

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
(FAMILY DIVISION)

MISCELLANEOUS CAUSE NO.004 OF 2023

NAMUSOKE ANNET KIWANUKA ::::::::::::::::::::::::::: APPLICANT

VERSUS

1. EVA AMUGE

2. MAJ. DAVID LIVINGSTONE ONYADI:::::::::::::::::RESPONDENTS

3. JENGA PAUL

RULING: BEFORE HON. LADY JUSTICE CELIA NAGAWA

1.0 INTRODUCTION

1.1 The late Isaac Omaset Ekwaro Alias Ekirapa Moses Nyapidi Alias Nyapidi Ekirapa whose burial is in dispute, died domiciled in Canada, Grande Pairie – Alberta on 24th November, 2022. At the time of his demise, the deceased was working with Wapipi Company as a driver and staying with the 1st Respondent and his three (3) sons, born to the Applicant.

1.2 On 27th January, 2023, this Court granted interim orders restraining the Respondents either by themselves, their agents, family members other than the Applicant's relatives and/or any other person whomsoever acting under the Respondents' instructions from removing and disposing of the body of the deceased Omaset Isaac Ekwaro alias Moses Nyapidi from the funeral home, interfering with the remains of the deceased and/or interfering with the deceased's said body in any manner



whatsoever pending the inter-parties hearing and determination of Application No. 004 of 2023. The body of the late Omaset Isaac Ekwaro alias Ekirapa Moses Nyapidi, be kept in Mulago City Mortuary or any other registered mortuary/ funeral home until the disposal of Miscellaneous Cause No. 04 of 2023. The respondents and their agents are restrained from burying the body of the late Omaset Isaac Ekwaro until final disposal of Miscellaneous Cause No. 04 of 2023.

1.3 The orders have remained in force and the remains of the deceased continue to lie embalmed at the Mulago City Mortuary (Hospital), for almost 5 weeks since repatriation.

1.4 This Court was first moved vide a Notice of Motion filed by Namusoke Annet Kiwanuka (the applicant) under Section 98 of the Civil Procedure Act, Cap. 71, Sections 14 and 33 of the Judicature Act, Cap. 13, Order 52 rules 1 & 3 of the Civil Procedure Rules SI-71-1. Seeking orders that;

a) The applicant be granted burial rights over her deceased husband's body and or remains at their matrimonial home at Lukyamu Village, Tweyanze Parish, Katikamu Sub-County, Luweero District.

b) A restraining order be issued against the Respondents or anyone claiming any rights through them from interfering with the said burial of the deceased.

c) Costs of the application to be provided for.

1.5 The grounds of the application are set out in the Notice of Motion and explicated in the supporting affidavit sworn by



Namusoke Annet Kiwanuka (the applicant). Briefly, the grounds are that;

- a) The applicant is the only surviving widow of the deceased Omaset Isaac Ekirapa alias Ekirapa Moses Nyapidi, having been customarily married. They have a matrimonial home at Lukyamu Village, Tweyanze Parish, Katikamu Sub County, Luwero District.
- b) The late husband held a function for his relatives and informed them that he must be buried at his home at Lukyamu Village, Tweyanze Parish, Katikamu Sub County, Luweero District should he pass on. The deceased made the pronouncement in the presence of his mother, sisters, wife and many other people. It is in the interest of justice that this application is granted.

1.6 The Respondents opposed the application in their affidavits in reply and argued among others that the 1st Respondent is the lawful wife of the deceased and not the applicant. They averred that the deceased married the 1st Respondent customarily on the 24th January, 2015 at Karagaliya Village, Kiryadongo District. The 1st Respondent further contended that she lived with the deceased and was close to him in sickness and in health. Given her closeness with the deceased and her status as his wife, it was the contention of the 1st Respondent that the deceased be buried at Kachaboi Village, Kachumbala Sub County, Bukedea District.



2.0 Representation.

- 2.1 At the hearing, the Applicant was represented by Mr. Omongole Richard from M/S Omongole & Company Advocates, and the Respondents were represented by Mr. Odokel Opolot assisted by Mark Chirchir from M/S Odokel Opolot & Company Advocates. They based their arguments on the respective affidavits summarized above and cited a number of authorities that have assisted me in determining this application.
- 2.2 I have carefully perused the record, evaluated the evidence and considered the oral submissions of both learned counsel. I also note that at the end of the trial, the 1st Respondent made a prayer on the documents pertaining the deceased to be handed over to her. The Applicant and the 1st and 3rd Respondents, their relatives were present at the hearing.

3.0 BRIEF BACKGROUND

- 3.1 A dispute arose on where the deceased should to be buried. The applicant and the 1st Respondent both claim to be legal wives of the deceased and therefore entitled to his human remains to be interred.
- 3.2 Neither the Applicant nor the Respondents could address the question of whether the deceased died testate or not. As such, there was no evidence of a burial wish in a Will.
- 3.3 The Applicant stated that she entered into a marriage relationship with the deceased and they were blessed with three children namely Omaset Harrison, 21 years, Ekatan Benny, 16 years and Favour Njoroge 14 years.



3.4 It was the testimony of the Applicant and her witnesses that the deceased verbally willed/wished to be buried at Lukyamu Village, Tweyanze Parish, Luwero District where he owned land and built a home. On the other hand, the Respondents averred that the deceased should be buried at Kachaboi Village, Kachumbala Sub County, Bukedea District or Kwapa Tororo District.

4.0 The Applicant's Case.

- 4.1 The applicant entered into a marriage relationship with the late Omaset Isaac Ekwaro in 1997. They were blessed with 3 children. They cohabited together in their matrimonial home in Nansana now Nansana Municipality. In 2008 the husband relocated to Canada where he worked as a driver among other jobs. He visited his family occasionally other than during the COVID-19 Pandemic period.
- 4.2 On 11th August, 2013 the late Isaac Moses Nyapidi customarily married the applicant at a ceremony that was conducted at her late father's home in Kasanje Village, Villa Maria Parish, Masaka District now Kalungu District.
- 4.3 In 2020 the deceased sent her money to buy building materials to start constructing their matrimonial home on the land situate at Lukyamu village, Tweyanze Parish, Katikamu Sub County, Luweero District. Despite COVID -19 Lockdown challenges she persisted and constructed the house until March, 2022 when the late husband visited.



- 4.4 On 21st March, 2022 he invited his relatives and friends including his biological mother to their family home in Luweero to show them the land he had bought together with his wife. This would later turn into his family ancestral home. On the same date while with his family he thanked the applicant for the work well done and informed the guests that he made a decision that in the event of his death he would prefer to be buried in Luweero.
- 4.5 He returned to Canada for work and he continued to communicate until 9th November, 2022 when he complained about a chest problem and the children informed the applicant that the deceased was unwell. On 24th November, 2022 the applicant received a message from her son Harrison Omaset that their father had passed on.
- 4.6 Following his death, a meeting was held in Kwapa Tororo about repatriation of the remains. The 2nd Respondent in the presence of the Applicant while on phone with other family members, informed the gathering at the meeting that the deceased had wished that he should be buried at Lukyamu Village, Luweero district.
- 4.7 Family meetings were held in the village on funds to repatriate the remains. On 6th December, 2022 a meeting was held in Nansana and one of the relatives suggested that they sell off the deceased properties to repatriate the human remains. The applicant communicated to the 1st Respondent who informed her that they needed 25,000CAD to repatriate the body. She was later contacted by Mr. Emojong Peter her brother-in-law



though a telephone conversation who notified her that it had been resolved that the deceased would to be buried in Canada.

- 4.8 On realizing lack of funds, the applicant through the heir of her late father, Mr. John Mukalazi Kamyia sent 10,000CAD as requested for by the 1st Respondent, to the applicant's son who paid the said amount to Park Memorial Funeral Home. Once the said payment was received, the 1st Respondent cut off all the communication. The respondents then held meetings on how the remains would be transported from Entebbe to Kwapa Village, Tororo District for public viewing and then taken to Kachumbala Village for burial. The biological mother of the deceased and his biological sisters, wished the human remains should be buried in Luweero. The applicant believes that she was the closest person related to the deceased.

5.0 Respondents' Case.

- 5.1 The 1st respondent is a Canadian citizen, of Lango origin presently domiciled in Grande Prairie- Alberta Canada. She was customarily married to the deceased on 24th January, 2015. In 2012 the deceased paid a visit to her parents in Agwata village, Dokolo District and this was followed by a customary marriage on 24th January, 2015 at Karagaliya Village, Kiryadongo District. The said marriage was conducted in the absence of the deceased. On concluding the marriage ceremonies, they started working towards acquisition of properties both in Uganda and Canada. She lived with the deceased and his children born to the applicant in Canada and the deceased went to Canada upon



her invitation. She averred that the applicant's claims are false and that she is the lawful wife of the deceased. That the applicant has never been customarily married to the deceased.

5.2 The 1st respondent was informed by her late husband and the 2nd Respondent that they had a casual visit to the applicant's newly constructed home and never mentioned that he wanted to be buried at Lukyamu Village. She stated that the deceased loved his Iteso Culture and his ancestral homes.

5.3 According to information availed to the 1st respondent by the 2nd respondent, the visitors in Luweero were just merry making and drinking alcohol and therefore if at all the deceased made any of such utterances which is disputed it was a mere joke under the influence of alcohol.

5.4 The 1st Respondent, explained that she was close to her late husband, during his sickness and death. On 5th November, 2022 the husband complained of cough, chest pain and fever though he tested Covid- 19 negative. While on a night shift on 8th November, 2022, she missed a call from the husband and when she returned his call, he informed her that he was unwell and needed medical attention. Upon arriving home in the morning, he found him weary and tired and contacted the family Doctor. Several tests were done which established that the deceased suffered from acute pneumonia and influenza, his condition worsened and he was transferred to another hospital in Edmonton Canada where he was pronounced dead on 24th November, 2022.



- 5.5 The 1st respondent organized a requiem mass, sought necessary clearance to repatriate the human remains and she was desirous of having him buried at his ancestral home in Kacumbala according to his customs.
- 5.6 That being the lawful wife of the deceased, she wishes that he should be buried as the Iteso culture dictates at Kwapa Tororo District where the Family burial grounds are situated or as unanimously decided by the family at Kachaboi Village, Kachumbala, Bukedea.
- 5.7 The 3rd Respondent, wished the brother to be buried in Kachaboi Village, Kachumbala, Bukedea or Kwapa in Tororo District as per the culture norms of the Itesot.

6.0 Evidence of the Parties.

The Applicant called four (4) witnesses and relied on a number of exhibits evidence. The Respondent called three (3) witnesses and relied on a number of exhibits evidence. The parties were cross-examined by the opposite counsel on their sworn affidavits.

- 6.1 Both Counsel for each party made oral submissions and relied on a number of authorities in support of their client's case.
- 6.2 I evaluated the parties' evidence as a whole, analyzed each party's documentary evidence, perused and analyzed each parties' submissions and arguments. I, thus, recommend each party's advocates for the research done in order to prosecute and prove their respective client's case.
- 6.3 In Civil cases, each party bears the burden of proof, to prove its case on the balance of probabilities. In the case of **Miller –VS- Minister of Pensions [1947] 2 ALL ER 372**, speaks to it.

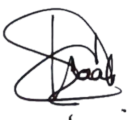


7.0 ISSUES:

- i. Whether the deceased should be buried in Wombulezi (Luweero), Kachumbala or Kwapa?
- ii. Between the 1st Respondent and the Applicant who is the next of kin?
- iii. Whether the deceased ascribed to Itesot culture and if the same should be applicable?
- iv. What are the remedies available?

8.0 The Law

- 8.1 Although the right to a decent burial has long been recognized, there is no express statutory provision on burial disputes more so for a person who dies intestate.
- 8.2 The Constitution of the Republic of Uganda, 1995 (as amended), the Judicature Act, Cap. 13, the Succession Act, Cap. 162, The Administrator General's Act, Cap. 157 and the Civil Procedure Act, Cap. 71 are some of the laws that are in place to guide this Court in matters of contention as such this.
- 8.3 In this regard, the preamble of the Constitution of the Republic of Uganda, 1995 (as amended), Objective 24 provides that; "cultural and customary values which are consistent with fundamental rights and freedoms, human dignity, democracy, and with the Constitution may be developed and incorporated in aspects of Ugandan life. The State shall (a) promote and preserve those cultural values and practices which enhance the dignity and well - being of Ugandans."
- 8.4 Section 14 (1) and (2) of the Judicature Act, Cap.13 empowers the High Court with unlimited jurisdiction over all matters that are in



conformity with; written law, common law and the doctrines of equity.

- 8.5 Section 14 (2) (c) of the Judicature Act, states that; “*subject to the Constitution and this Act, the jurisdiction of the High Court shall be exercised, where no express law or rule is applicable to any matter in issue before the High Court, in conformity with principles of justice, equity and good conscience”.*
- 8.6 The application of customary law is guided by Section 15(1) of the Judicature Act, Cap.13 which prescribes that; “*Nothing in this Act shall deprive the High Court of the right to observe or enforce the observance of, or shall deprive any person of the benefit of, any existing custom, which is not repugnant to natural justice, equity and good conscience and not incompatible either directly or by necessary implication with any written law*”.
- 8.7 Section 98 of the Civil Procedure Act, Cap. 71 provides that nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of process of the court.
- 8.8 The deceased had children, two of whom are below the age of 18 years. The Children act, Cap. 59 (as amended) under Section 3 provides for the Welfare and guiding principles.
- 8.9 **Section 3 (1)** is to the effect that; “The welfare of the child shall be of paramount consideration whenever the state, a court, a tribunal, a local authority or any person determines any question in respect to the upbringing of a child, the administration of a child’s property, or the application of any income arising from that administration.



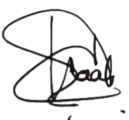
(2) In all matters relating to a child, whether before a court of law or before any other person, regard shall be had to the general principle that any delay in determining the matter is likely to be prejudicial to the welfare of the child.

(3) In determining any question under subsection (1), court or any other person shall have regard to—

(a) the ascertainable wishes and feelings of the child concerned, with due regard to his or her age and understanding; (b) The child's physical, emotional and educational needs; (c) The likely effects of any change in the child's circumstances; d) The child's sex, age, background and any other circumstances relevant in the matter;(e) Any harm that the child has suffered or is at the risk of suffering; and (f) where relevant, the capacity of the child's parents, guardian or any other person involved in the care of the child, and in meeting the needs of the child."

9.0 The welfare of the child is the paramount consideration in most court adjudicated disputes. This means that rights and interests of others are relevant only in so far as they bear upon the child's interest. Alternatives to the welfare principles remain closely wedded to its basic premises; that children should be afforded special consideration in the decision making process. Children's rights play an increasingly important role in family law and are now widely recognized and respected.

9.1 The meaning of "Paramount" has been interpreted by the House of Lords in **J V C [1970] AC 668, 710-11 by Lord MacDermott**

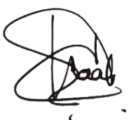


who gave the clearest judgement as to the meaning to be attributed to the term; the second question of construction is as to the scope and meaning of the words “shall regard the welfare of the infant as the first and paramount consideration. *“Reading these words in their ordinary significance.... It seems to me that they must mean more than that the child’s welfare is to be treated as the top item in list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child’s welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed”.*

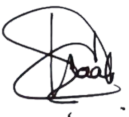
- 9.2 The child’s welfare is thus determinative, with other potentially relevant factors, such as the rights, wishes or feelings of the child’s parents, taken into account only insofar as they have a bearing upon the best interests of the child. The two sons (Harrison Omaset and Andrew Etyang) claimed to be born of the deceased testified and their evidence has been taken consideration of in this decision. Each son with distinct wishes and background relationship with the deceased.

10.0 Determination by this Court

Issue 1: Whether the deceased should be buried in Wobulenzi (Luweero), Kachumbali or Kwapa?



- 10.1 In ordinary circumstances, where the deceased left a Will, it would clearly state the wishes of the deceased on where he would want to be buried.
- 10.2 The place of burial of a person is closely linked to three things: the person's wishes, the duty imposed on those closely related to the deceased during his lifetime to bury him and whether the deceased had established a home. Additionally, the custom to which the deceased is subject comes into play.
- 10.3 The applicant averred that the deceased sent her money to buy materials, to construct a house in Lukyamu Village, Tweyanze Parish, Katikamu Sub-county in Luweero District. On his visit in March, 2022 the deceased was pleased with what he found, he invited his relatives and friends for a Thanksgiving ceremony at their new residence where he uttered his wishes that in case he passed on, he would be buried in Luweero and so would his family. This he said in the presence of his biological mother Janet Omaset, Sisters Eunice Abonyo, Margaret Abisangi, Hellen and Beatrice among others. The applicant identified each one of them during the court hearing.
- 10.4 This was collaborated by the testimony of Janet Omaset (mother of the deceased), Eunice and Margaret who stated that the deceased told them at a function that he organized in Luweero in March, 2022 that in case of his passing, he wished to be buried in Luweero.
- 10.5 Harrison Omaset, son to the deceased, testified while online that his father was very passionate about the land in Luweero. His plans were that during his retirement he would move to and



settle in Luweero where he built his home. His father did not have a house in Kacumbala, the four houses that are there belong to his grandmother (Mrs. Janet Omaset).

10.6 The Son further testified that, it was proposed by some of the fathers relatives that the late father should be buried in Canada because of shortage of money, something his mother and himself strongly objected and then he begun a social media drive (Go fund) to help raise money to enable him return the fathers remains be buried in Uganda. His father's last wish was to be buried in Wobulenzi (Luweero) and this land actually exists. It is titled land. His wish including the wishes of his siblings in regard to father's respect was to be buried in Luweero.

10.7 In opposition, the 1st Respondent submitted that the wishes of the deceased on how his remains should be interred must be given effect. The 1st respondent was not aware that the 2nd respondent had visited Luweero in preparation of the burial and that he was opposed to burying the deceased brother in Kwapa. She preferred her late husband to be buried in Kachumbala much as she did not disclose nor consultant her mother-in-law, sisters-in-law (Eunice and Margaret), not even the children of the deceased and obviously the applicant. She believed that her position was final as to where the late Omaset would be buried. During his life, the deceased lived in Kwapa in Tororo and Kachumabala in Bukedea, the 1st respondent was not aware of any place where the deceased lived while in Kampala. Kachumbala is where the mother-in-law lived, and she did not know why the mother preferred her son to be buried in Luweero.



10.8 As such, it is imperative on this court to weigh the wishes of the deceased against the applicable customs, if any, in discerning where the deceased ought to be buried. **In SAN Vs. GW, Civil Appeal No. 01 of 2020 [2020] eKLR the Court of Appeal (Ouko (P), Gatembu & Murgor, JJA)** expressed itself thus;

“...courts have also been unanimous as far as we can tell from decided cases that, both laws, common and customary, have one thing in common, in so far as burial is concerned; that the wishes of the deceased, though not binding, must so far as is possible, be given effect, so long as those wishes are not contrary to custom or to the general law or policy.

The wishes or a Will on how the deceased’s remains will be disposed of upon death are not, as a general rule binding because, in the first place, there is no property in a dead body and secondly, because a dead person cannot take part in the decision of his or her own burial. There must, however, be compelling reasons for not heeding the expressed wishes of the deceased.”

10.9 The representative of the clan who testified with respect to the clan’s burial practices (RW2) Emapus Elijah and the 3rd Respondent Jenga Paul testified simultaneously. Mr. Emapus Elijah stated that he was the vice chairperson of the clan, he was therefore clothed with the knowledge of the intricate details of the Ikatekok luk’epikist luk emojong clan customs. According to both Emapus and Jenga, the clan wanted the deceased to be buried in Kwapa. The argument for this was that since the father, grandfather, and siblings (step siblings) had been buried in Kwapa, therefore the deceased should as well be buried there.



10.10 During cross examination Emapus who also doubled as cousin to the deceased was asked about the land wrangle in Kwapa between his family and that of the deceased. He quickly added that, the land issue was resolved but he failed to explain how. He was put to notice that due to land wrangles between the families (Emapus) and (Omaset) the deceased had to find his own plot of land elsewhere in Uganda and even wished to be buried there. He did not refute that statement.

10.11 According to the case of **Nice Bitarabeho Kasango Versus Rose Kahise Eseza Miscellaneous Cause No. 17 of 2021** Lady Justice Lydia Mugambe stated inter alia that; *“It therefore does not matter that one loves their ancestry or not, is ashamed of it or not, knows or speaks their ancestral language or not, practices their ancestral culture or not. We are born into our ancestry. We do not choose it. It is imparted by birth and it is a matter outside our discretion”*.

10.12 The applicant’s Counsel submitted that the wishes of the deceased on how his remains should be interred must be given effect as practicable as possible. It is common ground that the wishes of a deceased person are of paramount consideration in a burial dispute as held in the case of **Jacinta Nduku Masai vs. Leonida Mueni Mutua & 4 others Kenya HCCA No. 139 of 2018** the learned Judge cited **John Omondi Oleng and Anor Versus Suelfaln Radal (2012) eKLR** where it was held that inter alia; *“... when it comes to the disposal of the body of a married man or woman, the spouse should take a leading role. It would be better if the relatives of the deceased can sit down and agree on how to give their loved one a dignified exit. When they fail to agree and*



approach the court of solution, the Court has no option but to step in”.

10.13 Counsel for the applicant further argued that the property rights are enriched in Article 26 (1) of the Constitution include one’s right to be buried in their property anywhere in Uganda, subject to the limitations under Article 26 (2).

10.14 The applicant contended that the deceased’s wish was to be buried at his home in Luweero, where he had built and established a home. This wish, she stated, found support in the testimonies of the witnesses herein that the deceased had decided to permanently relocate to Luweero. The applicant attached to her affidavit a copy of a land certificate of title registered in their children’s names as proof of ownership of land. Therefore, the deceased had expressed an unequivocal wish of where he wished to be buried.

10.15 On the contrary, Counsel for the respondents argued that the deceased should be buried in Kwapa or Kachumbala that it is against the Itesot custom for the deceased to be buried in Luweero moreover on a private mailo plot of land. Counsel argued that it was undisputed that the deceased father’s was buried in Kwapa and contended that it was against custom for a man to be buried in Buganda and yet he was an Itesot.

10.16 When dealing with burial disputes, the court will consider the following factors;

- i. The deceased’s wishes
- ii. The reasonable requirements and wishes of the family and friends who are left to grieve;
- iii. The place the deceased was most closely connected with; and



iv. Ensuring that the body is disposed of with respect and without delay.

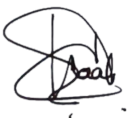
10.17 Of these factors, the fourth is generally considered to be the most important consideration for the court, also referred to as the “overriding factor”.

The property (land) in Luweero is undisputed, I accordingly find that the deceased should be buried in Luweero following the wishes of the mother Mrs. Janet Omaset and in consideration of all other factors.

11.0 Issue 2: Between the 1st Respondent and the Applicant who is the next of kin?

11.1 When a person is married it may be common to refer to their spouse or civil partner as next of kin and respect that person’s right to make a decisions if their spouse is unable to do so. But, with the exception of some situations relating to children, naming someone as your ‘next of kin’ creates no rights for that person because it is not a recognized legal status. Nevertheless, there are some situations when references to “next of kin” are often used, such as in medical settings and on death.

11.2 The naming of a person on hospital or care home records as ‘next of kin’ creates no particular rights for that person, although it acts as consent to the hospital or home to disclose information about the patient to the person named. If a person wants to nominate someone to make decisions when they cannot do so, then they may, if they have legal capacity to do so, make a lasting power of attorney appointing their chosen person as attorney, able to make decisions pertaining to their health and well-being. This is subject



to the safeguard that medical professional may refer the issue to court if there is disagreement about what is in the person's best interests. Similarly, a person can appoint a property and financial affairs attorney to deal with their assets. Where a person has already lost mental capacity to make decision, then the court can appoint, a 'deputy' to manage their affairs. Those acting under powers of attorney or deputyship must act in the best interests of the person concerned.

- 11.3 Upon the death, a person may deal with the funeral directors, coroner, or other official's organizations. Generally, this work will fall to the closest relation, but there is no law requiring that. Taking on this role confers no rights or responsibilities and has no effect on inheritance, which falls to be dealt with under a Will (by the executor) or the intestacy rules. If there is a dispute about a body, then court would become involved. The relevant law is as set out by *Hale J* in ***Buchanan Vs Milton [1999] 2 FL R 844***.

"There is no right of ownership in a dead body. However, there is a duty at common law to arrange for its proper disposal. This duty falls primarily upon the personal responsibilities of the deceased. An executor appointed by Will is entitled to obtain possession of the body for that purpose even before the grant of probate. Where there is no executor, that same duty falls upon the administrators of the estate, but they may not be able to obtain an injunction for delivery of the body before the grant of letters of administration".

- 11.4 Sometimes, alongside a Will, the deceased leaves a written document setting out how they would like a funeral to happen. These are not binding in law, although those left may consider them morally binding.



11.5 There is no right of property in a dead body in the ordinary sense, but it is regarded as property so far as necessary to entitle the surviving spouse or next of kin to a legal protection of their rights in respect to the body. While the primary and paramount right to possession of the body and control of the burial is vested in the surviving spouse, the right of a surviving spouse to control the burial is dependent on the peculiar circumstances of each case, and may be waived by consent or otherwise. This means that the right of a surviving spouse to the custody of the dead body for purposes of burial is not an absolute one. Additionally, if the deceased had expressed any particular place for his/her burial, then consideration must be given to that place.

11.6 Upon the death of a married person, the surviving spouse has the paramount right as to the custody of the remains of the deceased and its burial. As would be the case in intestacy, the right only accrues to a legally married wife, blood relatives of the deceased or a lawful attorney duly authorized in writing. This is because the wife and blood relatives by reason of proximity are presumed to know and represent the wishes of the deceased in his death. In the case of **Kyobe Julius & others V Aidah Namwala Misc. Application No. 167 OF 2021**, it was stated that there is a requirement of actual closeness or proximity to the deceased in enforcing the deceased's rights and this must not be ignored.

11.7 Both the applicant and the 1st Respondent, demonstrated to this court that they were legally customarily married. There was no established proof by way of marriage certificate much as the 1st Respondent tried to exhibit one in court but on further probing by

counsel for the applicant she confessed that indeed she obtained the marriage certificate on her return to Uganda in February, 2023 after the death of the husband and following the filing of this application by the applicant. She stated that the Marriage Certificate was procured by her sister (Esther Akullo Otada) whom she identified to this Honorable Court at the hearing. She further explained that even the signature on the certificate did not belong to her late husband since he had passed on. The Marriage Certificate was obtained on 6th February, 2023 and it belonged to Bunyoro Kitara Kingdom.

11.8 Counsel for the Applicant asserted that the deceased entered into a marriage union with the Applicant on 11th August, 2013 as testified by all the witnesses and therefore that in the absence of any divorce decree or evidence of the nullification of the marriage, the court should make a finding that at the time of his death, the deceased was still legally married to the Applicant.

11.9.1 At the center of every burial dispute is the issue of marriage and its legality. This is so because of the cardinal principle that the person in the first line of duty in relation to a deceased person is the one who is considered to be of the closest legal proximity, who in most instances is the spouse if the deceased was married. The decisions in **Ruth Wanjiru Njoroge vs. Jemimah Njeri Njoroge & Another (supra)** and **John Omondi Oleng and another vs. Sueflan Radal [2012] eKLR** speak to this.

This is further confirmed by Section 5 (1) of the Administrator General Act which provides that;

No grant shall be made to any person, except an executor appointed by the Will of the deceased or the widower or the widow



of the deceased or his or her lawful attorney duly authorized in writing, authorizing that person to administer the estate do the deceased person, until the applicant has produced to the court proof that the Administer General or her agent has declined to administer the estate or proof of having given to Administrator General fourteen clear days definite notice writing of his or her intention to apply for the grant.

11.9.2 This therefore means that upon death of a person, a number of rights accrue to different individuals in the order of priority.

- i. The rights and or wishes of the deceased take priority and that is why the will is given first mention
- ii. The widower or widow
- iii. The deceased's lawful attorney duly authorized in writing
- iv. Administrator General
- v. Any other person with consent of the Administrator General.

11.9.3 In **SAN vs. GW [2020] eKLR**, the Court of Appeal observed thus:

“The third aspect of this dispute is that the law only recognizes the persons who are closest to the deceased to have the right to bury the deceased. Those persons have been identified as the spouse, children, parents and siblings, in that order. The other consideration is that the person claiming the right to bury the deceased must be one who is demonstrated to have been close to him or her during his or her lifetime.”

11.9.4 The uncontested parent of anyone is the mother. Similarly both the Applicant and the 1st Respondent do recognize the special position the mother holds to the deceased by way of stating that the deceased ought to be buried in Kacumbala, Bukedea District at the mother's home according to the 1st Respondent and the



Applicant testified that the mother was present at the Thanksgiving function when the deceased made his wishes, including the mother's preference that the deceased ought to be buried in Lukyamu Village in Luweero District.

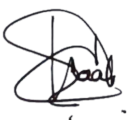
This court therefore finds that the mother to the deceased Mrs. Janet Omaset in this particular dispute is the "next of Kin".

12.0 Issue 3: Whether the deceased ascribed to Itesot culture and if the same should be applicable.

12.1 Customary law is only applicable where one or more of the parties is subject to it or affected by it, in so far as it is not repugnant to justice and morality or inconsistent with any written law. The place of customary law as the personal law of the people of Uganda is complementary to the relevant written laws and the Constitution is the supreme law.

12.2 The Constitution guarantees protection of freedom of conscience, expression, movement, religion, assembly and association. It also provides for a right to culture and similar rights as enumerated under its Articles 29 and 37 respectively.

12.3 According to the Black's Law Dictionary, 10th edition at p. 779 **"freedom"** is the quality, state, or condition of being free or liberated; esp., the right to do what one wants without being controlled or restricted by anyone and "freedom of choice" is the liberty embodied in the exercise of one's rights. It is therefore evident that the Constitution guarantees each individual the freedom of expressing their wishes, beliefs and opinions on personal matters. This includes the freedom to practice a religion of one's choice and to express themselves on how they wish to be



treated upon their death. Numerous case law on burial disputes recognizes that the wishes of the deceased, though not binding, ought to be given effect in so far as is practicable. This demonstrates that whereas a corpse has no legal standing or personality, the courts have given effect to past rights created during a person's lifetime with respect to the manner in which their remains should be handled.

12.4 Having determined issue two above, this court therefore decides that the "next kin" being the mother to the deceased will decide whether the Itesot culture will be applied during the burial of the deceased.

13.0 Passport and Death Certificate.

13.1 Before I take leave, during trial, the 1st Respondent prayed for an order to be made in regard to the authorities of Mulago City Mortuary to release the deceased passports (Uganda and Canadian passport) and death certificate plus any relevant documents to her as the consignee.

13.2 The death certificate is confirmation of death which should be used by the administrators to obtain Letters of Administration. This court finds it premature to determine who should be handed over these critical documents among the parties. Therefore, all documents mentioned hereby should be deposited in court within 7 days by the next of kin.

14.0 Conclusion

In conclusion and for the foregoing reasons, I accordingly direct that;


1. The body of the late Omaret Isaac Ekirapa (herein referred to as the deceased) is to be released to the mother Mrs. Janet



- Omaset for burial at the deceased home in Lukyamu village, Tweyanze Parish, Wobulenzi Sub County, Luweero District.
2. The mother of the deceased Mrs. Janet Omaset is hereby declared the next of kin to the deceased.
 3. The mother to the deceased Mrs. Janet Omaset will decide whether the Itesot culture will be applied during the burial of the deceased.
 4. The Respondents and/or anyone claiming any rights over the deceased Omaset Isaac Ekirapa are restrained from interfering with the burial.
 5. The Respondents and their relatives (including clan members) are allowed to attend the burial, if they so desire;
 6. The burial will be within 5 days from the date of this ruling.
 7. The burial must be conducted decently, giving the immediate family an opportunity to send off the deceased and find closure;
 8. The travel documents of the deceased (Ugandan and Canadian Passport) and the death certificate shall be handed over to the mother of the deceased for deposit in this Court within 7 days from the date of this Ruling.
 9. No orders as to costs.

I so Order

Dated, signed and delivered by email this 20th day of March, 2023.



**CELIA NAGAWA
AG. JUDGE**