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**IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM**

CIVIL REVISION NO.184 OF 2002

ESTERZIAH AYUGI.....APPLICANT

VERSUS

**1. JOSEPH ODUNDO ELIJAH AYUGI]
2. SAMSON NDONDO]
3. PETER LANYA]....RESPONDENTS**

RULING

ORIYO, J.

The appellant, Esterziah Ayugi is a widow of the late **ELIJAH YONGO AYUGI** who was involved in a fatal car accident in December, 2002. The first respondent is a son of the late Ayugi, born out of wedlock. The second and third respondents are residents of Dar es Salaam originating from Buturi Village, Tarime, which was the home Village of the late Ayugi as well.

The application for Revision of the Ruling and Order of the Resident Magistrates Court at Kisutu in Misc. Civil Cause No.205 of 2002, was made Under Order XXXVII rule 4 as amended by GN 508/91 and XXI rule 24(1); Section 79(2), Civil Procedure Code and Section 44(1) (b) of the Magistrates Courts Act, 1984. As usual, it

was supported by the applicant's affidavit and that of her counsel. The applicant sought two sets of reliefs; one set was **Exparte** and the second one was **Interpartes**. The exparte orders sought were:-

1. That the Order by the Hon. Magere, PRM, made on the 16th December, 2002, granting the respondents the right to bury the late Elijah Yongo Ayugi under Luo customary law be stayed pending the hearing of the revision proceedings.
2. An order for the respondents and the Buturi Luo living in Dar es Salaam appearing in affidavit Annex "A" to Misc. Civil Cause No.205 of 2002; to return the body of the late Ayugi to Dar es Salaam pending the revision proceedings.

This set of **Exparte** orders were withdrawn at the instance of the applicant before hearing because they had been overtaken by events; after the respondents had finalized the burial process in Buturi Village, Tarime, Mara Region.

The record remained with the **Interpartes** orders which were for :-

1. A Declaration that the trial court had no jurisdiction to entertain the application, based on Luo Customary Laws.

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2. That the applicant who professes the Christian faith has statutory and constitutional rights to bury the late AYUGI according to the Christian faith which is guaranteed and protected under the Constitution.
3. A Declaration that upon the death of the late AYUGI the applicable law in respect of his burial and other matters related to his estate is the Probate and Administration Ordinance, Cap 445 of the Laws and not Luo Customary Laws.
4. A Declaration that the decision of the High Court of Kenya relied upon by the trial magistrate is repugnant to the laws of Tanzania and has no legal force in Tanzania.
5. Costs of the application.

In addition to the supporting affidavits one by the applicant and a supplementary by counsel the applicant filed another document to accompany the application. It was titled **GROUND OF REVISION**. Briefly stated, the grounds included issues of the jurisdiction of the trial court over Luo customary Laws, the Locus standi of the respondents, the application of the Kenyan Luo customary Laws in Tanzania, the importation of extraneous facts into the matter and

that the trial court decision of allowing the first respondent to bury the deceased had the implication of legitimizing him, an illegitimate son; contrary to the laws of Tanzania.

The brief facts of the case are not in dispute. The late **ELIJAH YONGO AYUGI** was married to the applicant, **ESTERZIAH AYUGI**. The couple was blessed with four issues of the marriage; namely Tumaini (31), Bahati (29), Baraka (28) and Bella (21); (their ages in brackets were as of 10 December, 2002). The deceased was involved in a fatal car accident on 4 December, 2002; somewhere out of Dar es Salaam. The body was transported back to Dar es Salaam where the couple resided and worked for gain. The body was preserved at the Mission Mikocheni Hospital awaiting burial arrangements to be finalized. Apparently, the applicant, who was traveling in the same car with her husband, sustained serious injuries from the accident and was admitted at the **MUHIMBILI ORTHOPAEDIC INSTITUTE (MOI)** for treatment. In fact the proceedings at the trial court proceeded and were determined while she was in hospital. The applicant and her four children wanted the body of the deceased buried in Dar es Salaam; their residential place; a home. The respondents objected and insisted that the clan members and Buturi Village Community living Dar es Salaam wanted the deceased body to be buried at his ancestral Village of Buturi in Tarime. In pursuit of their wish, the respondents sought a court order to that effect vide Misc. Civil Cause No.205/02. The orders

were sought pursuant a Chamber Application filed under Sections 68(e) and 95 , Order XLIII rule 2 Civil Procedure Code and Section 2(2) Judicature and Application of Laws Ordinance. They had three substantive prayers, for :-

- (a) A Declaration that the respondents had a right to claim the body of the deceased AYUGI and bury him in priority to the applicant, pending the lodging of an application for Letters of Administration over the estate.
- (b) A permanent restraint order against the applicant, her agents and/or representatives, from removing the body from the mortuary for burial purposes or for interference with the burial arrangements organized by the respondents
- (c) The deceased body to be handed over to the respondents for burial at Buturi Village, Tarime District, Mara Region.

The application was supported by an affidavit of Joseph Odundo Elijah Ayugi, the first respondent. The reasons advanced to support the application are contained in paragraphs 6 to 16 of the affidavit; all of which are based on the Luo customs and traditions whereby the wife of a deceased spouse has no say as to the burial of the deceased. It is alleged in the affidavit that such right lies with the clan members and in this case, the wishes of the Buturi Villagers resident in Dar es Salaam as well. In response, the applicant filed a

counter affidavit, as well as a Notice of preliminary Objections on the jurisdiction of the trial court and the absence of **locus standi** on the party of the respondents. The trial court overruled the preliminary points of objection, rejected the denials in the counter affidavit and granted the prayers sought in the Chamber Application. The decision of the trial court was delivered on 16 December, 2002.

The decision bestowed upon the respondents, the Buturi Village Luo clan members and the Buturi Village community members resident in Dar es Salaam exclusive rights over the body of the late AYUGI and burial arrangements. The immediate family; i.e. the wife/applicant and her four children were totally excluded from the handling of the body. They were effectively denied any information and/or right of participation in the burial arrangements and ceremony conducted in Buturi Village, Tarime. All this took place when the applicant was confined to a hospital bed.

The representation of parties in this court and at trial was the same. The applicant was represented by Mr. T. Nyanduga, learned counsel and the respondents by Mr. Magafu, learned counsel. It should be noted here that after the withdrawal of the **exparte** application for interlocutory orders under the provisions of Order XXXVII rule 4 as amended by GN 508/91 and Order XXI rule 24(1); the only matter remaining before the court now is the application for Revision, which was **interpartes** and was brought under the

provisions of **SECTION 79(2)**, Civil Procedure Code and **SECTION 44(1) (B)**, Magistrates Courts Act..

I will start with the issue of the jurisdiction of the trial court. Apparently, for reasons not disclosed in Court, the respondents did not file a counter affidavit; but their learned counsel, Magafu, made submissions from the bar. In his submissions Mr. Magafu stated that the trial court was seized with jurisdiction because the matter before it was to determine the place or venue where the deceased body was to be buried and not the application of Luo customs and Traditions. He conceded that the trial court had no jurisdiction over matters of customary laws and traditions, but in the same breath, he submitted that the trial court sought support from the Kenyan decision on Luo customs and traditions because the decision had a persuasive value. He contended that Kenyan decisions have persuasive status in our courts. He reiterated that the application at the trial court was made under the provisions of the Civil Procedure Code above cited and the orders were made under the same provisions. On the other hand, the applicant vehemently argued that the trial Court's decision was based on the Luo customs and traditions and that's why the trial court sought support from the Kenyan decision; the trial magistrate must have failed to get hold of any statute or case law in Tanzania in support of the decision and orders. The applicant submitted that the trial court assumed jurisdiction and applied Luo customary laws against clear statutory provisions under the Magistrates Courts Act,

1984, the Constitution of the United Republic of Tanzania 1977 as amended and case law. The applicant cited the provisions of Section 18(1)(a)(i) of the Magistrates Courts Acts as conferring jurisdiction over customary laws to primary courts. Also cited were Constitutional provisions against discrimination and those guaranteeing equality before the law. Some of the cited court decisions included that of **HAMISI MASISI AND 6 OTHERVS. R [1985] TLR 24** and **SIMANGO KEHEGU VS ATHANAS TARAYANI [1989] TLR 120** on the supremacy of the provisions of the constitution over all other laws. The court was also referred to the celebrated decisions which refused the application of customary laws to deceased estate where deceased had professed the Christian religion and way of life during his life; eg. **RE: INNOCENT MBILINYI; DECEASED (1969) HCD 283.**

The applicant cautioned that the trial court decision should not be allowed to stand because it is a dangerous precedent. It was prayed that the application for revision of the errors in the trial court be granted, the ruling and orders quashed and that a Restatement of the correct legal position be made.

SECTION 18, MAGISTRATES COURTS ACT 1984 on the Jurisdiction of Primary Courts states :-

"18. – (1) A primary court shall have and exercise jurisdiction

(a) in all proceedings of a civil nature

(i) where the law applicable is customary law"

Further, the **FOURTH SCHEDULE** of the same law titled :- **PROVISIONS RELATING TO THE CIVIL JURISDICTION OF PRIMARY COURTS** provides on the application of customary laws as hereunder:-

"2. In the exercise of its customary law jurisdiction a primary court shall apply the customary law prevailing within the area of its local jurisdiction,in matter of practice and procedure to the exclusion of any other customary law."

That is the legal position and as correctly argued by the applicant that jurisdiction on issues on the Buturi Luo customary laws and traditions was vested in the primary court in Buturi, Tarime or within the local jurisdiction of that Luo community. In the ruling delivered on the 16/12/2002, the learned trial magistrate overruled the

preliminary objection by the applicant that the resident magistrates court had no jurisdiction over Luo Customary laws. The objection was rejected because the issue before the learned magistrate as stated in the said ruling was not on Luo customary laws, but the burial place of the deceased. It is stated in the last paragraph at page 3 of the typed Ruling as follows :-

"It is true as argued by Mr. Nyanduga that matters in relation to customary law are dealt with in primary courts. I have to draw the attention of Mr. Nyanduga as correctly argued by Mr. Magafu that the issue before the court is to determine the deceased burial place, whether he is buried under Christian or customary rites that is not the court's concern."

With due respect to the learned trial magistrate, immediately after denying that the issue before her was based on customary laws, she resorted to the practice in African communities. At the top of page 4 of the ruling, she states :-

"As it is a practice in our African Communities, and if I may point out that it is a common phenomenon that once one is

Further evidence that the issue before the trial court was the Luo customary laws is found in paragraphs 6 to 16 of the supporting affidavit of the first respondent at the trial. The reasons advanced by Joseph Odundo Elijah Ayugi on why the respondents and the Buturi villagers resident in Dar es Salaam have a superior right to take over the deceased body and burial arrangements were all based on the Luo customary laws which do not recognize the widow and the children left behind. The sole evidence before the court on the Luo customs was derived from that affidavit. There are statements like, that burying the deceased in Dar es Salaam according to the wishes of the applicant and her children would have been contrary to Luo customs and traditions. It was also stated that under Luo customary laws; on marriage, a wife becomes part and parcel of the husband's household and a member of the Luo clan. Actually the contents of paragraphs 8 and 9 of the affidavit are a reproduction of the quoted paragraph above from the Kenyan case.

In my considered opinion, it is a matter beyond controversy, that the issue before the trial court was on the Luo customs and traditions on the status of a married woman and the clan's rights over the burial of a deceased Luo man as opposed to the rights of his wife; which are not recognized because a wife has no right or any say to bury her deceased husband. The Resident Magistrates Court at Kisumu erred in assuming jurisdiction over customary laws in contravention of the clear provisions of statutory laws.

Let's assume for a moment, for the sake of arguments that the issue of the customs and traditions of the Luo community was properly before the court; can the decision of the trial court be held to be correct in the context of the Constitution of the United Republic of Tanzania 1977, as amended and other statutory enactments ? Was the Kenyan decision good law ? I hasten to answer it in the negative. Tanzania as a member of the international community is signatory to various International Instruments on Human Rights including Treaties, Covenants, Conventions and related Protocols. In assuming its International obligations in the instruments to which it has become a party thereto Tanzania introduced into her Constitution certain provisions on the Basic Rights and Duties of her citizens; as provided under Articles 12 to 29 of the Constitution which fall under **PART III OF CHAPTER ONE**. Pursuant to these provisions, guarantees and protection of equality of all before the law are available; discrimination on the basis of gender, tribe, place of origin, colour, religion political opinion, etc; is prohibited; the rights to privacy, marriage, to found a family, etc. are recognised and protected. Others include the rights to life, freedom of association, movement, expression and religion; etc. These basic rights and duties are enforceable in courts of law pursuant to the provisions of an enabling statute specifically enacted for that purpose, the **BASIC RIGHTS AND DUTIES ENFORCEMENT ACT, NO.33 OF 1994**. Similar provisions are repeatedly found in International Instruments

like the United Nations Declaration of Human Rights, 1948; the African (Banjul) Charter on Human and Peoples Rights; the Convention on the Elimination of All Forms of Discrimination Against Women and many others.

In view of the foregoing constitutional guarantees on the basic rights and duties of all Tanzanians which are also entrenched in other statutes such as the Law of Marriage Act 1971, etc; even if the trial court was seized with jurisdiction over customary laws; the same should have been applied subject to the basic rights and duties provisions. The decision of the trial court is in conflict with the supreme law of the land and other statutory enactments. The Kenyan decision was bad law for application in our jurisdiction. With due respect to the learned trial magistrate, the decision was also erroneous on this score.

I think I have sufficiently demonstrated why I hold that the trial court erred in assuming jurisdiction over Luo customary laws and further hold that even if, for the sake of argument only, the trial court was vested with jurisdiction over the customary laws; the decision arrived at was also erroneous. I believe these two grounds are sufficient to dispose of the matter without looking at the other grounds raised. For the reasons I have given, the application for revision is granted. Accordingly, the proceedings' ruling and orders

in Misc. Civil Cause No.205 of 2002 are hereby quashed and set aside.

Due to the nature of the proceedings, I make no order for costs.



K.K. Oriyo

JUDGE

9/5/2005

Court

Ruling delivered in Chambers today in the presence of Mrs Ringo for the applicant and in the absence of the respondent.

Order:

1. The application for Revision is granted
2. The proceedings decision and orders of the trial court in Misc. 205/02 are hereby quashed and set aside.
3. Due to nature of proceedings, I make no order for costs.

K.K. Oriyo

JUDGE

9/5/2005