



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO 76 OF 2002

KANDIE & 2 OTHERS.....APPELLANT

VERSUS

BEATRICE JEPKEMOI CHEROGONY.....RESPONDENT

(Appeal from the judgment of the Resident Magistrate's Court at Eldoret, PN Ngigi Esq, in Eldoret CMCC 553 of 2002 dated July 6, 2002)

JUDGMENT

Beatrice Jepkemoi Cherogony, the respondent herein, lost her husband, namely, Dr. Sammy Chebii Cherogony, at Moi Teaching and Referral Hospital through illness on the 19th May, 2002. As the deceased's widow, she embarked on making funeral arrangements for his burial at Molo where the deceased had purchased a parcel of land number L R MOLO/NYOTA FARM/10940/63. However, the appellants, being the deceased's father (2nd) and his two brothers were opposed to his burial at Molo and instead insisted that he be buried at his ancestral home in Baringo District. It was the contention of the respondent that the deceased had expressed an oral wish that he be buried at Molo.

There being no consensus in the matter, the respondent filed suit in the Chief Magistrate's Court at Eldoret vide Eld CMCC No. 55 of 2002 in which she sought the following orders:-

(a) A permanent injunction to restrain the Defendants jointly and severally from interfering with the funeral arrangements and burial ceremony of the deceased Sammy Chebii Cherogony at the deceased's home LR. NO MOLO/NYOTA FARM 1094/63

(b) A declaration that the plaintiff has the sole right as the widow of the deceased to conduct the funeral of the deceased in MOLO/NYOTA FARM/1094/63.

(c) Costs of this suit.

(d) Any other relief that this Honourable court may deem fit to grant.

Miss P N Ngigi, Resident Magistrate heard the evidence which the parties presented before her and in her judgment dated 6th July, 2002 while granting the main prayer in the plaint had this to say on pages 90 and 91 of the record of appeal.

"Whereas there is not opposed (sic) to the deceased being buried in Tiriondonin, we are not told where

in particular. The contention that it is the land of the ancestors is vague. Molo land belongs to the deceased and all his dependants.

I will therefore grant the prayers in the following terms. A permanent injunction to restrain the defendants jointly and severally from interfering with the funeral arrangements and burial ceremony of the deceased SAMMY CHEBII CHEROGONY at the deceased's home LR NO MOLO/NYOTA FARM/10940/63....."

The defendants were dissatisfied with the trial magistrate's judgment hence this appeal in which 8 grounds are set out. In his argument at the hearing of this appeal, Mr. Mweitch, counsel for the appellants condensed the grounds of appeal. His main contention was that both the deceased and the respondent wife were Tugens from Baringo District and that the law applicable to the deceased's burial place was his personal law. That personal law, he submitted, was overwhelmingly proofed before the lower court in that the customs and practices of the Tugens proved that their dead be buried in their rural ancestral home. In the case of the deceased, that was at Tiriondonin village in Baringo District. Counsel contended that the deceased had followed that custom in his lifetime when his son died and was buried in the rural ancestral home. In her judgment, the trial magistrate had brought in her own views on the Tugen customs and their propriety in modern Kenya. In doing so, it was submitted, she misdirected herself in law and facts since she lacked the basis for holding such views or for making the said conclusions.

Counsel relied on the famous authority of the Court of Appeal: *Virginia Edith Wamboi Otiemo v Joash Ochieng' Ougo and Omolo Siranga* Civil Appeal No. 31 of 1987 in asserting that the personal and not any other law was applicable and should have been applied by the trial magistrate. It was also a misdirection on the part of the court to make a finding that the deceased had no land at his ancestral home.

Mr. Chepkonga for the respondent while supporting the lower court's judgment conceded that the law applicable to the deceased's burial place was Tugen customary law, and that by it, the Tugens are ordinarily buried in their ancestral land. But like the trial magistrate, he contended that agriculture and commerce could dictate the burial of a Tugen away from ancestral home and that the magistrate was entitled to come to that conclusion, invoking her personal knowledge.

In this appeal, the following issues are necessary for its determination.

- (a) Both the deceased and the respondent were Tugens. Were they subject to Tugen customs and practices on burial matters"
- (b) If so, what were these customs and practices" Are they repugnant to justice and morality or any written law" (See Sect.3(2) Judicature Act)
- (c) Did the deceased own land at his ancestral home, and is such ownership relevant in determining the burial place under the customs in question"

Throughout the proceedings in the court below and during the oral arguments before me by counsel, it was abundantly clear and beyond any doubt that both the deceased and the respondent subscribed to the Tugen customs as to burial as Tugens. There was evidence that in his own lifetime, and despite the fact that he had a large farm at Molo, the deceased elected to bury his son at his ancestral home. In her judgment, the trial magistrate correctly held that his alleged wish or oral will that he be buried at Molo was not proved. Even if it had been proved that would not have altered the position in law. The deceased maintained regular contact with his ancestral home and even during the tribal clashes decided to return

there. In *Wamboi Otieno's* case (supra), the deceased husband of the widow had very little contact with his ancestral home, rarely visited it and lived in the city of Nairobi. Nevertheless, the Court of appeal upheld the High Court decision that he was governed by his tribal customs and practices and qualified to be buried at his rural home, his western lifestyle and sophistication notwithstanding. This is a binding authority on the lower court as it is on this court. It was not thus open to the trial magistrate to give her gratuitous opinion of either her personal knowledge or experience with regard to Tugen customs. She was obliged to rule on the facts adduced before her and to apply the law as it is. The answer to issue (a) is in the affirmative.

For reasons that have already emerged in the body of this judgment, the customary law of the Tugens is that a man must be buried by his father and family members at his ancestral home. In the case of the deceased herein, at Tiriodonin, Baringo District. It was never suggested that such a custom is inconsistent with any written law and in *Wamboi's* case, the Court of Appeal held that it is not repugnant to justice or morality.

Turning to the last issue, I have noted from the record of appeal that there was evidence laid before the trial court that the deceased had his own pieces of land at Baringo. Consequently the trial magistrate's main reason for ordering that the deceased be buried at Molo on page 90 of the record of appeal was a misconception of the evidence and a plain misdirection in fact. But even if it were that the deceased had no land of his own, that was an immaterial fact in the Tugen customary law. The deceased recognized this fact when he buried his child in Tugen land home. The point is that ownership of land though proved, was in itself an irrelevant fact in determining the deceased's burial place.

For all the above reasons and having considered the rival arguments before me by counsel, and bearing in mind the said leading authority of *Wamboi Otieno's* case (supra), I hold that the proper place to bury the deceased who has been lying in the mortuary for all this time, close to 5 months, is at his Tiriondonin rural home and not Molo. The orders to the contrary handed out by the trial magistrate on the 6th July, 2002 are accordingly set aside and substituted with the order that the deceased be buried at Tiriondonin, Baringo District. The appeal thus succeeds and is allowed.

Taking into account all the sad circumstances of this saga, I order that each party shall bear its own costs herein and in the court below. The cost of the mortuary shall be shared equally. These are the orders of this court.

Dated and delivered at Eldoret this 16th day of October 16, 2002

G.E.O TUNYA

JUDGE



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