



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, GATEMBU & MURGOR JJ.A)

Civil Appeal No. 13 Of 2011

Between

Samuel Onindo Wambi APPELLANT

AND

C O O1ST RESPONDENT

M J O2ND RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Kisumu, (Abida Ali Aroni, J.) dated 9th April, 2010

in

H.C.C.S. NO. 143 OF 2009)

JUDGMENT OF THE COURT

1. The facts giving rise to this appeal are tragic. A summary of the same will make this clear.
2. **V J A A** (the deceased) married **D O W** (hereinafter referred to as D or the husband) at a marriage ceremony celebrated on 31st March, 1990, at St. Paul's Catholic Church in Nairobi. They were blessed with two children both of whom, unfortunately, had a medical condition which the witnesses described as "*cerebral palsy, autism and polio.*" D and his family blamed that condition on the deceased. As a matter of fact, D' father told C O O, PW5 that the childrens' condition was attributable to the fact that the deceased herself was "*a child of an adulterous relationship.*" After the birth of the second child in 1994, with that condition, D abandoned the deceased and the children and gave them no support at all.
3. In 1997, D was involved in a tragic accident which rendered him physically and mentally incapacitated. To date, he is on a wheel chair and unable to hold any comprehensive communication with anybody. In his brother T O O, DW2's view he is an invalid who is "*totally insane.*"
4. After the accident D was admitted to Kenyatta National Hospital where the deceased took care of

- him and after his discharge, she took him to her residence at Kakamega where she at that time worked. She employed two house helps to take care of him. On an unstated date in 1997, S O W, D' father (the father) went to the deceased's said residence and without her knowledge or consent, took away D to his home at Kamagambo in Rongo. From the father and his family's behavior, the deceased was in no doubt that she was not wanted at the father's home. So she never visited D thereafter.
5. The two children of the marriage died; the first one in 2001 and the second one in 2005. The deceased, without any assistance from D's family, buried them at the father's home at Kamagambo in Rongo.
 6. At the funeral ceremony for the burial of the second child, the father made derogatory remarks against the deceased which so depressed her that she suffered a mild stroke that kept her in hospital for a whole year.
 7. After the burial of her second child, the deceased went back to her place of work at Kakamega. She was unfortunately, killed in a road accident on 19th September, 2009. Thereafter a dispute arose as to who, between C O O the deceased's step brother and adopted son M J O (the respondents) on the one hand and D' father on the other, had the right to decide where the deceased was to be buried. That led to the filing by the former of Kisumu HCC No. 143 of 2009 from which this appeal arises.
 8. After hearing that case, Aroni, J. acceded to the respondents' plea and ordered that the deceased be buried according to her wishes at her piece of land known as **Title No. [particulars withheld]** in Kakamega District. This appeal is against that decision.
 9. At the hearing of the appeal, Mr. E.N. Okero, learned counsel for the appellant argued only one of the seven grounds of appeal, that is, that the learned trial Judge erred in finding that the wishes of the deceased superseded Luo Customary Law to which the deceased was subject. Counsel argued that as provided for in **Section 3(2)** of the Judicature Act, in civil cases in which one or more of the parties is subjected courts should be guided by African Customary Law. As the deceased, like D, was herself a Luo, counsel argued that she ought to have been buried in accordance with Luo Customary Law. He therefore faulted the learned Judge for holding that the deceased's wishes, which at any rate were equivocal according to counsel, superseded the Luo Customary Law which gives the husband or his family the right to bury a deceased wife. He cited the case of **Joash Ochieng Ougo -v- Virginia Wambui Otieno [1987] eKLR** and urged us to allow this appeal. He however did not ask for the exhumation of the deceased's remains for burial at the father's home as he said he had no instructions on that.
 10. Opposing the appeal, Mr. S.A. K'Opot, learned counsel for the respondents, dismissed this appeal as academic and totally unmeritorious, the deceased having been buried more than five years ago, and further that the appellant had not sought the exhumation of her remains for burial at his home. He cited several authorities for the proposition that on matters of burial the deceased's wishes reign supreme. He therefore supported the learned Judge's decision and urged us to dismiss this appeal with costs.
 11. Having perused the record of appeal and considered these rival submissions as well as the authorities cited by counsel for the parties, we find that this appeal raises only one main issue for our determination: in burial matters what factor supersedes the other; the deceased's wishes or customary law to which the deceased was subject.
 12. It is not in dispute that the deceased was a Luo. It is also not in dispute that at the time of her death, though she had been separated from D for over twelve years, she was still married to D. But as we have stated, following the tragic accident in which he was involved in 1997, D is now an invalid and does not know what is going on around him. His father argued that in the circumstances he had the right to bury the deceased. Although he is not seeking to exhume her

remains for burial at his home in Rongo, he urges us to find that he has that right and sought to reiterate Luo Customary Law on burials for posterity.

13. In the case of **Edwin Otieno Ombajo-v- Martin Odera Okumu [1996] eKLR**, it was held that the husband’s right to bury his deceased wife’s body may be superseded by the deceased’s wishes if the husband’s behavior renders him undeserving to bury the remains of his wife.

14. In this case, D neglected the deceased after the birth of the second child. The deceased’s letters to him produced in evidence in the lower court bear testimony to the fact that he subjected her to a very miserable life. After nursing D at Kenyatta National Hospital for over a month and taking him to her place of residence at Kakamega where she employed two house helps to take care of him, without any consultation D’ father took him away to his home in Rongo. That was in 1997. Before then the father had made unsavory remarks against the deceased. He had told PW5 that the autistic condition of the deceased’s children was as a result of the deceased having been born out of an adulterous relationship. That was not all. When the two children of the marriage died the deceased single handedly buried them without any assistance from D’s family. At the funeral ceremony for the burial of the second child, the father made derogatory remarks against the deceased which stressed her to a point of suffering a stroke. For the time she was in hospital thereafter, which was about a year, neither the father nor any member of his family went to visit her. In those circumstances, we find that the father was not deserving of the right to bury the deceased.

15. Five witnesses testified that the deceased categorically stated to all and sundry that upon her death she should be buried on her piece of land in Kakamega District. William Odera Ayila, PW1, a freelance journalist, produced CDs and DVDs that he recorded on 1st August 2009 during a function which the deceased’s friends held to fete her upon her promotion to the position of District Commissioner. A transcription of those CDs and DVDs unequivocally brought out the deceased’s burial wishes. She said: “... *within here there are learned friends but one learned friend has left. But I want you to write a will and I will sign it stating very well that should a time come when God calls me to rest, if I will not have any land anywhere, peleka mimi pale KK ...Hapana peleka mimi Kamagambo. You saw what I went through.*” [Emphasis added]. We do not agree with counsel for the appellant that this statement was equivocal. The statement speaks for itself. The deceased’s wishes were that upon her death she should be buried on her piece of land in Kakamega “*if [she] would not have any land anywhere.*” With respect to counsel, how can such a statement be said to have been equivocal and implying that she could as well be buried at her father’s home? We are satisfied that the deceased was categorical that her remains should never be taken to Kamagambo meaning the father’s home.

16. A deceased person’s burial wishes are akin to a will. Save for a compelling reason, they supersede customary law and should be followed.

17. 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, we find no good or compelling reason to go against the deceased’s wishes. Consequently, we find no merit in this appeal and we accordingly dismiss it. We order that each party bears its own costs.

DATED and delivered at Kisumu this 18th day of June, 2015

D.K. MARAGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU,

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR