IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OUKO, (P), GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 1 OF 2020

BETWEEN

SAN.....APPELLANT

AND

GW.....RESPONDENT

(Being an appeal from the Judgment of the High Court at Kisumu, (F.A. Ochieng, J.) dated 19th *December, 2019 in Civil Appeal No. 81 of 2019)*

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JUDGMENT OF THE COURT

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 has been held to be the applicable personal law regulating 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. But since customary law exists in almost all ethnic groups in Kenya with a homogeneous value system and the customs vary from one ethnic group to another means that the resolution of burial disputes will depend largely on the peculiar circumstances of each case.

Difficulties are bound to arise where, like this one, the deceased and the parties claiming the right to bury are governed by different customs, with the question being, which custom should be preferred. The **SM** case is also partially a manifestation of this cultural clash or conflict. But the clash is not confined to Kenya.

For instance, in the South Australian case of **Jones vs. Dodd**, [1999] 73 SASR 328 the court determined that the deceased's father had the right to bury the deceased, and not the mother of the deceased's minor children. There were issues around the question whether the deceased had abandoned his Aboriginal cultural beliefs and converted to Christianity. As we have said, the court released the body to the father of the deceased in accordance with Aboriginal tradition. In a unanimous decision, the Supreme Court said:

> **"…. proper respect and decency compel the courts to have some regard to what Martin J [in Calma vs. Sesar] refers to as 'spiritual or cultural values', even if the evidence as to the relevance of such considerations in a particular case may be conflicting"**.

In Kenya, to resolve burial disputes, the courts have variously resorted to customary law, common law, marriage law, succession law, human rights law, land law and other bodies of personal law. Customary law is applied by dint of **Section 3 (2) of the Judicature Act** that provides that:-

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

Because of the state of burial law in the country, the courts have roundly decried the paucity of legislation to codify burial laws. In the **S. M.** case, the Court of Appeal expressed a wish for legislation thus:

> **"It does appear to us that in the course of time Parliament, may have to consider legislating separately for burial matters covering a deceased's wishes and the position of his widow and so enabling courts to deal with cases related to burials expeditiously."**

Scholars too have similarly expressed the same sentiments.

> **"One of the by-products of the so-called S.M Otieno 'burial saga' has been a proliferation of calls for legislation on matters relating to burial in Kenya."**

See Ojwang J. B, Mugambi J. N. K & Aduwo G.O, 1989, pp 116 *'The S.M Otieno Case: Death and Burial in Modern Kenya,'* Nairobi University Press.

> **"Legislation has made massive inroads into areas that were previously within the exclusive domain of African customary norms and regulations. Even in the arena of personal law, legislation has been enacted regarding marriage, divorce, succession etc. Indeed, the only area where there is no legislation at present is burial and it is here that the courts have given African customs a certain supremacy that they do not enjoy anywhere else…"**
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> See Abdullahi A.M, 1999, pp 171 *'Burial Disputes in Modern Kenya; Customary Law in a Judicial Conundrum,'* Faculty of Law, University of Nairobi.

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

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] e KLR and **Samuel Mungai Mucheru & 3 Others vs. Ann Nyathira** [2014] e KRL.

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.

As was observed by the Court in the **SM** case, it is only through legislation that matters such as the deceased's wishes will be given a permanent place in law.

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. 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".**

Having set out the law, we turn to relate them to the facts in the dispute. Even as we do so, we are 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. See **Kenya Breweries Ltd vs. Godfrey Odoyo,** Civil Appeal No. 127 of 2007.

The late SN was married to SAN, the appellant, as his first wife in 1986 and established their matrimonial home in Nyalenda within Kisumu County. In 1990, he married GW, the respondent, as his second wife and they proceeded to settle in Bungoma, where he also set up a home.

Upon his death on 2nd February, 2019, the respondent transferred his remains from Kenyatta National Hospital to Bungoma Sub – County Hospital with the intention to having his remains buried at their matrimonial home in Bungoma on **L.R No. E.BUKUSU/S.KANDUYI/8917**.

The appellant did not approve of this arrangement insisting, for her part, that the deceased could only be buried at their matrimonial home in

Nyalenda for the reason that she was the first wife; and that that home, unlike the Bungoma home, was established in accordance with Luo custom.

The appellant moved to the trial court to challenge the respondent's decision to bury the deceased's remains in Bungoma. She also asked the court to declare her as the person legally entitled to bury the remains of the deceased at their matrimonial home in Nyalenda.

The respondent, on the other hand, maintained that the deceased had not lived with the appellant for over 26 years; that when the deceased was ailing, he expressly made known his wish that he should be buried in Bungoma and had in fact pin-pointed the specific spot where he wished to be rested; that the mother of the deceased, his clansmen and his children were all in agreement that the deceased be buried in Bungoma and that, according to Luo customs, there was no specific requirement that a polygamous man must be buried at the home of his first wife.

The trial court considered the claim by the appellant and respondent and finding no merit, dismissed the appellant's claim.

The High Court (F. Ochieng, J.) agreed and upheld the decision of the trial court, and stated, in part as follows;

> **"49. I have found that the deceased established a home for the Appellant at Nyalenda, Kisumu.**
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> **50. I also find that the deceased established a home, for the Respondent, at Bungoma.**
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> **….**
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> **56. The details of how the Appellant's home was established are almost a replica of how the Respondent's home was established.**
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> **57. Therefore, I find that both the home in Nyalenda and the home in Bungoma were established in accordance with Luo custom.**
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> **58. I also hold that the deceased gave clear and precise instructions concerning his place for burial: he was to be buried a few metres from the mango tree, at his home in Bungoma.**
>
> **…**
>
> **60. I find that the wish of the deceased, to be interred at his home in Bungoma is not contrary to the general law or to the policies applicable in Kenya generally and also applicable to persons who subscribe to Luo customary law.**
>
> **61. There is a precedent that had already been set even within the family of the deceased.**
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> **62. In a nutshell, I find that the judgment rendered by the trial court was properly founded upon a sound analysis of both the evidence on record and also on the applicable law. Therefore, the appeal fails and is dismissed".**

Not relenting, the appellant now comes before us challenging the foregoing conclusions on 4 grounds; that the learned Judge erred in finding: that the evidence on record proved that the deceased had established his home in Bungoma in accordance with Luo customary law; that there is no hard and fast rule of Luo customary law that a polygamous Luo man must be buried outside the house of the first wife; that the deceased gave clear and precise instructions as to his place of burial, and failing to hold that even if such instructions were given, they were contrary to customary law to which the deceased subscribed and were therefore unenforceable; and finally, that the High Court failed to re-analyze and re-evaluate the evidence in its entirety and as a result arrived at a wrong conclusion.

Mr. Otieno, learned counsel for the appellant, submitted that the deceased was a Luo man who subscribed to Luo customary law; and that he built homes for both parties. However, according to counsel, the Judge erred in holding that the Bungoma home was built in accordance with Luo customary law yet the ingredient for establishing home in compliance with Luo customary law was not satisfied and; that the respondent not being a Luo, did not understand the Luo customary law.

Counsel maintained that the trial court, having been unable to reconcile the parallel testimonies of the appellant and respondent on the question of how the Bungoma home was set up, called two witnesses. But the evidence of Fanuel Magak, the deceased's confidant, pointed to the fact that the Bungoma home was not set up according to Luo customary law. With this direct evidence, the learned Judge still rejected the appellant's case on this aspect without giving reasons for doing so.

The learned Judge was further faulted in failing to acknowledge, and indeed, misinterpreting the principle established in the case of **Mary S. Awino Ayoki & Anor vs. Hellen Akello & 2 Others** (2009) eKLR, that in Luo customary law, a polygamous Luo man must be buried outside the house of his first wife.

It was also improper, counsel submitted, for the learned Judge to hold that the deceased gave clear and precise instructions as to his place of burial. If such instructions were given, then they were against the customary law to which the deceased subscribed and were therefore unenforceable. To the contrary, it was the appellant's evidence that when Magak went to visit the deceased in Bungoma West Hospital, the deceased told him that if he passed on, his body should be taken to the appellant's home in Nyalenda ; and that if the deceased had expressed any wish to be buried in Bungoma, such a wish was contrary to customary law.

Opposing the appeal, Mr. Makhoha, learned counsel for the respondent, reminded us to determine only points of law and to disregard the grounds argued by the appellant which are largely issues of fact. Counsel posited that the deceased had left oral instructions of where he wished to be buried; that he confided in several people about this; that burial wishes are akin to a will and the deceased even pointed out the spot where his grave would be dug; that Magak was not a confidant as he failed to appear at the crucial time and that he was not an impartial witness; that the behavior of the appellant was questionable as she had been away from the deceased for 26 years and only appeared after his death; that there is no rule under Luo customary law that the deceased must be buried next to his first wife's home; and that the establishment of the home in Bungoma was an issue of fact.

The question we have been asked to determine is whether, in light of the evidence presented by the parties, both courts below erred in giving judgment in favour of the respondent by finding that it was perfectly legitimate for the deceased to be buried in Bungoma.

It is common ground that the deceased was a Luo tribesman. There is evidence on record that he practiced Luo customary law, in the manner both sides claimed he established his two homes. He also married both his wives according to Luo customary law, even though the second one was a Luhya. There is incontrovertible evidence that before his death, the deceased had been separated from the appellant for over 26 years; and that throughout that period, he was married and lived with the respondent in their home in Bungoma.

We have set out the law earlier in this judgment to the effect that burial disputes are governed by the personal law of an individual deceased person, in the circumstances before us, Luo customary law.

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!

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.

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 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.

The upshot is that this appeal lacks merit and is accordingly dismissed. We make no orders as to costs.

Dated and delivered at Nairobi this 18th day of December, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

……..

JUDGE OF APPEAL

A.K. MURGOR

……..

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR