



**Wanjala v Malaba; Nyukuri (Interested Party) (Civil Appeal
E064 of 2025) [2025] KEHC 12020 (KLR) (11 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 12020 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E064 OF 2025
MS SHARIFF, J
AUGUST 11, 2025**

BETWEEN

LUKA NAMAYI WANJALA APPELLANT

AND

JOHN LUBISIS MALABA RESPONDENT

AND

ELECTINA NELIMA NYUKURI INTERESTED PARTY

JUDGMENT

A. Background

1. One Richard Wanjala Malaba, a polygamous Bukusu man who had been hospitalized at Webuye Sub-County hospital, succumbed to his illness on 12th March 2025, whereafter his cadaver was preserved in the same hospital's morgue awaiting interment.
2. Subsequent thereto, the family of the deceased formed a funeral committee chaired by one John Lubisia Malaba, an elder brother of the deceased.
3. While the clan was preparing for the burial that was scheduled to take place on 22nd March 2025, one Luka Namayi Wanjala, the appellant herein, who is the first born son of the deceased from the 1st house, instituted a case against the chairman of the funeral committee before the subordinate court in Webuye, wherein he craved for injunctive orders to issue against his uncle, John Lubisia Malaba, restraining him from burying the deceased in Mikuva on parcel No Ndivisi/ Mihuu/2573 (Original No Ndivisi/Mihuu/ 121), where the deceased used to reside with his 2nd wife before his demise. Instead he craved for orders that the deceased be buried where his 1st wife had been interred on parcel No Ndivisi/Mihuu/89 situate at Jagari(Jaggery)Village in Matulo Sub-County in Bungoma County.



4. The Respondent filed his statement of defence dated 25th March 2025, seeking the dismissal of the Appellant's Plaintiff and that the Respondent and his relatives be allowed to bury the deceased person in Mikuva Village. The Interested Party therein applied, successfully to be enjoined as an Interested Party in the suit.

B. Appeal

5. The case was heard and determined against the appellant who felt aggrieved by the decision of the lower court hence his filing of the memorandum of appeal dated 24th April 2025, which he basically premised on grounds that the trial magistrate disregarded the Luhya Customary Law on burial practices, that the trial magistrate erred in holding that the burial of the deceased person herein on land parcel Ndivisi/Mihuu/89 was dangerous, that the judgment was contrary to an existing judgement of Bungoma ELC Case No. 4 of 2020 which vested parcel No Ndivisi/Mihuu/89 in the deceased. That the judgment was against the weight of evidence and had occasioned a miscarriage of justice.

C.evidence

6. This being the first appellate court I am duty bound to reconsider the evidence, re-evaluate it and reach my own conclusion while bearing in mind that unlike the trial court, I neither heard or saw the witnesses testify wherefore I should take that into account in arriving at my decision. (see *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] EA 123).
7. Without fully reproducing the proceedings at the trial Court, the record reveals that the Appellant testified as PW1. He told the Court that the deceased person lived with the Interested Party herein as husband and wife for about 14 years and that as per the Bukusu Customary Law when a husband dies he is buried where the 1st wife was buried. He denied that Bukusu customs forbid a child from burying his father where the deceased is survived by another wife. The Appellant reiterated that the Interested Party herein was an inherited wife and that it is against Bukusu Customary Law for an inherited wife to bury her husband: she already buried her first husband. He urged the Court to allow him bury his father and denied during examination in chief and upon cross-examination that parcel No Ndivisi/Mihuu/89 had any pending dispute in court.
8. Esther Nakhungu Malaba PW2 a younger sister of the deceased testified that her brother had one wife, the late Suzy Luyalo, with whom he had sired 11 children, one of whom is deceased. She told the trial court that Electina, the Interested Party herein was inherited by the deceased from a paternal cousin and that they begot twins. She denied that the deceased had paid dowry for the Electina. On cross-examination she admitted that she was ignorant of the fact that the deceased had paid dowry for the Interested Party and that she did not participate in dowry negotiations for the Suzy, the 1st wife, either. It was her evidence that Bukhusu customs did not allow Electina to bury the deceased. This witness testified that her grandmother, mother and a son of the deceased were buried at Jaggery, that no one had ever threatened to exhume their bodies and she was ignorant of any pending land cases.
9. Patrick Malaba Giyo PW3, a step brother of the deceased also maintained that the Interested Party had been inherited by the deceased and they cohabited at Chwele until the demise of the deceased, who never returned to Jaggery. He denied that the deceased had paid dowry for the Interested Party. He testified that Bukhusu customs did not permit an inherited wife to bury her husband upon his death and that when the inherited wife dies, she is taken back to first husband for burial. This witness told the court that the deceased and himself had a land case with Seraphine but they had won the case and that he had not been served with any appeal documents. He admitted that the disputed land was still



registered in the name of Serephine. He said that he had no objection to the burial of the deceased at Jaggery.

10. James Iyaya Simwelo PW4 testified that he was 89 years old Luhya from the Tachoni sub-tribe and versed in Luhya customs; that when a polygamous Luhya man dies then he is buried at the residence of his 1st wife. And that an inherited wife can never bury her inheritor husband, and is not even allowed to speak during the burial.
11. Wepukhulu Indienyi, PW5, testified that he is 93 years old and was part of the Bukusu Customary Committee in 1973 prior to his retirement, and is well versed with the Luhya Customary law. According to him an inherited widow is not allowed to bury the husband and if the same is done, it will lead to the destruction of the family. He testified that under Luhya customs, the 1st wife and the first son decide where the deceased man is to be buried and when a brother intervenes then his intentions would be to inherit the widow. He testified that in instances where the parcel of land where the 1st wife had been buried has been disposed off, then the deceased person is buried at a place of choice of his children and that an inherited wife cannot perform the customary ritual of uprooting one of the three cooking stones as this is the sole preserve of the 1st wife, who is in this case, pre-deceased her husband.
12. John Lubisia Malaba, DW1, testified that it is the desire of the whole clan that the deceased to be buried at Mikuva Village as there is a case pending which prevents the burial of the deceased person herein at Jaggery Village. He testified that the Interested Party herein married the deceased person in the year 2000, but the deceased had a 1st wife. He clarified that when one inherits a wife he pays dowry and that as per the Bukusu Customary law, if a person is polygamous, he is buried at the 1st wife's homestead and if the 1st wife is dead then at the 2nd wife's homestead. He testified that parcel at Jaggery Village is registered under the name of Seraphine Kutondo and there is a pending appeal on the same at the Kisumu Court of Appeal. Further that Seraphine had sued him, Electina & Others in Bungoma CMC ELC Case No E032/2025, to restrain him from burying the deceased at Jaggery. He maintained that an inherited wife is allowed to bury her deceased husband.
13. Mark Oloo Wafula Wanjala, DW2, testified that he is 64 years old and the national chairman of the Bulonja Clan. He produced a Confirmation Certificate in proof of that fact. He corroborated the evidence of the Appellant, that the 1st wife of the deceased person herein was buried at Jaggery. He however testified that under Bukusu Customary Law any land under dispute cannot be allowed to be used as a resting place of a deceased person. He reiterated that Balonja elders are ordinarily issued with Certificates. He said that he was opposed to the burial of the deceased person at Jaggery Village due to the pending land dispute.
14. Electina Nelima Nyikuri, DW3, testified that she is the 2nd wife to the deceased person herein and that when her 1st husband died, she returned to her people and the deceased person herein approached her clan and asked for her hand in marriage. She disputed the allegations that she was inherited and availed before the Court a dowry agreement. She admitted that her 1st late husband had a blood relation with her current late husband. She testified that if she were to die today, she will be buried at her current husband's home. She testified that as per the Bukusu Customary Law the surviving wife buries her husband and since the land at Jaggery Village has an active case in Court the best place to lay the deceased to rest will be at Mikuva Village which is the ancestral land inherited from the mother of the deceased person.
15. Seraphine Kutondo, DW4, testified that she has an active appeal matter before Kisumu Court of Appeal being ELCA NO E224/2024 with regards to the parcel located at Jaggery Village parcel No Ndivisi/Mihuu/89 and that the Respondent in the matter was the deceased person. Further that the contentious parcel of land is currently registered in her name. She further testified that she has also



instituted a case in Bungoma against the Respondent herein and the Funeral Committee in Bungoma CMCC ELC No E032/2025, wherein she is craving for orders of injunction so as to restrain the Funeral Committee from burying the deceased on parcel No Ndivisi/Mihuu/89.

D. Analysis And Determination

16. This appeal was canvassed by way of written submissions. This court has duly re-evaluated the evidence tendered before the subordinate court and has considered the rival submissions of the parties, the cited legal provisions and authorities and the issues that emerge for determination are as follows:
 - a. What is the applicable law?
 - b. Who ought to bury the deceased?
 - c. Where should the deceased be buried?
17. A plethora of cases all over the world have demonstrated that burial disputes have been with us throughout history and they will continue being part of matters that many a modern-day Solomon is called upon to adjudicate: I thus find myself being called upon to make that Solomonic decision.
18. The clan of the deceased and the community where a deceased hailed from have defined roles to play during funeral preparations and at the burial. Each tribe has its own unique customs, rites and traditions that regulate burial preparations and proceedings. Traditionally the burial of an African is never the preserve of his nuclear family, but rather the coordination of his clan and community at large. Ordinarily a funeral committee is constituted as is the case in this instance.

What is the applicable law?

19. African 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. Given that customary laws are ethnic based and as diverse and divergent as the ethnic groups in Kenya, the resolution of burial disputes will depend largely on the peculiar circumstances of each case.
20. Kenyan Courts have times without number resorted to customary law, common law, marriage law, succession law, human rights law, land law and other bodies of personal law when dealing with burial disputes. 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.”
21. In order to prove the existence of a custom, evidence of its existence must be called to provide the juridical and philosophical basis. This requirement is premised upon the provisions of Section 51 of the *Evidence Act*. That was the ratio decided 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”.

Who ought to bury the deceased?

22. This is a battle of burial rights between the son of the deceased herein and the brother of the deceased person. The evidence of the supposed experts on Luhya customary law was surprisingly divergent on the status of a second wife and of an inherited wife, depending on whose side a witness was testifying for. The only certified expert was DW2 Mark Oloo Wafula Wanjala whose told the trial court that a Bukhusu customs do not permit a burial on dispute land. He maintained that a married second wife can bury her husband.
23. Be it as it may, this Court is guided by the dints of Section 3(2) of the Judicature Act. All witnesses agreed on one issue; that when a polygamous Bukusu man dies, then his 1st wife would perform the burial rituals of “Lusuli” which involved the uprooting of one of the three fire place stones and the cleansing ritual of “Kimiluka”, while his whole family will participate in the “Lufu” ceremony which entails the identification of assets, liabilities and heirs of the deceased. The point of departure is instances where the 1st wife has pre-deceased the husband as in this case. The appellant’s witnesses have maintained that the Interested party is by custom forbidden from burying her husband due to their position that she was inherited and therefore she is technically a concubine and not a wife.
24. The respondent and his witnesses have taken a different position on this issue and have maintained that the Interested party is a wife for all intents and purposes given that dowry was duly paid as per the exhibited dowry payment agreement and she begotten twin boys with the deceased. The interested party testified that the deceased went to her clan to request for her hand in marriage and eventually paid dowry. The deceased and the Interested Party Cohabited for 24 years. It is instructive to note that the deceased moved out from Jaggery while his 1st wife was alive given that the latter died in the year 2009 while the deceased started cohabiting with the interested Party in the year 2000.
25. Premised upon the analysis made hereinabove I do find that the clan of a Bukusu is responsible for his burial and not his nuclear family wherefore the Respondent as the brother of the deceased and the chair of the funeral committee is responsible for burying the deceased in conjunction with the family of the deceased and the community at large.

Where should the deceased be buried?

26. In keeping in line with the Bukhusu customs, burial rituals and rites such as Lufu, Lusuli and Kimiluka have to be undertaken. The latter two rituals involve a widow and not a son. In this dispute the appellant is said to have hurriedly put up a temporary structure upon the demise of his father. None of the wives of the deceased have ever prepared a meal for the deceased in that new structure. He appellant intended to beat the cultural system but the question that arises is of what significance is the new structure that the appellant has constructed in the performance of the burial rituals. Whereas I am not an expert in Bukhusu customs, I reasonably believe that the new house is of no significance in the performance of the burial rituals and rites.
27. The Respondent and his respective witnesses stated that the land parcel Ndivisi/Mihuu/89 is subject to an appeal before the Kisumu Court of Appeal. Further that a case had been filed in Bungoma CMC ELC Case No 32 of 2025 by one Seraphine Kutondo Washiko the appellant in Kisumu Court of Appeal ELCA E224 of 2024, against John Lubisia Malaba, the Respondent herein & Others. On my perusal of the record of appeal there is no indication that the decision of my learned colleague Justice Cherono was stayed.



28. . The above observations notwithstanding, I do agree with the subordinate court that an appeal can turn either way. The deceased is said to have moved from Jaggery and resided at Mikuva village for over 24years after demolishing the house that he used to reside with his 1st wife at Jaggery. This conduct of the deceased does no portray a man who desired to be taken back to Jaggery upon his demise. Whereas the deceased and PW3 have a subsisting judgment that vested in them ownership of parcel No Ndivisi/Mihuu/89 by way of adverse possession, that parcel land is still registered in the name of Seraphine Kutondo Washiko; save for registering a caution on 24.7.2019, the deceased and PW3 are yet to execute that judgment of Bungoma ELC Case No E004/2020 (OS). This court can not ignore the pendency of Appeal case before the Court of Appeal in Kisumu and the other case before Bungoma Chief Magistrate Court.
29. The term ‘rest in peace’ in burial terminology imply that once a deceased person joins the afterlife, his or her remains are interred as soon as practically possible subject to religious and/or customary burial rites in the hope that departed soul finds peace after death. However, for one Richard Wanjala Malaba, the main character in this burial dispute, the moment of resting in peace has been sadly procrastinated by the litigation instituted by the appellant herein. Whereas this is a family matter, the combatants herein have not deemed it fit to adopt alternative dispute resolution mechanism. I find and hold that the deceased will rest peacefully in parcel No Ndivisi/Mihuu/ 2573 (Original No Ndivisi/Mihuu/121).
30. On the balance I find that this appeal is devoid of merit and I dismiss it in its entirety and I uphold the judgment of the lower court.
31. The appellant shall pay the mortuary costs.
32. Given that this is a family matter, each party shall bear its own costs.
33. This file is marked as closed.

Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 11TH DAY OF AUGUST 2025.

M.S.SHARIFF

JUDGE

In the presence of:

Mr Wegesa for the Appellant

N/A by Ms Wambani for the Respondent and the Interested Party

Peter Machoni – Court Assistant

