- iii. Whether customs and religious practices automatically attained a higher hierarchy over the burial rights of the person with the most proximate legal and familial bonds with the deceased.

### **Held**

1. Burial disputes were emotive. The Court of appeal was called upon to balance the clashing interests of parties who should ordinarily be involved in the burial in one way or another. Unlike many other civil disputes, burial issues concern people who were close to the deceased in one way or the other. Consequently, the Court desired to find some sense of legal and constitutional harmony by overcoming the dichotomies that seemed to make burial dispute jurisprudence disarrayed.
2. In burial disputes, the constitution could only be considered a living constitution if it also considered the customs that communities regard as crucial in death rites, but only to the extent that the death rites also promote constitutionalism. In the same breath, customary practices would only be considered progressive customs if they promoted the burial wishes of the deceased that did not flout constitutional order.
3. Under the common law, a corpse did not constitute property. Therefore, the wishes of a deceased could be disregarded if they were contrary to the constitution or the customary practices of the particular community. The deceased wishes were subsidiary to the other considerations because no one would be harmed by the failure to enforce such wishes.
4. Burial disputes have been complicated by the 'no property' rule, which prohibited individuals from leaving binding burial instructions. Since there was no property in a body, any person could claim to have the right to perform the burial rites. In addition, Kenya's legal system did not have a hierarchy of identifying who had the most legitimate interest in a burial dispute. The courts discerned the interests of the parties from their legal proximity.



5. The religious and cultural practices of a deceased was an important factor in burial disputes concerns. Article 11 of the Constitution recognized culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation. Further, article 32 of the Constitution provided that every person had the right to freedom of conscience, religion, thought, belief, and opinion. The cultural and religious practices of the various communities and people in Kenya were therefore to be promoted if they were consonant with constitutional principles.
6. In instances where the customs and religious practices formed part and parcel of the factual basis of a burial dispute, the same ought to be considered to the extent that they were not contrary to the constitution and other laws. However, they did not automatically attain a higher place than the burial right of the person with the most proximate legal and familial bonds with the deceased.
7. The interest of the nuclear family ought to be respected. The Court of Appeal disapproved of customary edicts that superseded the natural and paramount unit of society, safeguarded under article 45 of the Constitution. Without family, there would not be customs and social norms. The constitution embodied the family as the natural and fundamental unit of society and the necessary basis of social order. However, a court could consider exceptions where a deceased was a known cultural leader in a community and his figure extended past the family to a communal group. That was one of the reasons the Constitution acknowledged culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation. There were men and women who went before us whom by their way of life on earth were as important to family as they were to their cultural groups.
8. The Constitution recognized that customary law was applicable in instances where one or more of the persons was subject to or affected by it. However, the customary law should not be repugnant to justice, morality, or any written law. A person who wished to rely on a custom had to adduce evidence to show how the parties were affected and its applicability.
9. The deceased was to be buried following the Gusii customary law. The people of Gusii were buried where they set up their homestead. It need not be their paternal homestead but where they had built a home. Furthermore, it was conducted in the place where the deceased spent a considerable amount of time during his lifetime. Thus, contrary to the appellant's lamentations, the High Court did not rely on extraneous matters when it explicitly demonstrated the exodus of the people of Gusii moving away from Kisii and Nyamira. That analysis was corroborated by the evidence of DW1, DW2 and DW3 who testified that the members of the Gusii community had indeed moved, settled and were buried in several parts of the country.
10. From the evidence, the deceased built a home in Kamulu which was the matrimonial home and another in Kisii. Both houses were constructed with two doors. Critically, the uncontroverted evidence of PW2 disclosed that the deceased's house in Kisii was in a bad state and as such had no intention of living in that house. Similarly, it was also established that the house in Kamulu was the deceased's matrimonial home where his relatives visited for celebratory events with the deceased before his death. The High Court had not erred in ordering that the deceased be buried in Kamulu.
11. The judgment of the High Court was sound. The learned judge allowed appellants the right to participate in the burial and perform the rituals under the Gusii customary law. Whereas the appellants may understandably be aggrieved and emotionally drained, the law was not on their side.
12. **(Obiter)** "It was important for judicial officers to inculcate therapeutic jurisprudence in determining burial disputes. The central insight of therapeutic jurisprudence was the realisation that the law itself could function as a therapeutic or anti-therapeutic agent. Legal rules, legal procedures and the roles of legal actors constituted social forces that may impact on the psychological well-being of those caught up by it. Burial disputes were emotive and whatever the outcome, some would be left in tears. The words and phrases employed in the resolution of the dispute should be sensitive to the mental and physical health of the parties involved in the burial dispute. The faction of the law considered humanness as a crucial ingredient in the crucible of justice and therefore it ought to be factored in the process



of judgment-making. Nevertheless, that did not involve shelving away the tenets of due process and adherence to judicial impartiality nor did it mean the substitution of therapy with sound judicial reasoning.”

*Appeal dismissed.*

### **Orders**

- i. *Judgment of the High Court and the order that the remains of the deceased be buried on the parcel of land No. Block 12/221, Mavoko Town, was upheld.*
- ii. *The body of the deceased shall be released to Zipporah Masese Ondieki, the respondent.*
- iii. *The appellants were at liberty to attend burial and perform the Gusii customary rites.*
- iv. *Each party ought to bear their costs. The costs of the mortuary shall be shared between the two parties as ordered by the High Court.*

### **Citations**

#### **Cases**

#### **Kenya**

1. *Apeli v Buluku* Civil Appeal 12 of 1979; [1980] KECA 39 (KLR) - (Applied)
2. *In re Burial of Musa Magodo Keya (Deceased)* Civil Suit 11 of 2019; [2021] KEHC 5262 (KLR) - (Explained)
3. *Kaittany, Sakina Sote & another v Mary Wamaitba* Civil Appeal 108 of 1995; [1995] KECA 2 (KLR) - (Explained)
4. *Kenya Breweries Limited v Godfrey Odoyo* Civil Appeal No 127 of 2007; [2010] eKLR - (Explained)
5. *Kinyanjui, Sarafina Wanjiku & 5 others v Elizaphason Kinyanjui Mukora* Hcca Appeal 512 & 530 of 2012; [2013] eKLR - (Explained)
6. *Leting, Charles Kipkoech v Express (K) Ltd & another* Civil Appeal 40 of 2016; [2018] KECA 187 (KLR) - (Mentioned)
7. *Muumbo & another v Muumbo & 2 others* Civil Appeal 373 of 2018; [2022] KECA 568 (KLR) - (Applied)
8. *Njoroge, Ruth Wanjiru v Jemimah Njeri Njoroge & another* Civil Case 330 of 2004; [2004] KEHC 2617 (KLR) - (Explained)
9. *Ogeisia, Jerusa Basweti v Jenifer Nyamoita Achoki & another* Environment & Land Case 98 of 2017; [2018] KEELC 4603 (KLR) - (Explained)
10. *Omoi, Oliver Bonareri & 5 others v Joseph Basweti Orogro* Civil Appeal 110 of 2010; [2010] KEHC 1099 (KLR) - (Explained)
11. *Ondicho, Serebine Moraa & 2 others v Josephat Omoi Omboga* Civil Appeal 11 of 2018; [2018] KEHC 6534 (KLR) - (Explained)
12. *Otieno, Virginia Edith Wamboi v Joash Ochieng Ougo & another* Civil Appeal 31 of 1987; [1987] KECA 63 (KLR) - (Explained)
13. *Oyier, Dinah Adhiambo v Hellen Achieng & 3 others* Civil Appeal 14 of 2017; [2017] KEHC 6276 (KLR) - (Followed)
14. *SAN v GW* Civil Appeal 1 of 2020; [2020] KECA 46 (KLR) - (Explained)

#### **Uganda**

*Namusoke Annet Kiwanuka v Eva Amuge and two others* Miscellaneous Cause No 004 of 2023 - (Mentioned)

#### **South Africa**

1. *DM v B2P Funeral Services and others* (2023/071479) [2023] ZAGPJHC 856 - (Explained)
2. *Pilane and Another v Pilane and another* (CCT 46/12) [2013] ZACC 3; 2013 (4) BCLR 431 (CC) - (Explained)
3. *Shilubana and others v Nwamitwa* CCT 03/07 [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) - (Explained)



4. *South Gauteng High Court, Johannesburg in Sengadi v Tsambo* (40344/2018) [2018] ZAGPJHC 613; 2019 (4) SA 50 (GJ) (3 November 2018) - (Explained)

#### **United Kingdom**

1. *Borrows v HM Coroner for Preston and another* [2008] EWHC 1387 (QB) - (Explained)
2. *Doodeward v Spence* [1908] HCA 45 -6 CLR - (Explained)
3. *Martin v Glywed Distributors Ltd (t/a MBS Fastenings)* 1983 ICR 511 - (Explained)
4. *McGee v Attorney General* [1974] IR 284 - (Explained)

#### **United States**

*Louisville & NR Co v Wilson* 51 SE 24, 25; Ga 1905 - (Explained)

#### **Texts**

1. Kellehear, A., (2002), *Grief and Loss: Past, Present and Future* Medical Journal of Australia 177
2. Wexler, D., Winick, B., (Eds) (1996), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* Durham, North Carolina: Carolina Academic Press
3. Levine, R.A., (1982), *Gusii Funerals: Meaning of life and death on an African Community* Wiley, Vol 10, No 1
4. Wagner, JW., (Ed) (1999), *Death, Dying, and Burial: Approaches in Religious Law and Practice* The Catholic University of America, Columbus School of Law

#### **Statutes**

##### **Kenya**

1. Constitution of Kenya articles 2(4); 11; 27(3); 32; 44(1); 45 - (Interpreted)
2. Judicature Act (cap 8) section 3(2) - (Interpreted)

#### **Advocates**

None mentioned

## **JUDGMENT**

### **Judgment of Gachoka, JA**

1. Despite no one having personal experience with death, we all know that one day we will all meet our end at some point but how and by whom our corporal remains will be disposed remains unknown to us. In Christian theology, we are told that Jesus of Nazareth, predicted his death, but he did not at any point prophesy that Joseph of Arimathea would inter his body at Golgotha. Fortunately, no burial dispute ensued.
2. In Greek mythology, one of the earliest recorded burial disputes is aptly depicted by Sophocles in his work 'Antigone.' Following the brutal murder of Polyneices, Creon, the King of Thebes, prohibits the burial of Polyneices. Polyneices's sister, Antigone, defies the king and proceeds to bury him. She then declares to her sister, Ismene, that we have only a limited time to please the living, but an eternity to honour the deceased. Abiding by the law of the gods, she defies the human law set by Creon.
3. Burial disputes are therefore far from simplistic. This is because the relatives of the deceased and society ought to participate in the burial rites to contemplate their mortality on earth. As a plethora of cases all over the world have demonstrated, these disputes have been with us throughout history and unless death abandons humankind (for we cannot abandon death), they will continue being part of matters that courtroom Daniels are called upon to decide upon.
4. Probably, it is time we put the law on burial disputes to rest but this is easier said than done as humanity is not homogenous; every society has its own burial beliefs, rites, and customs. As if those customs



are not enough, the religious beliefs and the interplay with the customs and the question which takes priority over the other only make the disputes even more complicated. To cap it all, constitutionalism has grown over the centuries with the resultant clash between some customary rites and the rights of individuals. Thus, decisions made regarding the disposal of a body are complex to decide upon and difficult to undo as human nature frowns on disturbing the remains of the deceased.

5. It is also apt to note that burial disputes are also prevalent in the developed world. In *Louisville & NR Co v Wilson*, 51 SE 24, 25; Ga. 1905, the US Supreme Court of Georgia expressed itself on the necessity of setting guidelines on how we lay the departed. The court noted that:

“And the law, in its all-sufficiency, must furnish some rule, by legislative enactment or analogy, or based on some sound legal principle, by which to determine between the living questions of the disposition of the dead and rights surrounding their bodies. In doing this the courts will not close their eyes to the customs and necessities of civilization in dealing with the dead and those sentiments connected with decently disposing of the remains of the departed which furnish one ground of...”

6. Turning to the burial dispute that is before us, this is a second appeal from the judgment of the High Court (EK Ogola J) involving the remains of Naftali Onderi Ontweka, who in his lifetime was a senior public servant. The term ‘rest in peace’ in burial nomenclature connotes that once a deceased joins the afterlife, his or her remains are interred as soon as possible subject to religious and/or customary burial rites in the hope the departed’s soul finds peace after death. However, Naftali Onderi Ontweka, the main character in this burial dispute, who died on 19 April 2023 has not enjoyed that peace. As soon as he died two factions of his family could not agree on his place of burial and his body still lies in the mortuary.
7. By way of background, the late Naftali Onderi Ontweka celebrated his nuptials with Zipporah Masese Ondieki, the respondent herein, in 1980 under Gusii Customary Law. Following their union, the couple was blessed with four issues namely Boniface Gwaka Onderi (1982), Haron Okindo Ondieki (1984), Denver Mochama Onderi (1985) and Batsheba Osebe Onderi (1987), constituting the highest degree of consanguinity. The appellants are his brothers. Palpably, this burial dispute is a legal tussle between the wife of the deceased and his brothers.
8. From what we can discern from the record, during his lifetime the deceased constructed a family home situated in Kamulu, Mavoko Town on a parcel of land No LR No Mavoko Town Block 12/221 measuring approximately 5 acres which he purchased on 13<sup>th</sup> September, 2005. The respondent, the wife, wants him buried there. The deceased also had a home in Kiango, Kisii County, where the appellants, his brothers, want him buried, and another home in Kileleshwa in Nairobi County. He was also building another home in Iyenga, in Kisii County on a property measuring 3 acres.
9. As fate would have it, the deceased fell ill and received treatment at Nairobi Hospital. Regrettably, the deceased succumbed to death on 19 April 2023. His body was then transferred to Lee Funeral Home. An obituary in the local dailies on 30 April 2023 informed members of the general public that the deceased would be buried on 5 May 2023. The place of burial was not disclosed.
10. The record shows that the 4<sup>th</sup> appellant procured a burial permit intending to transport the deceased’s remains to Kiango, Kisii County. As a result, the respondent filed a plaint in Nairobi CMCC No E1878 of 2023; *Zipporah Masese Onderi v Joseph Ontweka & 3 others*, which was amended on 4 May 2023. She prayed for an order of permanent injunction against the appellants restraining them from interfering, removing, interring, transferring, or burying the deceased’s remains in Kisii County and further that the deceased’s remains be released for burial at Kamulu.



11. At the trial court, the respondent accused the appellants of dividing the family by making decisions contrary to the wishes of the deceased and refusing to surrender the burial permit to her. She further averred that since she ranked highest in priority together with her children, they were automatically entitled to decide where to bury the deceased. In her view, the matrimonial home was the best place to bury the deceased as she would take care of the grave.
12. The appellants denied the averments set out in the amended plaint. Filing a defence and counterclaim dated 5 May 2023, they avowed that since the deceased and his family subscribed to Gusii Customary Law, he ought to be buried based on those cultural rites by his brothers. To the appellants, irrespective of where he acquired properties across the country, the burial rites under Gusii Customary Law ranked highest.
13. In the said counterclaim, the appellants urged the trial court to dismiss the respondent's suit and further prayed that the deceased body be released to the 4<sup>th</sup> appellant for burial at Kiango Bomachoge Borabu Kisii County following the Gusii customary law.
14. In its judgment delivered on 5 June 2023, the trial court found that the deceased never professed the Christian faith, despite his baptism; that he never divorced himself from his patrilineal Gusii traditions taking note of the fact that he married the respondent under Gusii Customary Law; named his children in that law; accepted his role as chairman of the Mugunde family; and wasn't a member or affiliated to any church. The trial court opined that the deceased and respondent subscribed to the Gusii Customary Law which remained applicable to the fact and circumstances of this case by dint of section 3(2) of the *Judicature Act*. The trial court fortified its findings by relying on the case of *Jerusa Basweti Ogeisia v Jenifer Nyamoita Achoki & another* [2018] eKLR and *Serebina Moraa Ondicho v Samuel Opande Omboga & 2 others* [2018] eKLR. The trial court also relied on this court's decision in *Virginia Edith Wamboi Otieno v Joash Ochieng' Ougo & another* [1987] eKLR that held as follows:

“... there is no way in which an African citizen of Kenya can divest himself of the association with the tribe of his father if these customs are patrilineal.”
15. Continuing, the trial court found that the deceased never wished to be buried in Kamulu, contrary to the respondent's assertions. The court further held that the evidence of PW2 (his son) controverted the respondent's evidence when he stated that the deceased never expressed any wishes as to where he wanted to be buried. For the above reasons, the trial court held that the deceased ought to be buried in Kiango, Kisii County in light of article 44(1) of the *Constitution*.
16. While acknowledging that the respondent, as the deceased's spouse, ranked in priority in terms of the right to bury the deceased based on their closeness during his lifetime as held by this court in *SAN v GW* [2020] eKLR, the trial magistrate held that the right to bury was not an issue for determination. Instead, the place of burial was the cornerstone of the dispute. That in fact, no bar had been placed by the appellants to deter the respondent from participating in the burial ceremony.
17. For those reasons, the trial court dismissed the plaintiff's suit and allowed the counterclaim with each party being directed to bear their costs.
18. Aggrieved by those findings, the respondent filed a notice of appeal on 12 July 2023 in High Court Family Division, Nairobi. As the first appellate court, the High Court was duty bound to re-evaluate and re-analyze the evidence on record while bearing in mind that it did not have the benefit of seeing the demeanour of the witnesses.



19. The appeal was heard based on the parties' rival written submissions. Upon considering the arguments and the evidence on record at trial, the High Court framed the issues for determination, which can be summarized as follows: who had the right to bury the deceased? did the trial court consider the wishes of the deceased of where he was to be buried? which was the right place where the deceased ought to be buried? and whether the counterclaim was incurably defective for want of a verifying affidavit.
20. On the first issue for determination, the High Court noted that the parties in the dispute were relatives of the deceased and that they were entitled to bury the deceased. The High Court held that there is no property in a dead person but observed that most African communities show respect by honouring their wishes. For those reasons, the High Court upheld the trial court's findings that the right to bury was not an issue for determination.
21. As to where the deceased wished to be buried, the High Court deduced from the evidence of the appellants, the respondent, and their witnesses that it was unclear and difficult to arrive at an unwavering conclusion that the deceased wished to be buried in Kamulu or Kiango. Therefore, the High Court noted that the main issue for determination was the place where the deceased was to be buried.
22. In deciding that, question the learned Judge noted as follows:

“From what the parties are saying about the deceased, he seemed to have been an esteemed member of the society who had almost everything figured out. It is highly unlikely that he would have been confused on his resting place; he seems to have been someone who would know that giving such contradictory statements would bring conflict to the family. In this regard, I find that the deceased had not declared his wish as to his final resting place as no evidence has been provided by any of the parties to prove the same.”
23. Continuing, the learned Judge, invoked section 3(2) of the *Judicature Act* qualifying that customary law remained applicable according to substantial justice and cited the cases of *Dinah Odhiambo Oyier v Hellen Achieng' & 3 others* [2017] eKLR, *Virginia Edith Wamboi Otieno v Joash Ochieng' Ougo and another* (*supra*) and *Sakina Sote Kaitany v Mary Wamaitba* [1995] eKLR.
24. The learned Judge then went ahead to codify burial disputes under Gusii Customary Law by relying on the authority of *Oliver Bonareri Omoi & 5 others v Joseph Basweti Orogro* [2010] eKLR where Maraga J (as he then was) held as follows:

“Does Kisii customary law provide for burial disputes like the one in this case? Yes, it does. Under Kisii customary law, the widow or widower has a right to bury his or her deceased spouse. It follows that the respondent in this case has a right to bury the deceased. That right is, however, not absolute. The deceased's view as to where and who should bury his or her body as well as other circumstances do in most cases override that right.

It is common knowledge and I take judicial notice of the fact that a reasonable fraction of Kisiis have moved out of Gusii land and settled in other parts of the country. Except in cases of ownership disputes, nearly all of them are buried in their new acquired home when they die.”
25. Also citing this court's decision in *SAN v GW* (*supra*) the learned Judge set aside the judgment of the trial court and ordered that the deceased be buried in his Kamulu home and that the appellants were



free to participate. He also ordered that the Gusii Customary Law be observed and expressed himself as follows:

“The nuclear family is the basic unit of the family which is recognized and protected by the state. The core and basic unit of a family is the nuclear family; this means that the basic unit of the family has rights that should be recognized and upheld by the state. In this case, the appellant’s family, being the basic unit and the nuclear family of the deceased, has the right to bury the deceased unless exceptional circumstances arise as to render the nuclear family undeserving of burying the deceased. With that in mind, I declare that the appellant has the right to bury the deceased.”

26. Aggrieved by that judgment the appellants filed a notice of appeal on 6 July 2023 and the memorandum of appeal dated 24 August 2023 before this court. The appellants raised ten grounds impugning the findings of the High Court which can be recapitulated as follows: that the learned judge failed to properly analyse the appellants’ evidence on record and in particular that the deceased wished to be buried at his ancestral home in Kiango where he built a home and was crowned a Gusii leader; that the judge failed to properly apply the deceased’s personal law, being Gusii customary law; that the court improperly determined who had the right to bury when it was not an issue before the trial court; that the court relied on extraneous issues when it stated that the Gusii moved from Kisii and Nyamira counties to other counties within the republic of Kenya; and that the judge misapplied article 45 of the *Constitution* to hold that the deceased’s nuclear family was entitled to bury the deceased. For those reasons, the appellants prayed that their appeal be allowed by setting aside the judgment of the high court.
27. The appeal was disposed of by way of written submissions that were orally highlighted during the hearing of this appeal. The appellants relied on their joint written submissions dated 1 September 2023. Relying on the evidence of PW1 and PW2, the appellants submitted that the deceased during his lifetime, practiced Gusii customary law and built a home in Kiango, Kisii County. They submitted that according to PW2, the deceased did not express any wishes to be buried in Kamulu and that burying him in Kamulu would go against his wishes and the Gusii customary law.
28. Relying on the appellants’ witness accounts, coupled with the findings of the trial court and the High Court, the appellants concluded that the deceased never divorced himself from his personal law being the Gusii customary law which is evident by building a home in Kiango in accordance with custom and tradition, constructing a new home in Iyenga, being a chairman of the Mugunde clan, being in close contact with the people of Kisii and having offered himself for a political seat in Kisii in the 2022 general elections. As such, he desired that his resting place to be in Kisii.
29. The appellants then submitted that the High Court misdirected itself when it placed peripheral matters to explain the origins and exodus of the Gusii people. In their view, those were issues not canvassed at trial and as such, ought not to have formulated a basis for determination as done by the high court. For that reason, the high court arrived at an erroneous decision.
30. While acknowledging that the respondent had the right to bury and thus not an issue for determination, the appellants contended that the deceased ought to be buried in Kisii. It was submitted that indeed the respondent was free to participate in the funeral arrangements of the deceased.
31. In fortifying their arguments, the appellants cited the following decisions: *Oliver Bonareri Omoi & 5 others v Joseph Basweti Orogoo (supra)*, *Virginia Edith Wambui Otieno v Joash Ochieng’ Ougo & another* [1987] eKLR and *Re burial of Musa Magodo Keya (deceased)* [2021] eKLR. They prayed that the appeal be allowed.



32. The respondent relied on her written submissions dated 15 September 2023 to argue that article 27(3) of the *Constitution* should not be curtailed as her rights to bury her husband remained superior. It was her further submission that the testimonies of DW1, DW2, DW3 and DW7 indeed demonstrated a violation of that protected right.
33. The respondent submitted that contrary to the appellants' assertions, the High Court applied personal law and did so properly. Indeed, the court directed that the burial conforms to the deceased' personal law, being Gusii Customary Law. The respondent further submitted that the court acknowledged that the deceased could be buried either in Kamulu or Kiango since both houses were erected with two accessible doors. For this, she relied on *Muumbo & another v Muumbo & 2 others* (Civil Appeal 373 of 2018) [2022] KECA 568 (KLR).
34. The respondent faulted the appellants for failing to call a customary law expert to the stand. Relying on the case of *Sakina Sote Kaitany & another v Mary Wamaitba* [1995] eKLR and PW2's testimony, she submitted that the deceased wished, not as of custom, to be buried in Kamulu. She added that nothing was advanced by the appellants to demonstrate that the deceased was customarily required to be buried in Kisii. She cited Robert A Levine "*Gusii Funerals: Meaning of life and death on an African Community*" and *Jerusha Basweti Ogeisia v Jeniffer Nyamoita Achoki & another* [2018] eKLR for this presupposition.
35. On whether the High Court relied on extraneous matters to arrive at an unjust conclusion, the respondent submitted the contrary. She pointed out that the High Court's historical abridgment of people of Gusii moving away from Kisii and Nyamira was supported by the evidence of DW1, DW2 and DW3 who testified that the members of the Gusii community have indeed moved, settled and have been buried in several parts of the country.
36. The respondent further submitted that the High Court emphatically stated that the right to bury was not an issue for determination before the trial court. While acceding that the High Court indeed pronounced that she had a right to bury, the respondent deciphered that the finding did not contradict the High Court's earlier pronouncement that the right to bury was not in dispute. She argued that that determination was made to justify a sequential finding. She cited *SAN v GW* (*supra*) as well as other persuasive decisions of the high court for this holding.
37. Finally, the respondent submitted that the appellants improperly accused the first appellate court of failing to take the holistic evidence on record into account. She submitted that the facts in *Virginia Edith Wambui Otieno v Joash Ochieng' Ougo & another* (*supra*) were different and could be distinguished as that case dealt with Luo customary law, whereas in this appeal the deceased had expressed his wish to be buried in Kamulu and had built a house with two doors in line with Gusii Customary Law. In the upshot, she urged that given the holding in *Sarafina Wanjiku Kinyanjui & 5 others v Elizaphason Kinyanjui Mukora* [2013] eKLR, she was entitled to bury the deceased in Kamulu. She urged this court to dismiss the appeal with costs.
38. As a second appellate court, our mandate is strictly confined to matters of law only unless it can be demonstrated 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 *Charles Kipkoeh Leting v Express (K) Ltd & anothe*[2018] eKLR].
39. In the English case of *Martin v Glywed Distributors Ltd (t/a MBS Fastenings)* 1983 ICR 511, 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.

40. In addition, this court in *Kenya Breweries Limited v Godfrey Odoyo* [2010] eKLR (Civil Appeal No 127 of 2007) hastened to observe that failure on the part of the first appellate court to re-evaluate the evidence tendered before the trial court and as a result, arriving at the wrong conclusion, is a point of law.
41. As already observed, burial disputes are emotive, and the court is called upon to balance the clashing interests of parties who should ordinarily be involved in the burial in one way or another. Unlike many other civil disputes, burial issues concern people who are close to the deceased in one way or the other. Consequently, this court desires to find some sense of legal and constitutional harmony by overcoming the dichotomies that seem to make burial dispute jurisprudence disarrayed. As stated by Allan Kellehear in *'Grief and Loss: Past, Present and Future'* (2002) 177 Medical Journal of Australia 177, physical, spiritual and intellectual experiences of grief and bereavement cannot be understood in isolation, but only in the context of social norms, personal styles and cultural prescriptions.
42. Looking at the grounds of appeal, it is clear that they all revolve around one issue; Whether the High Court as the first appellate properly re-analysed and reassessed the evidence that was adduced in the trial court in holding that the deceased was to be buried in Kamulu, Mavoko Town and whether the learned Judge reached the right conclusion.
43. In burial disputes, we can only call our constitution a living constitution if it also considers the customs that communities regard as crucial in death rites but only to the extent that the death rites also promote constitutionalism. In the same breath, we can only call our customary practices progressive customs if they promote the burial wishes of the deceased that do not flout constitutional order.
44. First, I consider the place of the wishes of the deceased in burial disputes. This court has stated in *Apeli v Buluku* [1980] eKLR that:

“It is trite law that there cannot be property in a dead body and a person cannot dispose his body by will, but it should be noted that courts have long held that the wishes of the deceased, though not binding must so far as practicable be given effect, so long the same is not contrary to the general law or policy.”
45. While this position has been law for a long-time developing jurisprudence in Australia and the United States of America have held that a corpse could constitute property. For instance, in *Doodeward v Spence* [1908] HCA 45 -6 CLR 406, the court held in a matter involving the ownership of ashes from cremation held that:

“... when a person has by the lawful exercise of work or skill so dealt with a human body ... that it has acquired some attributes differentiating it from a mere corpse awaiting burial.”
46. However, I defer the debate for any future court that may have the benefit of a dispute that may require that questions on posthumous autonomy be answered. In this decision, I proceed on the common law premise that a corpse does not constitute property.
47. The wishes of a deceased, therefore, may be disregarded if they are contrary to the *Constitution* or the customary practices of the particular community.
48. I take this approach in deciding that the deceased wishes are subsidiary to the other considerations because no one may be harmed by the failure to enforce such wishes. Indeed, St Augustine as



paraphrased by C Gittings in *Death, Burial and the Individual in Early Modern England* stated that funerary rites provide comfort to the living rather than the dead.

49. *The South Gauteng High Court, Johannesburg in Sengadi v Tsambo; In Re: Tsambo* (40344/2018) [2018] ZAGPJHC 666; [2019] 1 All SA 569 dismissed the wishes of a deceased and customary law that sought to have the deceased's widow bury the deceased. The deceased was a public figure of national importance and was to be accorded a civil burial by the provincial Government of the North West. The court stated that:

“The court was obliged to exercise a practical common-sense approach which prompted the court to subsume the legitimate burial rights of the applicant as the customary law wife of the deceased to the greater equally competing rights of the public interests, and the deceased's family rights more especially where the deceased's body was lying in the state in Mahikeng...”

50. Secondly, I consider the interest of the parties claiming to have a right to inter the remains of the deceased. Burial disputes are complicated by the ‘no property’ rule, which prohibits individuals from leaving binding burial instructions.
51. Noting that there is no property in a body, any person may come forward and claim to have the right to perform the burial rites. I am also aware that our legal system does not have a hierarchy of identifying who has the most legitimate interest in a burial dispute. The courts have discerned the interests of the parties from their legal proximity.
52. In *Ruth Wanjiru Njoroge v Jeremiah Njeri Njoroge & another* (2004) eKLR, the court expressed itself as such:

“the person who is first in line of duty in relation to the burial of any deceased person is the one who is closest to the deceased in legal terms and as the marital union is the closest chain of relationship touching on the deceased therefor, it is only natural that the one who can prove this fundamental proximity to the deceased, has the right of burial ahead of any other claimant...”

53. An array of burial disputes in Kenya usually pits the closest relatives of the deceased with a spouse. Despite proof of a close legal relationship between parties, there may arise special circumstances weighing in favour of varying the order of priority.
54. Sometimes, either the spouse is close or absent during the life of the deceased and in some instances, it is the close family relatives of the deceased. Sometimes while parties may prove to have the most proximate legal relationship, they may fail to prove that they have the most proximate familial bonds. Sometimes, a party may not be able to conduct a befitting send-off due to the vagaries of life.
55. In *Borrows v HM Coroner for Preston and another* [2008] EWHC 1387 (QB), the court denied the deceased the right to bury her son because she was addicted to heroin despite ranking first in the order of priority. The court held that:

“Whatever her good intentions, which she expressed in her evidence, I do not doubt that as a result of this addiction she is incapable of handling the funeral arrangements. Her sister, Mrs Jones, obviously from her evidence a capable woman, conceded that. Mrs Jones would be able to carry out the funeral arrangements, as she said she would, but she has no independent claim to do...”



56. Thirdly, another important factor in burial disputes concerns the religious and cultural practices of a deceased. *William J Wagner in 'Death, Dying, and Burial: Approaches in Religious Law and Practice'* (1999) 59, discusses the importance of religious and cultural practices on the burial of a deceased. He states that:
- “Religious and cultural beliefs often lead family members to take a particular view of what should happen to the body on death...”
57. Here in Kenya, article 11 of the *Constitution* recognizes culture as “... the foundation of the nation and as the cumulative civilization of the Kenyan people and nation...” Further article 32 of the *Constitution* provides that every person has the right to freedom of conscience, religion, thought, belief, and opinion. The cultural and religious practices of the various communities and people in Kenya are therefore to be promoted if they are consonant with constitutional principles.
58. In instances where the customs and religious practices form part and parcel of the factual basis of a burial dispute, the same ought to be considered to the extent that they are not contrary to the *Constitution* and other laws. However, they do not automatically attain a higher place than the burial right of the person with the most proximate legal and familial bonds with the deceased.
59. The elephant in the room is who has the right to bury the deceased and in which place? No case is on all fours with another, and each case is determined by the particular circumstances and the evidence that is adduced at the trial. In this appeal, we have a deceased who constructed two houses in two different places and the evidence on record shows that both had two doors in line with the Gusii Customary Law.
60. The place of burial has been discussed by the persuasive decision of the High Court sitting in Uganda in *Namusoke Annet Kiwanuka v Eva Amuge and two others* Miscellaneous Cause No 004 of 2023 as that which is: “to be closely linked to three things: the person’s wishes, the duty imposed on those closely related to the deceased during his lifetime to bury him and whether the deceased had established a home. Additionally, the custom to which the deceased is subject comes into play.”
61. I agree with the High Court that the interest of the nuclear family ought to be respected. I disapprove of customary edicts that supersede the natural and paramount unit of society, safeguarded under article 45 of the *Constitution*. Without family, there cannot be customs and social norms.
62. There must be a good reason why the *Constitution* embodies the family as the natural and fundamental unit of society and the necessary basis of social order. Indeed, the connotation of the family as a “natural” unit of society finds its basis in the philosophical and jurisprudential school of natural law as espoused by John Locke and other philosophers. As Locke put it, natural law is law before the existence of society and therefore a deviation from it in preference for legal positivism would not auger well with society.
63. In *McGee v Attorney General* [1974] IR 284 Walsh J noted that:
- “the State recognizes the family as the natural primary and fundamental unit group of society possessing inalienable rights antecedent to all positive law, and the State guarantees to protect its constitution and authority”
64. Hence, without family, there cannot be customs and social norms. And as are families, so are societies and so are a people and so is a state.
65. However, a court may consider exceptions where a deceased is a known cultural leader in a community and his figure extends past the family to a communal group. And that is one of the reasons the



Constitution acknowledges culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation. There are indeed men and women who went before us whom by their way of life on this earth were as important to family as they were to their cultural groups.

66. In this appeal, the High Court rightly observed that none of the parties was able to prove the wishes of the deceased and I also agree that the trial court misunderstood the evidence of PW2 that the deceased wished to be buried in Kiango, Kisii County. A scrutiny of the evidence in the trial court shows that no expert in Gusii Customary Law was called by the appellants. Further, the appellants' witnesses who were brothers to the deceased agreed in their evidence that over time people of Kisii origin have migrated to other places and have been buried where they put up their homes.
67. The place of customary law in our jurisdiction cannot be ignored. However, it must always be remembered that article 2(4) of the Constitution which provides that any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid. Section 3 (2) of the Judicature Act further underscores the applicability of Customary Law in Kenya stating thus:

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

68. In applying customary law, we must appreciate and recognize the living nature of customary law. This was the holding of the South African Constitutional Court in Pilane & another v Pilane & another (CCT 46/12) [2013] ZACC 3; 2013 (4) BCLR 431 (CC) which held as follows:

“The true nature of customary law is as a living body of law, active and dynamic, with an inherent capacity to evolve in keeping with the changing lives of the people whom it governs... Our history, however, is replete with instances in which customary law was not given the necessary space to evolve, but was instead fossilised and “stone-walled” through codification, which distorted its mutable nature and subverted its operation. the Constitution is designed to reverse this trend and to facilitate the preservation and evolution of customary law as a legal system that conforms with its provisions.”

69. Similarly, the same court in Shilubana and others v Nwamitwa (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) held as follows:

“Customary law must be permitted to develop, and the enquiry must be rooted in the contemporary practice of the community in question. Section 211(2) of the Constitution requires this. The legal status of customary law norms cannot depend simply on their having been consistently applied in the past, because that is a test which any new development must necessarily fail. Development implies some departure from past practice. A rule that requires absolute consistency with past practice before a court will recognise the existence of a customary norm would therefore prevent the recognition of new developments as customary law. This would result in the courts applying laws which communities themselves no longer follow, and would stifle the recognition of the new rules adopted by the communities in response to the changing face of South African society. This result would be contrary to the Constitution and cannot be accepted.”



70. Undeniably, the *Constitution* recognizes that customary law is applicable in instances where one or more of the persons is subject to or affected by it. However, there is a rider that the customary law should not be repugnant to justice, morality, or any written law. This means that a person who wishes to rely on a custom must adduce evidence to show how the parties are affected and its applicability. Society is dynamic a mere statement that one belongs to this or that tribe is not enough especially in a case like this where there are conflicting positions.

71. In the circumstances of this appeal, I do not agree with the appellants that the High Court disregarded the Gusii Customary Law. The learned judge relied on the evidence that was presented in the trial court and rightly concluded the only issue that the parties seriously disagreed with was the place where the burial would take place. The learned judge observed that the deceased had two homes that were constructed in accordance with Gusii Customary Law, and he properly directed that the customary law was to be observed. In my view, I find that the learned judge was merely restating and emphasizing the respondent's rank in priority as to the right to bury which right has been pronounced as emphatic by this court in *SAN v GW* (*supra*) where the court held as follows:

“... 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.”

72. I dare add that this order of priority is unwittingly proximate to the order of priority for the inheritance of the estate of an intestate under the *Law of Succession Act*. Whereas a burial dispute is not a succession dispute, the people closest to the deceased will oftentimes be the spouse, parents, siblings, and members of the clan. In determining the order of priority, the court will upon considering the evidence, weigh all the issues on the constitutional scale of justice.

73. As stated, ultimately, the deceased is to be buried following the Gusii Customary Law. No party called an expert witness to demonstrate the cultural burial rites of the Gusii people. I am aware of the fact that sometimes in burial disputes ascertaining what constitutes customary law is not at all straightforward. The South Gauteng High Court, Johannesburg in *DM v B2P Funeral Services & others* (2023/071479) [2023] ZAGPJHC 856 noted that:

“In the context of burial litigation, however, there are real problems with ascertaining what customary law is in any particular case, since the content of that law will generally have to be proved, sometimes by way of oral evidence. That sort of evidence is unlikely to make its way before a court in an urgent application, which is the type of proceeding in which the right to bury is most often contested.”

74. I will thus borrow expert wisdom from articles and cases with similar facts. Robert A Levine in his article titled *“Gusii Funerals: Meaning of Life and Death on an African Community”* notes as follows:

“... In 1974 a Gusii schoolteacher who lived in town decided to build his house in the rural area on a pleasantly situated spot within the paternal homestead. When his blind grandfather, who was head of the homestead, heard where the house had been built, he called in his grandson and told him that the spot was not a suitable house site because the ground there was solid rock and would not permit the digging of a grave in which he could be properly buried. Another house was thereupon erected on a site with softer earth... Gusii funerals take place at the home of the deceased. Each action, from dying to posthumous sacrifice has a customary location regarded by Gusii 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...”

75. He then observes:

“...One of the most interesting aspects of these spatial rules is the necessity that each adult have a unique location at burial, one that is not shared with any other adult of the same sex. Hence each man must have a house that was built for him and each woman a house in which she has cooked as his wife; no other available house in the homestead can serve as a substitute point of reference for their graves. The individual identity of the adult is at stake here. No matter how much emphasis there is on the corporate identity of the homestead and the generational continuity of the lineage in other parts of the funeral, each person who has reached maturity is entitled to a unique house-burial site as a minimal marker of individuality... informants emphasized the need to smooth down the earth after burial so that its location would be invisible to the witches, who are believed to exhume corpses and eat them. Thus the house is at the time of death and thereafter the only visible marker of the deceased as an individual. For the Gusii, whose bodies are literally incorporated at death into their homesteads and who see their descendants as their primary evidence of having lived, the house is an indispensable symbol of personal identity as an adult individual at the time of interment...”

76. From the above excerpt, I understand it to mean that the people of Gusii are buried where they set up their homestead. It need not be their paternal homestead but where they have built a home. Furthermore, it is conducted in the place where the deceased spent a considerable amount of time during his lifetime. Thus, contrary to the appellant’s lamentations, the High Court did not rely on extraneous matters when it explicitly demonstrated the exodus of the people of Gusii moving away from Kisii and Nyamira. That analysis was corroborated by the evidence of DW1, DW2 and DW3 who testified that the members of the Gusii community have indeed moved, settled and have been buried in several parts of the county.

77. From the evidence, the deceased built a home in Kamulu which was the matrimonial home and another in Kisii. Both houses were constructed with two doors. Critically, the uncontroverted evidence of PW2 disclosed that the deceased’s house in Kisii was in a bad state and as such had no intention of living in the said house. Similarly, it was also established that the house in Kamulu was the deceased’s matrimonial home where his relatives visited for celebratory events with the deceased before his death. From the evidence on record, we do not agree with the appellants that the High Court erred in ordering that the deceased be buried in Kamulu.

78. Before rendering the final orders of this court, I wish to emphasize the importance of judicial officers inculcating therapeutic jurisprudence in determining burial disputes. I quote, David Wexler and Bruce Winick’s, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* Carolina Academic Press, Durham, North Carolina (1996) where they opine that:

“The central insight of therapeutic jurisprudence is the realisation that the law itself can function as a therapeutic or antitherapeutic agent. Legal rules, legal procedures and the roles of legal actors constitute social forces that may impact on the psychological well-being of those caught up by it...”



79. Burial disputes are emotive and whatever the outcome, some will be left in tears. This means that the words and phrases employed in the resolution of the dispute should be sensitive to the mental and physical health of the parties involved in the burial dispute. The faction of the law considers humanness as a crucial ingredient in the crucible of justice and therefore it ought to be factored in the process of judgment-making. Nevertheless, this does not involve shelving away the tenets of due process and adherence to judicial impartiality nor does it mean the substitution of therapy with sound judicial reasoning.
80. I wish to seek solace in the words of Doyle CJ in *Dodd v Jones* [1999] SASC 458 [36] when he stated that:
- “The problem before me is really insoluble ... It is impossible ... to weigh the competing claims and arrive at what one would truly call a legal judgment. I understand and respect the wishes and beliefs of [the parties]. There is no solution ... that will satisfy each side. I can only make a decision and indicate my regret that it will cause pain to the unsuccessful party...”
81. In the circumstances, and upon a consideration of the arguments presented by the parties it is my finding that the judgment of the High Court is sound, and I agree with it wholly. I further note that the learned judge allowed appellants the right to participate in the burial and perform the rituals under the Gusii Customary Law.
82. Accordingly, whereas the appellants may understandably be aggrieved and emotionally drained, the law is not on their side. It is my finding that this appeal lacks merit, and it is hereby dismissed in its entirety. I uphold the judgment of the High Court and the order that the remains of the deceased will be buried on the parcel of land No Block 12/221, Mavoko Town. For the avoidance of doubt, the body of the deceased shall be released to Zipporah Masese Ondieki, the respondent. The appellants are at liberty to attend burial and perform the Gusii customary rites.
83. As regards the costs, I note that this is a family dispute and therefore order each party to bear their costs. The costs of the mortuary shall be shared between the two parties as ordered by the High Court.

### **Judgment of Tuiyott, JA**

84. I have read the careful and detailed draft judgment of my brother Gachoka, JA, with which I readily agree. In it, my learned Brother aptly recounts a Greek mythology. Just as Antigone had explained her defiance of the King, the proposed outcome of the draft judgment, while displeasing some of the living, brings honour to Naftali Onderi Ontweka, the Deceased herein.
85. In the end, and as Achode, JA is in agreement, this appeal be and is hereby disposed of in the terms proposed by Gachoka, JA.
86. Orders accordingly.

### **Judgment of L Achode, JA**

87. I have had the advantage of reading in draft the judgment of Hon Gachoka, JA. I am in full agreement with his reasoning and conclusions and, therefore have nothing useful to add.

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JANUARY 2024.**

**M. GACHOKA CIArb, FCIArb**

.....



**JUDGE OF APPEAL**

**F. TUIYOTT**

.....

**JUDGE OF APPEAL**

**L. ACHODE**

.....

**JUDGE OF APPEAL**

certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**

