Muumbo & another v Muumbo & 2 others (Civil Appeal 373 of 2018) [2022] KECA 568 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KECA 568 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 373 OF 2018

RN NAMBUYE, W KARANJA & MA WARSAME, JJA

APRIL 28, 2022

BETWEEN

BILLY MBUVI MUUMBO ..... 1ST APPELLANT

MWINZI MUUMBO ..... 2ND APPELLANT

AND

JOHNSTONE KASSIM MUUMBO ..... 1ST RESPONDENT

ALEX MUNYASYA MUUMBO ..... 2ND RESPONDENT

CAROLYNE KALUNDE MUUMBO ..... 3RD RESPONDENT

(An appeal from the Judgement and Decree of the High Court of Kenya at Nairobi (M.W. Muigai, J.) delivered on 6th August, 2016 in Nairobi Civil Appeal. No. 7 of 2016)

JUDGMENT

1. This is a second appeal arising from the judgment of the High Court of Kenya at Nairobi, Family Division (M. W. Muigai, J.) dated 6th August, 2018 in HCCA No. 7 of 2016.

2. The background to the appeal is that the deceased Timothy Mwandi Muumbo married Phiatah Kithumbi Muumbo as his first wife on or about 1957 under Akamba Customary Law. They had the following 10 children between them namely; Mwinzi Mwandi Muumbo, Johnstone Kassim Muumbo, Francis Munyoki (deceased), Alex Munyanya Muumbo, Charles Muimi, Caroline Kalunde Muumbo, Grace Kakali, Jackline Muthenya, Susan Kamene and Jane Mwende (deceased). The deceased, his first wife and their children resided in Nzatani Village, Mwingi South District.

3. The deceased and his first wife separated when she discovered that the deceased had in 1971 and without her knowledge and or consent married Josephine Kiloko as his second wife and variously lived with her in Narok, Kakamega and lastly, Kileleshwa, Nairobi, and had 5 children between them namely;

Edward Muumbo (Deceased), Billy Mbuvi Muumbo, George Kenyatta Muumbo, Mark Musembi Muumbo and Andrew Musyoka (deceased).

4. Upon his death on 22nd June, 2015, the respondents instituted Nairobi CMCC No. 3773 of 2015 seeking orders that the deceased be buried in Land Parcel No. Mwingi/Nzeluni/318 (Nzatani) while in their defence and counterclaim the appellants sought for the deceased's body to be buried in Land Parcel Number 1498, Mbakini.

5. Upon a merit hearing, the lower court ruled in favour of the appellants directing that the deceased's body then held at the Lee Funeral Home be interred at Migwani/1498, Mbakani in accordance with the deceased's wishes.

6. Aggrieved, the respondents filed Nairobi HCCA No. 7 of 2017 raising a litany of fifteen (15) grounds. At the conclusion of the hearing of the appeal, the learned Judge analyzed the record and identified six issues for determination namely: is the statutory law and/or customary law applicable in the instant case; what were the deceased's wishes with regard to his burial; what was the deceased's conduct, demeanor and circumstances surrounding the relationships he had with his first and second wives who had predeceased him and their respective children; where shall/should the deceased be buried, by who and how; who will pay/settle outstanding mortuary fees and costs of the appeal; did the trial court err in law and fact as stated in the grounds of appeal in granting the appellants the right to bury the deceased in Mbakini next to his second wife allegedly according to his wishes, and lastly, whether the respondents who were the plaintiffs at the trial were rightly ordered to settle the mortuary fees for allegedly occasioning the proceedings.

7. The Judge reminded herself of the role of a first appellate court as enunciated in the case of *Selle vs. Associated Motor Boat Company Limited* [1986] E.A 123, reviewed what according to the Judge were relevant legal provisions in the discharge of her legal appellate mandate namely, section 78 of the *Civil Procedure Act*, Article 2(4) of *the Constitution* of Kenya, and section 3(2) of the *Judicature Act*, concurred with the position taken by the trial court that there is no statutory law on burial in this jurisdiction and that courts of law in this jurisdiction whenever confronted with burial disputes have hitherto had to depend on case law for guidance, made observations that Article 2(4) of *the Constitution* of Kenya, 2010 recognizes application of African Customary Law where relevant so long as it is not repugnant to *the Constitution*. Considering the above in light of the issues in controversy before the court, the Judge expressed herself thereon as follows:

> " The deceased was of Kamba origin from Akitutu Clan and he practiced Kamba customary law. At some point, he was a patron of the clan. During his lifetime, the Akitutu clan was engaged in reconciliation efforts between the deceased and his family. It is settled law that a dead person is generally buried according to his/her customary practices."

8. Starting with the first issue, the Judge made observation that there was a contested Will in place in which the deceased had allegedly expressed his wish to be buried on land parcel number 1498 Mbakini Farm Migwani where his second wife was buried; that the said will had been subjected to forensic examination by the contesting parties. PW1 John Masinde superintendent of Police from the Directorate of Criminal Investigations, a forensic examiner had testified in court and produced his report to the effect that the signatures on the will were not appended by the deceased who was the author of the known signatures while DW8 Emmanuel Kenga a retired police officer and qualified forensic examiner on the other hand had testified in court and also tendered his report to the effect that the signatures on the will were those of the person whose known signatures had been forwarded to him for comparison purposes. In light of the above highlighted contradictions in the rival forensic

reports, the Judge discounted the said contradictory forensic reports and declined to use these as a basis for determining the ultimate burial place of the deceased.

9. Turning to the evidence, the Judge carried out an in-depth analysis of the rival oral testimonies on the alleged wishes of the deceased with regard to his preferred burial place and expressed herself thereon as follows:

> " The totality of the evidence is that it is one's word against the other on the diverse statements that the deceased is alleged to have said with regard to his wishes and place of burial. Since this Court cannot conclusively determine what the deceased said to who about his wishes, the Court shall rely on Kamba customary law."

10. On the deceased's relationship with his deceased wives, the Judge made observation that there was an apparent existence of acrimony between the deceased's polygamous family. That is why according to the Judge the children had stepped into their deceased mother's shoes and were then fighting over the deceased's remains instead of embracing an amicable solution into the burial dispute.

11. Having discounted evidence on the alleged oral and testamentary wishes of the deceased as to his preferred burial place, the Judge stated explicitly that she had no alternative but to turn to customary law for a solution. The Judge reviewed a text on Kamba Customary Law and a wealth of local jurisprudence on burial disputes both binding and nonbinding. Also taken into consideration was the fact that the deceased's wives predeceased him.

    The contest was therefore between the children of the deceased. Considering these in light of the totality of the evidence assessed, the Judge made observations, inter alia, that: under Kamba Customary Law where a deceased's person's wish on his preferred burial place is not clear or known he may be buried either in the ancestral home or where settled subject to mutual agreement by the family; where a deceased person's wives have predeceased him like in the instant appeal then the mandate to bury the deceased fell on his children; there was no dispute that the deceased's ancestral home duly registered in his name is land parcel number Mwingi/Nzeluni/318; there were also developments on the land namely an incomplete house said to have electricity and ample space, various family members were buried on the said land namely, the deceased's parents, his first wife and two sons one from either deceased wife. In the Judge's opinion, there was sufficient demonstration that the ancestral home would remain open and accessible to the entire family of the deceased.

12. Turning to land parcel number Thitani/Migwani/1498, the Judge made observation that there was sufficient demonstration on the record that the

    land had been purchased for the deceased person's son from his second wife, one, Edward Muumbo who was also deceased. The land was registered in the deceased son's name. According to the Judge, upon the son's death it fell for inheritance by the son's widow and her children notwithstanding that the deceased may undoubtedly have contributed immensely to the developments thereon and that the deceased's second wife was buried on this land. The Judge concluded that being private land it may not be accessible to all the family members of the deceased if the deceased were to be buried there.

13. On the totality of the above assessment and reasoning, the Judge granted an order directing that the deceased's remains be buried in his ancestral home namely, Mwingi/Nzeluni/318, directed Mwinzi Muumbo as the first born son of the deceased to spearhead the burial in collaboration with family members, the clan and friends at large as more particularly set out in the judgment.

14. Guided by Articles 22(1) & (2) & 48 of *the Constitution* of Kenya, 2010, the Judge ruled that neither the appellants nor respondents before court were to be penalized or condemned to pay mortuary fees and gave directions on how these were to be raised as more particularly set out in the judgment.

15. Not relenting, the appellants are now before this Court on a second appeal raising a litany of twenty-one (21) grounds of appeal, subsequently condensed into five (5) grounds, in the appellant's written submissions dated 26th November, 2019 which we find prudent to rephrase as follows: that the learned Judge erred in law in: condemning them unheard contrary to the principles of natural justice; erroneously finding that the wishes of the deceased as to his preferred burial place could not be ascertained from the evidence tendered; misapprehending the nature of the relationship between the deceased and the rival parties herein vis-à-vis the appellants' rights to bury the deceased; erroneously finding that Thitani/Migwani/ 1498 would not be accessible to the larger deceased's family hence introducing new issues not pleaded nor alluded to in the lower court; and lastly, failing to take into account the diverse Kamba customs with regard to burial.

16. The appeal was canvassed virtually through the respective parties written submissions dated 26th November, 2019 and 4th October, 2021 respectively and the respondents' notice of preliminary objection dated 27th January, 2020, fully adopted by learned counsel for the respective parties herein with oral highlighting. Learned counsel, Ms. Ann Githogori, appeared for the appellant while learned counsel Ms. Mary Muigai appeared for the respondent.

17. Supporting the appeal on issue (a), the appellants rely on the case of: *Maina vs. Mugiria* [1983] KLR 78, *Kenya Breweries Limited vs. Godfrey Odongo* Civil Appeal No. 127 of 2007 and Stanley N. Muriithi & Another vs. Bernard Munene Ithiga [2016] eKLR all on the mandate of this Court on a second appeal and invite this Court to consider the record holistically and find that the learned Judge condemned them unheard contrary to the rules of natural justice.

18. On issue (b), the appellants rely on the holdings/propositions in the following authorities: *Apel vs. Buluku* [2008] 1 KLR (G & F) 873, that

> " the wishes of the deceased, though not binding must be so far as practicable be given effect, so long as the same is not contrary to customs nor contrary to the general law or policy"; Jacob Blasto Okumu & 4 Others vs. Claris Auma [2014] eKLR, that "the only time that a court will not enforce the wishes of the deceased is where such wishes are clearly offensive, illegal or unenforceable"; and lastly, Virginia Wamboi Otieno vs. Ochieng Ougo & Omolo Sirangi [1982 – 88] 1 KAR 1049 on the prerequisites for applying customary law in a burial dispute and submit that according to them, evidence tendered before court and which was easily discernible from the record, on the deceased's wishes with regard to his preferred burial place and which they contend the learned Judge was explicit that the deceased wished to be buried at Mbakini.

19. On issue (c) the appellants rely on the case of *Edwin Otieno Ombajo vs. Martin Odera Okumu* [1996] eKLR and submit that had the learned Judge applied the correct test as enunciated in the above case as to which set of the deceased's children should be mandated to bury his remains she would have arrived at the only and one conclusion, namely, that it is the appellants who were closest to the deceased and who were, therefore, the only ones who were eligible to be vested with the mandate to bury his remains at Mbakini especially when it had been demonstrated sufficiently that the relationship between the deceased and the respondents was acrimonious.

20. Supporting issue (d), the appellants submit that the learned Judge's direction that the deceased be buried at Mwingi/Nzeluni/318 because it was accessible to all his family members went contrary to the

respondents' assertions in their pleadings that the reason for their fight to have the deceased's remains buried in the ancestral land and next to his first wife was merely based on culture.

21. Lastly, in supporting the appeal on issue number (e), appellants rely on the decision in Garissa Civil Appeal No. 2 of 2014 *Neema Mulwa vs. Joyce Mwango* and submit that under Akamba Customary Law, it was not mandatory that the deceased be buried in the ancestral land.

22. In opposing the appeal Ms. Mary Muigai firstly, submitted that the appeal offends the mandatory provisions of Section 72 and 79D of the *Civil Procedure Act*. Secondly, that should their above objection not be sustained, then they submit on the merits of the appeal that land parcel number Mwingi/Nzeluni/318 being the ancestral land of the deceased was rightly held by the Judge that the same be the burial place of the deceased as it was accessible to all his children and on that account asked the court to dismiss the appeal as it was not only ill-motivated but also cultivated to enhance selfish wants of the appellants.

23. This is a second appeal. 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 vs. Godfrey Odongo*, Civil Appeal No. 127 of 2007, and Stanley N. Muriithi & Another vs. Bernard Munene Ithiga [2016] eKLR, among numerous others for the holdings/ propositions 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.

24. Having carefully considered the record in light of the rival submissions set out above and the principles of law relied upon by the respective parties herein in support of their opposing positions, the issues that fall for our determination are firstly, whether as contended by the respondents, the appeal before us is incompetent. Secondly, should the preliminary objection fail, then the issues for determination in the disposal of the appeal are as condensed by the appellants in their five grounds of appeal submitted above.

25. The respondents' preliminary objection to the competence or otherwise of the appeal as laid dated 27th January, 2020, are firstly that the appeal offends sections 72 and 79D of the *Civil Procedure Act* (CPA) because according to them all the grounds raised by the appellants in support of the appeal all relate to "errors of facts" and /or raise factual complaints over which this court lacks jurisdiction to entertain. Secondly, the appellants seek to reinstate the judgment of the subordinate court attained and or given without jurisdiction contrary to section 5 of the *CPA*. Thirdly, grounds of appeal as raised and/or framed offend the mandatory prerequisites in Rule 86 of this *Court's Rules*, 2010 as the same are not concise and therefore vague while others are based on matters of fact only.

26. We have considered the above preliminary objection in light of the record as assessed above and our mandate in the case law highlighted above among numerous others. Our take thereon is that apart from objection 3 which was on want of form, objections 1 and 2 touches on our mandate as a second appellate court which we have already set out above and which we shall bear in mind as we proceed to determine the appellants' condensed issues adopted above as issues falling for our determination in the disposal of this appeal. We are alive to the requirement in the exercise of our above stated mandate that we should steer clear of factual basis of the appeal unless these fall within the parameters permissible in law for us to intervene on them. As for the objection on want of form we find this cured by the appellants' action of condensing what they believed were issues for determination by this Court on a second appeal and secondly by us rephrasing the same in the manner set out above. In the result, we are satisfied that the appeal as laid is not incompetent. We shall proceed to pronounce ourselves on the condensed issues on their merits.

27. As we have already highlighted above, the learned Judge rejected evidence on the alleged deceased's wish on his preferred burial place in favour of the Akamba Customary Law. It means that before invoking and applying the Akamba Customary Law as basis for resolving the burial dispute forming the substratum in this appeal, both the Judge on first appeal and now this court on a second appeal were obligated to ensure that the Akamba Customary Law met the threshold for invoking and applying customary law as prescribed. Firstly, in section 3(2) of the *Judicature Act* and subsequently in Article 2(4) of *the Constitution* of Kenya, 2010.

28. We have revisited and construed the above provisions on our own. Our take thereon is that the overriding principle underpinned in the above provisions is that customary law applies where it is neither repugnant to justice and morality by dint of section 3(2) of the *Judicature Act* or repugnant to the spirit of *the Constitution* of Kenya as provided for in Article 2(4) of *the Constitution* of Kenya, 2010. The threshold for proof of a custom or customary law and which we adopt is that set out in section 51 of the *Evidence Act*, Cap 80 Laws of Kenya. It provides:

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(1) When the court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of such custom or right of persons who would be likely to know of its existence if it existed are admissible.

(2) For the purposes of subsection (1) of this section the expression "general custom or right" includes customs or rights common to any considerable class of persons.

29. The High Court decision in the case of *Nyariba Nyankomba v Mary Bonareri Munge* [2010] eKLR expressed itself on this issue as follows:

> " 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".

30. Guided as above on the mode of approach, we now proceed to determine the merits of the appeal. Starting with issue (a), the appellants have complained that they were condemned unheard hence their invitation for us to reevaluate the record holistically and rule in their favour on Akamba Customary Law. They have however not pointed out any specific aspects of the learned Judge's assessment of the record and the attendant reasoning thereto that would bring the Judge's discharge of her mandate as a first appellate court Judge within the exception to the general rule in the exercise of our mandate as a second appellate court namely, only to venture into the factual basis where there is sufficient demonstration that these were either misapprehended or the court misapplied the law to them and therefore the decision arrived at by the first appellate Judge is either erroneous, and or against the weight of the totality of the evidence tendered or is otherwise perverse.

31. As already highlighted above, all that the learned Judge did was to reject evidence on alleged deceased persons wish on his alleged preferred final resting place as tendered by the rival parties herein both orally and through forensic expert witnesses because both sets were contradictory hence the Judge falling on the application of Akamba Customary Law, as proper approach for resolving the burial dispute before her. That being the correct position on the record, we have no basis for delving into the factual base of the appeal.

32. We appreciate as did the learned Judge that in a burial dispute of the nature that the two courts below were confronted with and now this Court on appeal, wishes of a deceased person 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] [*supra*] and *Samuel Mungai Mucheru & 3 Others vs. Ann Nyathira* [2014] eKLR. Herein as we have already stated above at the risk of repeating ourselves, evidence on the wishes of the deceased was contradictory, and which evidence with regard thereto in our view was rightly rejected by the learned Judge. Upon rejecting the rival evidence on the alleged wishes of the deceased, the learned Judge had no other option in the absence of any legislative framework to guide the resolution of the dispute before the court but to fall back on the Akamba Customary Law.

33. The threshold to be applied in resolving a dispute of this nature is that set by this Court when similarly confronted in the case of *Virginia Edith Wamboi Otieno vs. Joash Ochieng Ougo & Another* (No.4), (1987) KLR 407, in which this Court set out guidelines for the determination of an appeal of this nature which we find prudent to rephrase albeit in summary that no matter how highly educated one may be or the lifestyle one leads one cannot divorce himself or herself from the application of customary law to his/her burial should such need arise.

34. See also *Kandie & 2 others v Beatrice Jepkemoi Cherogony* (2002) 2 KLR 613 in which the High Court of Kenya at Eldoret Tunya, J. (as he then was) not only approved but also applied the threshold in the case of *Virginia Edith Wamboi Otieno vs. Joash Ochieng Ougo & Another* [*supra*]. In the said case, the court established firstly that both the deceased and the respondents subscribed to the Tugen customs as to burial. Secondly, that during his lifetime, the deceased had maintained regular contact with his ancestral home where he had even buried his son despite having a large farm at Molo. Taking into account the proven fact that the customary law of the Tugen was that a man must be buried by his father and family members at his ancestral home, and in the absence of any suggestion that such a custom was either inconsistent with any written law or repugnant to justice and morality, ruled that the proper place to bury the deceased therein was at his rural home and in accordance with Tugen Customary Law.

35. In the instant appeal, the learned Judge took into consideration the fact that the deceased was an Akamba belonging to the Akitutu clan. He had at one time been its patron. It has also been involved in his own family reconciliations. We find no basis for faulting the Judge for the reason given in the impugned judgment as reasons for arriving at the conclusion that it was the Akamba Customary Law that was to guide the court in determining the ultimate site for the deceased's burial. We find nothing in the said custom that may be termed as repugnant to justice and morality nor that it offends the spirit of *the Constitution* so far as application of Akamba Customary Law to the issues in controversy herein is concerned.

36. The above finding now leads us to determine who of the two sets of the deceased's children was entitled to spearhead the burial of the deceased. Our take on the *Virginia Edith Wamboi Otieno case* [*supra*], is that customary law only recognizes persons who are closest to the deceased as having the right to bury a deceased person namely, a spouse, children, parents, siblings either alone or in collaboration with each other. The above right is however not automatic. Case law assessed herein demonstrates clearly that a person claiming a right to bury a deceased person must be one who has demonstrated to the satisfaction of the court to have been close to the deceased person during his or her lifetime. See the case of *Samuel Onindo Wambi v COO & Another Kisumu* Civil App. No. 13 of 2011 (2015) eKLR in which this Court expressed itself, inter alia, as follows:

> " ...A person's conduct to a deceased person can extinguish the right of that person of burying the remains of the deceased.
>
> .....

Further that 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".

37. In *James Apeli & Enoka Olasi v Priscilla Buluku* [*supra*] this Court when similarly confronted expressed itself, inter alia as follows:

> " There can be no property in a dead body. A person cannot dispose of his body by will. After death, the custody and possession of the body belong to the executors until it is buried... If the deceased had left directions as to the disposal of his body though these are not legally binding on his personal representative, effect should be given to his wishes as far as that is possible."

That was the same position in *Jacinta Nduku Masai v Leonida Mueni Mutua & 4 Others* [2018] eKLR where it was held 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."

38. The appellants and respondents being children of the deceased, neither had primacy over the other when it came to the determination by the learned Judge as to which set of the deceased's children should have the mandate to bury the deceased as they are deemed to be legally closest to the deceased. In the absence of concrete evidence that the deceased was closer to the appellants than the respondents, we agree with the persuasive judgment of Cherere, J. in *Dinah Odhiambo Oyier v Hellen Achieng & 3 Others* High Court Civil Appeal No. 14 of 2017 [2017] eKLR that where the people who are legally closest to the deceased:

> " have shown that they cannot now agree on that issue, it is desirable and, indeed imperative, in the circumstances of this case for this court to intervene and direct as to the deceased's place of burial."

39. See also Bosire, J's view (as he then was) in *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & Another* Civil Case No. 4873 of 1986

[1987] eKLR where he held that:

> " It is my judgment and so declare that the 1st defendant and also the plaintiff have the right under Luo custom, to bury the deceased and to decide where the burial is to take place. However, because the two have shown that they cannot now agree on that issue, it is desirable and, indeed imperative, in the circumstances of this case for this case, for this court to intervene and direct as to the deceased's place of burial."

40. In light of the above jurisprudential exposition though partially persuasive in nature, the Judge found as a fact and correctly so in our opinion that under the Akamba Customary Law in the absence of a Will or proven deceased person's wish, the mantle falls on the firstborn son of deceased to spearhead the burial of such a deceased person. That is what the Judge ordered. Apart from generally saying that this was contrary to Akamba Customary Law, no alternatives were suggested before us besides that on which the Judge based the conclusion reached above. As for the place of burial, the reasons the learned

Judge gave for settling for the final resting place of the deceased as opposed to that preferred by the appellants were well-founded both in Akamba Customary Law and the facts. They are unassailable.

41. The upshot is that this appeal lacks merit and is accordingly dismissed. In the circumstances of this case, and considering the relationship between the parties herein, there will be no order as to costs of this appeal. In other words, each party will bear own costs.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR