IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

(CORAM: KOOME, G.B.M. KARIUKI & ODEK, JJ.A)

CIVIL APPEAL NO 68 OF 2015

BETWEEN

ANNE NYATHIRA…….....APPELLANT

AND

SAMUEL MUNGAI MUCHERU…….....1ST RESPONDENT

DIANA GATHONI MUCHERU…….....2ND RESPONDENT

OBADIAH MBURU MUCHERU…….....…3RD RESPONDENT

DAVID NJUGUNA MUCHERU…….....…….4TH RESPONDENT

(Being an appeal from the judgment of Musyoka J., delivered on 1st April 2014 at the High Court of Kenya at Milimani Nairobi in Family Division

in

CIVIL SUIT NO. 25 OF 2013)
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JUDGEMENT OF THE COURT

[1] This is an appeal from the judgment of the High Court, Family Division Civil Case No. 25 of 2013, Musyoka J., dated 1st April 2014. The matter involved a burial dispute of the remains of the late Ibrahim Mucheru Wahothi (deceased) who died 5th September 2013. The deceased married five wives, and is survived by four widows and 23 children save for the 3rd wife who pre-deceased him. The deceased kept the families of each house in different places within the country. The 1st wife, the mother of the 1strespondent lives in a place called Munyu, the 2nd wife lives in Nakuru, the 3rd wife is deceased but her family reside within Thika Town at a place called Ngoiwa, the fourth wife lives in Kitale, while the 5th wife who is the appellant in this appeal lives in a place called Gatukuyu within Kiambu County.

[2] It is undisputed that when the deceased passed away, he was living with the 5th wife (appellant) at Gatukuyu for about 20 years. It is also not in dispute that no one resides at the deceased's ancestral home in Gakoe within Kiambu County and no other member of the deceased family is buried there. When the deceased passed away, the respondents who are his children, filed the aforesaid suit in the High Court seeking two principle orders, that was an injunction to stop the appellant from singularly planning or burying/interring the remains of the deceased; an order that an independent post-mortem be conducted on the body of the deceased in the presence of all the parties.

[3] By the time the suit in the High Court was finalized the issue of the post-mortem was settled and was no longer an issue. This is discernable from the aforesaid judgment where the judge stated the following;-

> **"Having considered the plaint, the statement of defence, witness statements, the oral testimony of the witnesses and the rival submissions of the parties, I hold that the main issue for consideration relates to the interment of the remains of Ibrahim Mucheru Wahothi, specifically where (sic) the site where he should be buried. I say so because the issue of post-mortem to establish the cause of death has been sufficiently dealt with, and autopsy report dated 30th September 2013, 2013 by Dr. Oduor Johanson a consultant pathologist who found the cause of death of the deceased to be Asphyxia due to food aspiration pending histology. I need not say anymore on the post-mortem."**

[4] Although the issue of where the deceased was to be buried was not specifically pleaded in the plaint, it would appear the dispute regarding the place of burial emerged in the course of the proceedings and evidence; the respondents wanted to bury the deceased at his ancestral home at Gakoe in Gatundu, while the appellant wanted him buried at Gatukuyu also within Kiambu County where the deceased resided prior to his demise. The respondents did not amend the pleadings, but from the proceedings of 14th October 2013, the place of burial took the centre stage and was the issue that was tried and determined.

[5] Upon evaluating the matter as aforesaid, the learned judge concluded that under the Kikuyu customs which is notorious, the decision of who and where to bury a deceased is made by the deceased's' clan or brothers and adult sons of the deceased. In this case the court ordered the deceased remains be interred at his ancestral home or compound of his first wife as follows;-

a. **"That the deceased shall be buried at the ancestral home at Gakoe;**

b. **That all members of the family of the deceased shall participate in the funeral arrangements;**

c. **That the funeral expenses, including mortuary charges, shall be borne by the family; and**

d. **That each party shall bear their own costs" .**

[6] Aggrieved by the said orders the appellant filed the present appeal which is predicated on some five grounds to wit;-

The learned judge erred in fact and in law in;-

- **Allowing the respondent's suit which was not supported by evidence**
- **By not finding the suit as filed was already spent and the evidence adduced was not founded by the claim in the suit**
- **Failing to find that the wishes of the deceased had expressly stated in his last will where he wanted to be interred.**
- **For not finding that the deceased wishes though not binding must in as far as possible be given effect**
- **In disregarding the appellants' unshaken evidence**
- **By completely disregarding the submission before court.**

[7] During the hearing of this appeal, Mr. Mbigi, learned counsel for the appellant, relied on his written submissions and made some oral highlights. Counsel submitted that although the learned trial judge went into considerable depth in analysing Kikuyu customs on burial, there was no evidence adduced in court on them. There was no treatise that was tabled in evidence, or an expert witness in Kikuyu customs on burial so as to give the appellant an opportunity to comment on that evidence. The judge was faulted for taking judicial notice of Kikuyu customs which were at variance with what is documented especially the "**RESTATMENT OF AFRICAN LAW –Eugene Contran,** the chapter on burial rites where it is stated that ;-

> **"The responsibility for burial falls on the eldest son or, in his absence, on the brothers of the deceased. A rich man (i.e. one who has many children and much livestock) is buried outside his hut on the right-hand side going out….a poor man is normally buried in a special family graveyard away from his house, or, in the past simply thrown in the bush.."**

According to counsel, the deceased in the instant appeal fitted the description of a rich man who had 5 wives and 23 children; and as the court was following the Kikuyu customs, it had a duty to ascertain where the deceased used to reside; his homestead was at Gatukuyu where he lived with the appellant for 20 years and that is where he should be buried.

[8] The learned trial judge was also faulted for failing to consider the deceased was not living at Gakoe; nobody lives at Gakoe and the land did not belong to the deceased. There was a bitter dispute in court regarding the manner in which the 1st respondent caused the land in Gakoe to be transferred in his name; moreover the land is charged to a bank; there was clear evidence that members of the deceased family were living in different parts of the country; the 1st wife of the deceased testified that she was the one who used to live at Gakoe. But she moved away in 1986; the house in Gakoe was made of scrap material and one of her disagreement with the deceased was that he refused to build for her a stone house; it was also admitted that the deceased left Gakoe when the 1st respondent now aged 53 years old was in primary school. Also the third widow of the deceased was not buried at Gakoe and there is no established graveyard for the family.

[9] Mr. Mbigi further submitted that the learned judge ignored uncontroverted evidence that the deceased established a home in Gatukuyu, where he built a home and took three wives to the exclusion of the 1st wife; while at Gatukuyu, he married the appellant and they have lived there for 20 years. Thus, going by the Kikuyu customs and the recent developments as custom and practices are never static, and even if the judge were to ignore the wishes of the deceased, the court ought to have ordered the remains of the deceased be interred at Gatukuyu. Lastly counsel for the appellant challenged the judgment for dealing with matters that were not pleaded, there was no plea of application of Kikuyu customs or the place of deceased burial. It was the respondents who sued the appellant seeking an injunction to stop the burial of the deceased on the ground that they were excluded from participating in the burial arrangements and an order for independent post-mortem.

[10] This appeal was opposed; Mr Kahonge, learned counsel for the respondent adopted his written submissions and held brief for counsel for the 3rd respondent adopted the same position in this appeal as the 1st 2nd and 4th respondents. According to counsel, although parties did not frame the issues for determination, the issue of the place of deceased's burial was palpable from the pleadings and the evidence adduced before the trial court. Counsel made reference to the list of authorities;-

> **Odd Jobs vs Mubia 1970 EA 474**6
>
> **Railways Corporation vs East African Road Services Ltd. (1975) EA 128**
>
> **Herman P Steyn vs Charles Tys [1997] e KLR**

In all those decisions it was held that a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue had been left to the court for decision.

[11] Counsel for the respondent submitted that it was the appellant who introduced the issue of a ***will*** in the proceedings contending that the deceased indicated his wishes. However that evidence was highly challenged because the ***will*** was not read wholly; the appellant was charged with the offence of forgery of the same ***will***; the executor of the will was not disclosed and the judge found it had no evidential value as he stated in part of the judgement as follows;

> **"As far as the defendant is concerned, the deceased left a will giving direction as to where he should be buried. What is interesting though is that the content of the said will is unknown**

save for the part that deals with the burial. In his letter dated 11th September, 2013 the Advocate who drew the purported will says at paragraph 2 second last line "We will open and disclose the content of the said will to all his wives and children when the mourning period is over."

Thus according to counsel, the appellant was to blame for withholding vital information regarding the deceased wishes; Mr. Nya'ngau was the appellants witness and northing prevented him from producing the entire ***will*** so as to assist the court arrive at a just determination.

[12] On the application of Kikuyu customs as stated in the Treatise by Eugene Cotran, Mr. Kahoge urged us to ignore it while terming it as completely out dated; it was compiled in 1968 and many things have changed; Kikuyus no longer live in huts in the ancestral homes; however, what has not been affected by modern trends is the responsibility and respect accorded to a 1st widow and 1st son of a deceased person who play a key role in determining where to bury a husband or father; the judge relied on the evidence of the respondents who testified that according to Kikuyu customs, it is the deceased clan in consultation with the family who determine a place of burial of a deceased person. Counsel therefore supported the judgement by the trial court arguing that the decision of where to bury the deceased was made by the 1st son and the brothers of the deceased, and he therefore urged us to dismiss the appeal.

[13] By a brief re joinder, Mr. Mbigi submitted that the suit in the High Court was virtually spent even as parties went into the hearing. The suit was never amended after post-mortem was done and the appellant conceded to the prayer allowing participation of the respondents in the burial; as regards, the comments by the court about the production of a portion of the *will*, counsel referred to the case of;- **SAKINA SOTE KAITANNY VS MARY WAMAITHA C.A NO 108 of 1995** in which it was held that a written *will* is proved in a probate cause where the proceedings are governed by an elaborate and special procedure provided for under the Law of Succession Act.

[14] This is a first appeal, that being so we have a duty to re-evaluate the evidence and make our own independent conclusions with the usual caveat that we did not see or hear the witnesses testify and give due regard to that. See the case of ***Mwangi v Wambugu, [1984] KLR 453***:

"A Court of Appeal will not normally interfere with a finding fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

[15] In keeping with the above mandate, we discern from the record before us that the learned trial judge elicited one issue for determination which was; the place of deceased's burial. At the preliminary stages the suit was before a different judge, **Waweru J.,** who gave directions regarding the production of the last will and testament of the deceased. A Mr. Leo Masore Nyang'au Advocate was summoned to produce page 1 of the deceased will. This is what the learned judge ordered;-

"If indeed the deceased left a provable written will that contains his instructions regarding his interment, the instruction should be disclosed and shown to the family, in (sic) the purposes of this suit. I direct that summons do issue to Mr. Nyangau to appear before the court on 18th

October 2013 at 11;30 am and bring along the deceased's will and show the same first in court in order for the court to see the deceased's wishes regarding his interment.

Further directions shall follow from there."

On 18th October 2013, the learned judge went on to make this order;

> '**Let Mr.Nyang'au provide to the court and the parties through their respective (sic) contents by way of an affidavit certified copies of page 1 of the will, the clause regarding place of burial and the attestation page of the deceased will.**
>
> **.."**

[16] The rest of the trial proceeded before **Musyoka J.**, after the file was transferred to the Family Division. The respondents led by Samuel Mungai Mucheru, a son of the deceased gave evidence in support of their suit. He told the court that the deceased was ailing; prior to his death, he had been hospitalized at Aga Khan hospital; he was later transferred to Kenyatta National Hospital for a couple of months, he was discharged and at the time he met his death he was staying with the appellant at Gatukuyu. Upon learning about the death of their father, the family met, consulted among the family members that is the four houses of the deceased with the exception of the appellant and also consulted some elders and they all agreed the deceased be buried at his ancestral land at Gakoe known as **Ndarugu/Gakoe/87**. This was a decision by the majority which was resisted by the appellant as she insisted she was following the wishes of the deceased contained in his last will. According to this witness, the decision to bury the remains of the deceased at his ancestral home was in accordance with the Kikuyu customs.

[17] Ester Wanjiru Mucheru, the 1st widow of the deceased also testified that she married the deceased in 1953; in 1970, the deceased informed her he would wish to be buried at his ancestral home in **Ndarugu/Gakoe/87** and not at any property that he purchased. She told the court that according to Kikuyu customs, she as the 1st wife had the priority to determine where her husband should be buried. She however admitted that she had not lived with deceased since 1986 when he married the appellant as the 5th wife.

[18] Chief Inspector Alex Muraguri who is a document examiner also testified regarding the authenticity of the signature on the purported ***will*** of the deceased. In his opinion the signatures on the affidavit that was filed in court sworn by Mr. Nya'ngau and the one on the purported ***will*** appeared to have been made by the same person. However during cross examination, he admitted that he did not know the signature of Mr.Nya'ngau because he had not obtained original specimens of his signature, nor did he know the signatures of the deceased.

[19] On the part of the appellant, Mr.Nyang'au an Advocate who drew the disputed ***will*** of the deceased also testified that he was retained by the deceased to act for him in various matters from 1996. He defended the deceased in **Divorce Case No 18 of 1996** where Ester Wangui Muchiri sued the deceased seeking divorce and maintenance orders. The said suit was dismissed and the appeal filled in **HCCA No. 48 of 1997** was withdrawn following reconciliation between the deceased the said wife. Mr. Nya'ngau also represented the deceased in **HCCC No 1194 of 1998** where the deceased had sued his son Samwel Mungai Mucheru seeking a re-transfer of a parcel of land known as Ndarugu/Gakoe/580 in his name.

[20] According to Mr. Nya'ngau, the deceased contended that sometimes in 1995, he was very sick; he informed his son Samuel Mungai Mucheru, that he would wish him to be registered as the proprietor of the aforesaid land upon his death so as to hold it in trust for himself and his other siblings; however Samuel transferred the said title to his name secretly and charged it to a Barclays Bank to obtain certain banking facilities. In summary, Mr. Nya'ngau had acted for the deceased in many matters but what was relevant in this matter was a ***will*** that he drew for the deceased in 2005; he prepared the ***will*** which was executed by the deceased on 6th December 2005, in the presence of an independent witness by the name **John Warui Kaguthi**. This witness also testified and confirmed that he knew the deceased as a friend of 30 years; the deceased asked him to accompany him to the offices of Mr. Nya'ngau where he witnessed the deceased sign the ***will***.

[21] Ann Nyathiru Mucheru the appellant also testified and told the court that she married the deceased in

1987, she cohabited with the deceased at Gatukuyu and that is where the deceased met his death. She denied having excluded the members of the deceased family from participating in the burial of the deceased. After the deceased died, the respondents obtained a police report as the deceased died at home and a burial permit. A funeral committee was formed to prepare for burial and it was during those meetings the respondents demanded to be furnished with all title documents of the deceased's vast estate before the burial. The appellant insisted the deceased had left a ***will*** with Mr. Nya'ngau that indicated his wishes on where he should be buried; this dispute led to her being charged before the Makandara Magistrates' Court with an offence of forgery of a ***will*** of the deceased; the trial was ongoing during the hearing of the dispute in the High Court. (*Although this is not an issue as far as this appeal is concerned, we were informed the appellant was acquitted of the charges)*

[22] We agree with counsel for the appellant that the pleadings before the trial court were slovenly drawn. There was no specific prayer for a determination of where the deceased body should be interred. Nonetheless the issue was prominently germane in the evidence adduced by both parties and in the event, although it would have been prudent for the parties to amend the pleadings, it would appear even the appellants acquiesced to the state of affairs and participated in the proceedings by adducing evidence of the deceased ***will***. Taking into account the circumstances obtaining in this case, we are of the view that it fits squarely within the ambit of the holding in the case of;- ***ODD JOBS V MUBIA, 1970 EA Page 47***6, where it held:

> ***"(i)*** **A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision;**
>
> ii. **On the facts, the issue had been left for decision by the court as the advocates for the appellant led evidence and addressed the court on it."**

1. So where should the remains of the deceased be buried? The respondents being the older sons or children of the deceased with the support of the 1st wife want the deceased buried at his ancestral land at Gakoe and that is what the learned judge ordered. That decision was largely informed by both the Kikuyu customs as elucidated by case law that was reviewed in the said judgment and the evidence by the respondents. The wishes of the deceased were not taken into account as they were to be taken from a will which was not proved. In our opinion disregarding the wishes of the deceased in an unproven ***will*** was the correct approach as this dispute was not a P&A matter. Parties were all in agreement, and the judge was emphatic that, there is no property in a dead body and burying a deceased person does not give any party any priority or advantage as regards inheritance rights of a deceased estate. This is as it was held in the case of **Sakina Sote** (supra):

> **"The judge declined to deal with the issue of the validity of the deceased's will which had been challenged by Sakina and Mustafa Kibet. He held that that this is a matter which should be decided by the judge hearing the probate cause filed by Wamaitha. There can be no doubt that in taking this view, the judge was right. The Law of Succession Act (Cap 160) provides a special procedure for applications for grant of probate and for dealing with any challenges to such an application. It is therefore not open to any party to mount such a challenge otherwise than in accordance with the statutory procedure."**

[24] What is the place of Kikuyu customs in regard to this case; there is ample case law in this regard, and the trial judge took considerable amount of time dealing with this issue. The place of customary law in our jurisprudence has been discussed in a long line of authorities. It gained prominence in the well known case of ***Otieno v Ougo & Another, 2008 1 KLR 9 & F*** page 948, where it was observed: -

> **"The place of customary law as the personal law is complementary to the relevant written laws. The place of the common law is generally outside the sphere of personal customary law with some exceptions. The common law is complimentary to the written law in its sphere. Now suppose that exceptionally there is a difference between the customary and common law in a matter of personal law? First of all, if there is a clear customary law on this kind of a matter, the common law will not fit the circumstances of people of Kenya.**

That is because they would in this instance have their own customary laws. Then suppose by misfortune that in this instance those customs were held to be repugnant to justice and morality and were thus discarded, there would be the common law to fall back upon, at least in a modified form. In this way, these two great bodies of law for that is what they truly are, complement each other. They may be different but the way to operate them is to use them as complimentary to each other without conflict as laid down in Section 3 of the

Judicature Act (Cap 8)".

[25] It is not at all disputed that the deceased came from Gakoe, and that was his ancestral land, presumably that is where his father and forefathers came from. We were nonetheless told none of the family members live in Gakoe and none is buried there. However what is of concern to us, is the fact that no evidence was adduced before the learned trial judge to that effect; indeed there was no expert witness on how to determine the place of burial of a Kikuyu. Gakoe was the choice of the respondents and indeed an affidavit sworn by the deceased in **HCCC No. 1194 of 1998** was relied on in which the deceased deposed as follows;

"That the said parcel of land has my matrimonial home and it is the place I would like to be laid to rest when l die and the same should not be sold or tampered with in any way as to affect my family's ownership of the same."

What the learned trial judge overlooked nonetheless was the fact that the aforementioned affidavit was sworn by the deceased when he was trying to recover the title to the Gakoe land from the 1st respondent. The deceased did not succeed in getting the land re-transferred back to him. The land is registered in the name of the 1st respondent and it is also charged to a bank. We think this was a fundamental factor to consider which the learned judge overlooked. The said affidavit goes on to state;-

" That on the 10th, April 1998, l attempted to discuss with defendant the said transfer and his threats to forbid me from ever stepping on the said parcel of land, before the chief, the defendant refused to attend the said meeting."

[26] In view of this evidence, we are satisfied the learned judge erred in his conclusion that the deceased should be buried at Gakoe. That cannot be taken to be his ancestral home, or the home of the 1st wife who is settled at Munyu and has no interest in burying the deceased where she lives.. The land belongs to the 1st respondent who was hostile to the deceased and threatened him with eviction. Had the learned judge interrogated the evidence by the respondents , he would perhaps have arrived at a different conclusion like we have, that the land did not belong to the deceased; the deceased vacated the land many years ago when the 1st respondent was in primary school, that translates to many years as the 1st respondent was said to be 53 years old; he lost the land to the 1st respondent and his bid to claim it back was unsuccessful; the deceased established his home in Gatukuyu where he lived with the appellant until he met his death; Gatukuyu became his home in the modern Kikuyu custom which resonates well with the provisions of **Article 40 (1) (a) (b)** of the Constitution of Kenya 2010 that allows a party to own land or reside in any part of the country. Removing the deceased from Gatukuyu where he built for himself a mansion and burying him at a desolate place where there is only a house made of scrap material that is not occupied would be tantamount to an indignity, nay disrespect. This, in our view, is also elevating customary practices that are retrogressive and are against the spirit of the Constitution that glorifies personal dignity.

[28] In the upshot we find this appeal regarding the place of internment of the remains of the deceased has merit. The learned judge fell in error and for that reason we interfere with the 1st order while we reverse and substitute with the following orders;-

a. **The deceased shall be buried at his home in Gatukuyu. In this regard the burial permit be issued to the appellant for purposes of securing the body of the deceased from the mortuary.**

b. **All the members of the deceased family shall participate in the funeral arrangements and in the burial programme**

c. **The funeral expenses, including the mortuary charges shall be borne by the family members but can be treated as a debt from the deceased estate.**

d. **As regards costs, this being a family matter, we do not wish to set them up against each other any longer, each party shall bear their own costs of this appeal and in the High Court.**

Dated and delivered at Nairobi this 22nd Day of February, 2016.

M. K. KOOME

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

J. OTIENO – ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR