

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(FAMILY DIVISION)
MISC CAUSE NO. 17 OF 2021

NICE BITARABEHO KASANGO ::::::::::::::::::::::::::::::::::: **APPLICANT**

VERSUS

ROSE KABISE ESEZA ::::::::::::::::::::::::::::::::::: **RESPONDENT**

BEFORE: LADY JUSTICE LYDIA MUGAMBE

RULING

a) Introduction

1. The applicant seeks i) an order authorising her to bury her late husband - Robert Aldridge Kasango (hereinafter the deceased) in Gweri village, Burahya county, Fort Portal city in Kabarole district; ii) a restraining order against the Respondent - who is the mother of the deceased or anyone claiming any rights through her from interfering with the said burial and costs of the application. The application is supported by the affidavit of the applicant.

2. The application was opposed through the affidavits of the Respondent and a one Opilli Esau Michael, a cousin of the deceased. Both contend that the deceased has to be buried in Tororo according to his Luo/Japadhola culture and rituals. The parties filed written submissions and were also heard orally.

3. The applicant is represented by Mujurizi Jamiru and Tumwesigye Humphrey of M/s. Mujurizi, Alinaitwe & Byamukama Advocates and the Respondent is represented by Odokel Opolot Deogratus and James Njogu of M/s. Odokel Opolot & Co. Advocates.

b) Background

4. The deceased married the applicant on 22nd December 2000. In the course of their marriage, they were blessed with three children to wit; Samora Kasango aged 19 years, Stephanie Kasango aged 16 years and Ivana Kasango aged 13 years. The deceased passed away on 27th February 2021 at Luzira prison and his body was released to the applicant as his next of kin on 28th February 2021 for burial. After the memorial service at All Saints cathedral on 3rd March 2021, the Respondent and her other relatives and/or agents forcefully made away with the deceased's coffin, insisting that he had to be buried in Tororo according to Japhadhola culture.
5. The deceased's coffin was intercepted by police and returned to A-Plus funeral home where it has been for over three weeks now. Several meetings in which friends and family members have tried to mediate between the applicant and respondent to resolve the *impasse* regarding where to bury the deceased. However these have not yielded any consensus. In the meantime, the funeral home charges a daily fee of Ug shs: 250,000 for preserving the deceased and this is borne by the applicant.
6. The applicant insists that the deceased should be buried in Fort Portal where they own land as the Kasango family, which they have always visited as a family, is known to the children as their village and the deceased wished to be buried there with his wife and children. She explains that the deceased had no attachment to Tororo, has no land in Tororo, never ever took his wife or children to Tororo and never expressed any intention or desire of being buried in Tororo.

c) Evidence

7. The parties adduced affidavit evidence. Both the Respondent and Opilli referred to the deceased as Robert Kasango Othieno. The Respondent confirmed that she is the biological mother of the deceased. According to the Luo/Japadhola custom - which she ascribes to, it was impossible for the deceased to have a home in foreign land (outside Tororo). He was a member of the Nyapolo oligo clan and he knew his lineage. It is his clan that is vested with the duty to preside over his burial ceremony.
8. She explained that there was no arrangement to bury the deceased in an alien land against the traditions, customs and culture of the Luo/Japadhola people. The applicant has not come with clean hands as she is attempting to offend the cherished burial customs of the Luo/Japadhola people.
9. She insisted that the deceased gave her money to buy him land in Tororo where he was to be buried and presented annexures B1 and B2 as proof of the deceased's ownership of such land. She admitted that the deceased never signed anywhere as a buyer on annexures B1 and B2 and that apart from these two pieces of land, the deceased had no other land in Tororo. She also insisted that allowing the applicant to bury the deceased at her mother's home would be an insult to Luo heritage, the Japadhola tribe and his clan's right to bury their own.
10. There was a lot of clarification during the Respondent's cross examination. She explained that the deceased's father was a one Livingstone Richard Kasimo from Busoga. She confirmed that she and this Kasimo were Basoga. The said Kasimo is deceased and buried in Bulemezi where his family migrated and settled in Buganda. Although her father was a musoga, he migrated to Tororo with his family long before she was born and their family settled and adopted the Japadhola culture of Tororo which she now claims for herself and the deceased. According to the Respondent, she became a member of the Japadhola tribe since her father migrated to Tororo before she was born and she is no longer a musoga. She also explained that she gave the Othieno name, as well as Robert Kasango to the deceased at birth.

11. The Respondent could not tell the size of the Tororo land presented as the accused's in annexures B1 and B2. First she insisted it was two acres, then she said one acre and finally, in a defeated tone, said she did not know the size but thought it was two acres. She also could not readily identify herself as a signatory on the said agreements made on the same day. On B1, her names are hand written as "Kabise Rose" against the names of Rose K Attek.
12. On B2, Mrs. Rose Okumu Attek is listed as witness number 5 present. After struggling to identify herself on this agreement while insisting she was there, she said there must have been a mistake; she clarified she was not Rose Attek but Rose Eseza Kabise. These are the names in her national identity card which she annexed to her affidavit as C.
13. The Respondent attached as A, the deceased's baptism certificate where he is presented as Robert Kasango of Y. K. Kasango. She also attached pictures D1, D2, D3, D4, D5 and D6 as proof of her good working relations with the deceased, the applicant and their children. According to the applicant, none of these pictures demonstrates any good relations; the Respondent is in none with the deceased; D1 where the Respondent is with Samora Kasango was taken only recently when the Respondent came to Kampala after the deceased's death; D2 was at the wedding of one of the children of uncle Sam Okello where she found the deceased's sister who is also in the picture with another child of the deceased and the applicant; D3 has the deceased carrying one of his newly born children with an older one looking on; D4 is their wedding picture where although the Respondent was present was never introduced or recognized as the mother of the deceased at the wedding.
14. The applicant clarified that no one ever introduced the Respondent to her as the deceased's mother. She only got the sense that she was the deceased's mother seven years into her marriage and started inviting her over to their home like once in two years. She explained that the deceased never ever invited the Respondent to their home and she only came at her invitation. D5 is a picture of the Respondent seated at a table with the applicant and another person in the applicant's home. The applicant explained that in this

picture, the Respondent had come to her home at her invitation. The applicant explained that whenever she insisted on knowing his relatives, the deceased always told her that he was protecting her and their children from his hostile family, it was for their own safety.

15. The Respondent appeared to confirm this when she explained that she always asked the applicant and the deceased's children when they would go to Tororo and also said that culturally she needed no invitation to her son's home.
16. In his supplementary affidavit, Mr. Opilli averred that he is well conversant with his Nilotic/Luo/Japadhola customs, traditions and practices. In order to accord a deceased person a decent burial in accordance with the customs, traditions and practices of the Japadhola people, the clan members are fully in charge of deciding the final resting place of the deceased. The custom also demands that the son of the clan be buried at the ancestral land of the deceased person or at his own land which he bought with the knowledge of the clan members.
17. For the deceased to be buried on his own land, the deceased must have left a will indicating that he should be buried on the same. He gave a step by step explanation of how the burial is conducted in their custom and what happens after the burial. Like the Respondent, in paragraph 15 of his affidavit, he explained that the deceased acquired his personal land and built a home on it at Wikusi zone, Katandi parish, Kirewa sub county in Tororo district. However in cross examination, Opilli clarified that he had only looked at the purchase agreements briefly and that from the description of the land, he knows where it is but had not physically seen the land.
18. He explained that Busoga culture is different from Japadhola culture but there can be some similarities. He did not know the deceased's biological father and has never met him. He then said that the late Okumu Bonventure was the deceased's biological father and that he was not aware that the deceased's biological father was not a Japadhola.

19. Opilli also explained that a person becomes Japadhola by birth when born to a Japadhola father. The mother can be of any tribe. He admitted that if evidence established that the deceased was not a Japadhola, he would not insist that he is buried in Tororo.
20. Regarding the interests of the deceased's children, Opilli clarified that he had not spoken to the deceased's children and did not know their interests. He confirmed and corroborated the applicant's evidence that the deceased never took his children or wife to Tororo in his lifetime.

d) Analysis

21. I have carefully considered all the pleadings and submissions of the parties and I'm alive to the reality of this case that the deceased remains unburied three weeks after his death.
22. The applicant submissions were based on the prayers first mentioned above while the Respondent framed five issues for resolution in her submissions. Respectfully I find these issues largely repetitive and unnecessary in some parts. In reconciling the two approaches, I'm framing three issues for resolution viz: i) Whether the Luo/Japadhola culture of the people of Tororo is applicable to the deceased and /or his wife and children; ii) whether the deceased should be buried in Tororo or Fort Portal and iii) remedies available.
23. Under the preamble of the Constitution, 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 - (i) promote and preserve those cultural values and practices which enhance the dignity and well - being of Ugandans." Section 15(1) of the Judicature Act provides 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."

24. In this conundrum, there are three children of the deceased, two of whom are children below eighteen years. This brings in the Children Statute (Cap 59 as amended in 2016). Section 3 provides for the welfare and guiding principles in matters concerning children. It provides that “(1) 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.”

25. The court in **J V C (1970) AC 668** defined the welfare principle as “when all 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 interest of the child...” (See also **HCFC No. 2 of 2018, in the matter of Hassam Kaaya, a child**). **Bromley’s Family Law, 8th Edition, at page 338** states that in applying the welfare principle, the court must act in the child’s best interest. “...it should be appreciated that a judge is not dealing with what is ideal for the child but simply with what is the best that can be done in the circumstances...”

i) The deceased’s burial culture

26. Uganda has about 54 tribes with unique cultural practices. The Iteso, Basoga and Japadhola are only some of these tribes. Most of these tribes have some common cultural

practices. Most of our cultures are passed down from generation to generation, through folklore and practice. It can also be said, without any fear of contradiction, that our different cultures are, if at all, very rarely codified or written down in some form. Nonetheless, they remain not lost on us and are very much cherished by each tribe.

27. It is also true that cultures evolve and do not remain static. Through the years, the bad or illegal cultural practices have been abandoned while the good ones have been preserved. Put in the context of cultural folklore, the birth waters have been poured away and the beautiful baby has been preserved and nurtured. This is in consonance with the requirements of the Constitution and Judicature Statute cited above.

28. Mr Opilli testified as one conversant with the Japadhola culture of Tororo to buttress the Respondent's case. He explained that a Japadhola child acquires the culture of his biological father. In agreeing with him here, I'm pacified by the knowledge of the patriarchal nature of Ugandan society and cultures.

29. Succession in Uganda is through the male children.¹ The importance of boy children is enshrined in the patrilineal nature of their society.² Culturally, children belong to the man because even when a girl gets pregnant her family looks for the father of the baby to take responsibility of his child. They take the child to its father's family. It is believed that through the boy child, a man leaves the continuity of his blood since he leaves an heir behind.³

30. The question therefore to be answered in determining the deceased's culture is who his biological father was/is. The applicant said this issue always agitated the deceased when she asked him about it. On one occasion he got so emotional and went off to the bedroom and cried incessantly, but still gave no answer. Sam Okello who is the husband to

¹ See for example "Not a boy, Not a child": A qualitative Study on Young People's views on Childbearing in Uganda" by Jolly Beyeza-Kashesya, Stella Neema, Anna Mia Ekstrom, Frank Kaharuza, Florence Mirembe and Asli Kulane, published in the African journal of Reproductive Health, March 2010 at pp.71-80. Available at: www.bioline.org.br/pdf?rh10006, accessed on 25 March 2021.

² Ibid, 75

³ Ibid, p.75.

Florence Okello - a sister to the Respondent, was presented to the applicant as the father of the deceased in the course of their marriage and he bonded with their children. She therefore developed a rapport with him as such and he made time with the deceased's children as their grandfather. The applicant explained that the question of who the deceased's biological father was always lingering and remained unresolved.

31. Although Opilli insisted Okumu Bonventure from Tororo was the deceased's father, he acknowledged that he did not know the deceased's biological father and had never met him. To this end, Opilli is not helpful to the determination of who the deceased's biological father was.
32. As the mother, the Respondent is best placed to say who the deceased's biological father was. It is also possibly true that the Respondent knows deep in her heart that the deceased's father was in fact a Japadhola, hence the insistence on his burial there. However she did not present evidence in this direction in court.
33. She denied that Sam Okello was the biological father of the deceased. She also clarified that her late husband- Okumu Bonventure was a stepfather and not the biological father of the deceased. She in no uncertain terms clarified that the deceased's father was a one Richard Livingstone Kasimo who was a musoga and whose family migrated to Bulemezi in Buganda, where he is buried.
34. If the deceased's mother is believed, in the patriarchal context of culture, then the deceased should be buried in Busoga or Bulemezi where his patriarchal ancestors originated or migrated to and were buried.
35. Migrations of families is a historical practice in Uganda. There are many Banyankole that migrated to Buganda; Baganda to Ankole, to give an example. So it is acceptable that the Respondent's family migrated to Tororo from Busoga, and Kasimo's family migrated from Busoga to Bulemezi in Buganda. It is also acceptable for such migrations, in some cases, to follow with migration even of burial grounds. Often times, the migrating

families may fully adapt to the cultural practices, language, food and way of life of the new area or tribe. This is within their discretion.

36. However, there is no evidence that such migrations change any one family's original patrilineal ancestry. Many times these families retain their original family names and refer to themselves as having migrated from their original areas. They also continue to identify their original tribes even where they learn and assimilate into the tribes and cultures of the areas they migrate to.
37. Perhaps the reason is simple; the migrations do not in any way affect their being Basoga, Baganda, Banyankole, Batoro, Bakiga, Iteso, Japadhola or whatever other tribe of their lineage because such identity is assigned by patriarchal blood following. 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're born into our ancestry. We do not choose it. It is imparted by birth. and it is a matter outside our discretion.
38. It follows therefore that if the deceased's biological father, a one Kasimo was a musoga, then there is no justification for Respondent to impose the Japadhola culture on the deceased or his family. The deceased's mother's love for the Japadhola culture is indisputable; it is the culture she's grown up in and practiced even though she has Busoga ancestry. However this too does not justify her desire to impose it on the deceased especially when I consider the nature of relationship between her and the deceased in his life.
39. There appears to have been a suggestion that the deceased be buried at the home or land of his stepfather - Okumu Bonventure. The Respondent claimed that Okumu loved the deceased so much. While this option can be available for consideration, it cannot be supported culturally because the said Okumu was not the deceased's biological father. Moreover according to the applicant, the deceased told her that the said Okumu mistreated him so much as a child and he ran away from home. Okumu also threatened to

kill him when relatives tried to return the deceased to his home. Even if I considered that the said Okumu was a good stepfather, I see no obligation to have the deceased buried at his Tororo land in the circumstances of this case.

40. There is no satisfactory demonstration that "Öthieno" was the deceased's name. The deceased's wife did not know it; it is not on their marriage certificate or his baptism certificate from many years ago. I am inclined to consider that the presentation of "Othieno" as one of the names of the deceased for the first time in the Respondent's affidavit points to a possible attempt to simply justify her claims.
41. Based on the above, I'm inclined to find that the Respondent had no patrilineal and consequently no cultural ties in Tororo or the Japadhola tribe. Accordingly the Japadhola culture does not apply to the deceased, his wife or children. Issue one is resolved in the negative.

ii) The place to bury the deceased

42. The applicant presented annexure D as proof of ownership of land in Fort Portal by the deceased, the applicant and their children. From the construct in D, on 28 December 2015, Robert Wabunoha and Annette Wabunoha Kihuguru allocated one acre of their family land in Fort Portal to the applicant, her husband - the deceased and their children to build their home and use it whenever in Fort Portal.
43. According to the applicant, this land was given to them by her mother's sister- Annette Kihuguru as payment for legal work done for the said Mrs. Kihuguru by the deceased. It was the land on which the deceased intended to build a country home and have burial grounds for his family. The applicant said these were their family plans and in that direction, they visited Fort Portal often as a family through the years, for Christmas and other holidays. She explained that it was the deceased's desire that he be buried on this land. Although the Respondent presented so much on the Japadhola cultural front, she could not satisfactorily rebut these assertions by the applicant- the deceased's wife.

44. Moreover, it is also well established and I am satisfied that the deceased did not have attachments to Tororo. In circumstances where the mother did not satisfactorily demonstrate she had a good relationship with the deceased; was never introduced to the applicant by her husband the deceased as his mother; was never invited to the deceased's matrimonial home by the deceased; the applicant only getting a sense that the Respondent was the deceased's mother seven years into their marriage; the non-recognition or introduction of the Respondent as the mother of the deceased at the deceased's wedding; the introduction of Mr. and Mrs. Okello as the parents of the deceased at their wedding; the Respondent's visiting of the deceased's home only at the invitation of the applicant during their marriage; it is difficult to fathom why the Respondent comes up to fight for the burial of the deceased in Tororo under Japadhola culture.
45. Respectfully, the Respondent should have done a better job to impress Japadhola culture on her son through the years of his life. It should also not be lost in translation that as an adult, the deceased, like his mother's father and his biological father and his lineage did, could safely migrate to another place, like Fort Portal and opt to be buried there. This is not an abomination nor repugnant to any laws in the land.
46. The applicant clarified that the land given to them was not her mother's family land; the mother's family and burial grounds are found in Rusekere, another village in Fort Portal. It matters less that the land was gifted or bought by the deceased. It is sufficient that the said gifter, giver or seller does not contest the same. It is also not illegal for such gifter or giver to be a relative. Therefore the Respondent's malicious claim that the deceased was being illegally buried on his in-laws land in Fort Portal was unnecessary.
47. There are some striking things about the two agreements B1 and B2 on which the deceased alleged purchased in Tororo. The land in B1 is 8feet by 10feet and 10feet by 4feet in B2; the Respondent's lack of knowledge of the sizes of these pieces of land as demonstrated in cross examination; the absence of the deceased as a signatory on B1 and B2; the difference in the alleged signatures of the Respondent on the two agreements which were signed on the same day; the absence of the Respondent's specific names on

the two agreements as a listed signatory; the inclusion of the Respondent's correct names as a signature against Rose Okello Attek on B1; the absence of a specific expression that the Respondent was transacting for the deceased who was absent and the lack of knowledge of the land described in B1 and B2 by the applicant- the deceased's wife.

48. In my assessment, all these point to a scheme by the Respondent and her allies to adduce some form of proof of land ownership in Tororo by the deceased that has failed to hold. I remain unsatisfied that the deceased owned land in Tororo that he intended to be the burial grounds for himself and/or his family. The sizes in B1 and B2 are too small to accommodate burial grounds for the immediate family of the deceased.
49. The deceased's wife and children have never been to Tororo; were taught or told nothing about Tororo or Japadhola culture by the deceased; merely knew or interacted with the Tororo relatives of the deceased at his behest. On the other hand, they have severally visited Fort Portal as their village; spent time there with the deceased; are aware that the deceased desired that Fort Portal be their country home and burial place and there is no dispute regarding the ownership of the Fort Portal land by the deceased and his family and its one-acre size is sufficient for burial grounds and a country home which were the deceased's plans for and with his family.
50. At the hearing, I also verified from Samora Kasango, the eldest son of the deceased, who confirmed all these claims and explained that their desire as children is to bury their deceased father on their family land in Fort Portal, which is what they've known and were told by the deceased growing up. If his assertions are to be believed on behalf of the children, they corroborate the applicant's contention that the deceased desired to be buried in Fort Portal.
51. It is easy to discern in the circumstances of this case, that while the deceased can safely be buried in Tororo or Fort Portal, the deceased's children have almost only their mother to look up to for their welfare. They have not bonded with the Tororo relatives. As a nucleus family they are uncomfortable with the burial of the deceased in Tororo where they've never been. However, they're comfortable and at peace with the burial on their

family land in Fort Portal which they know as intended to be their family burial grounds. It is also in the best interest of the children that the deceased is buried as soon as possible to avert the psychological torture they continue to suffer from the prevailing impasse.

52. At the oral hearing, the applicant revealed and the Respondent did not deny that initially the Tororo relatives including the Respondent accepted that the burial was to be in Fort Portal. They then sent a budget of about 25million for their facilitation to travel from Tororo to Fort Portal. When the applicant complained about the huge budget, another budget was sent with a total of about 14million. She rejected this budget as well and only sent a total of 3.5million to the Tororo relatives for their facilitation. To her surprise, they came but fought for the coffin after the memorial service saying burial had to be in Tororo. This version of events points to a possible sinister motive in the Respondent's cultural claims that the deceased must be buried in Tororo.

53. Based on all the above, I am satisfied and hereby direct that:

- i) the deceased shall be buried on his family land in Gweri village, Burahya county, Fort Portal city in Kabarole district;
- ii) the Respondent and anyone claiming any rights through her are restrained from interfering with the said burial;
- iii) the burial shall be within 4 days from the date of this ruling;
- iv) the Respondent and her relatives shall be allowed to attend the burial if they so desire;
- v) the burial must be conducted decently, giving the immediate family an opportunity to send off the deceased and find closure and
- vi) the police and local authorities must ensure that the burial is conducted in an orderly manner.

To avoid any further acrimony between the Respondent and the applicant, each party shall bear its own costs.

I so order.

Lydia Mugambe
Judge.
26 March 2021.