

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(FAMILY DIVISION)
MISCELLANEOUS CAUSE NO.41 OF 2023**

1. **ANNETTE YOSSA**
2. **KOMAKECH EMMANUEL**
3. **AMONY JACKIE**
4. **PICHO GODFREY**
5. **CHRISTINE ONYOK :::::::::::::::::::::::::::::::::::APPLICANT**

VERSUS

1. **AMBASSADOR IDULE AMOKO**
2. **ATTORNEY GENERAL ::::::::::::::::::::::::::::::::::: RESPONDENT**

Before: Ketrah Kitariisibwa Katunguka-Judge.

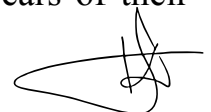
Ruling

1. Annette Yossa, Komakech Emmanuel, Amony Jackie Picho Godfrey and Christine Onyok (herein called **‘the applicants’**) brought this application against Ambassador Idule Amoko (herein called the **1st Respondent**) and Attorney General, (herein called the **2nd Respondent**) and collectively called **‘the Respondents’**); by notice of motion under section 64 and 98 of the Civil Procedure Act, Cap.71, sections 14, 33, 37, 38 and 39(2) of the Judicature Act and Order 52 Rules 1 and 3 of the Civil Procedure Rules; seeking orders that: -
 - a. The respondent and/or their servants or agents be restrained from receiving, transporting and burying the body of the late Hon. Justice Mary Stella Arach-Amoko to Arra Parish, Pachara Sub-county, Adjumani, as hastily advertised in a unilaterally sanctioned burial programme;
 - b. The applicants be authorized to receive, transport and bury the body of their mother, the late Hon. Justice Mary Stella Arach-Amoko at her family ancestral home/burial ground at Jukiya Hill Ward, Juba village, Nebbi District in accordance with the customary law of Ker Kwaro Kaal Jonam.
 - c. Alternative to the above orders; that the applicants be authorized to exhume and rebury the body of their late mother from Arra Parish, Pachara Sub-county, Adjumani to Jukiya Hill Ward, Juba village, Nebbi district and in accordance with ker Kwaro Kaal Jonam customs.
 - d. The applicants are awarded costs of this application.
2. The grounds of the application are contained in the Notice of Motion and further detailed in the affidavits in support deposed by Annette Yossa (the **1st applicant**) on behalf of the **2nd** and **3rd** applicants; the affidavit deposed by Picho Godfrey the **4th** applicant and, the affidavit deposed by Christine Onyok the **5th Respondent**; and briefly



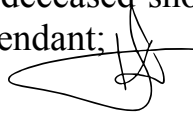
that: - the 1st, 2nd and 3rd applicants are the biological children while the 4th and 5th applicants are brother and sister respectively of the late Hon. Justice Mary Stella Arach-Amoko (herein referred to as 'the deceased'); the 1st respondent is the applicants' step father; the deceased died on 17th of June 2023 at Nakasero Hospital; at the time of the deceased's death, she was serving as a Justice of the Supreme Court of Uganda under the Judiciary; the deceased is being accorded a state funeral by the Government of Uganda;

3. The deceased, being the grandchild of Chief (Rwot) Dacaunder Kaal Ker Kwaro Jonam Kapita tribe, culturally could only be buried on the Royal grounds at Kaal Ragem in Pakwach district and in accordance with and observation of the Ragem culture and customs; and prior to her death the deceased opted to be buried next to her late father at her family compound or ancestral burial ground at Jukiya Hill Ward, Juba village, Nebbi district; she communicated this position to family members and summoned the 4th applicant on 12th June 2023 and categorically and unequivocally communicated this position to him;
4. The only home known by the applicants is that built by the deceased at Jukiya Hill Ward, Juba village, Nebbi district; on 18th of June 2023, a family meeting attended by the applicants, the deceased's mother and other relatives, the 1st respondent and his biological children, was held at Mbuya Kinawataka, Nakawa Division Kampala where it was agreed that the deceased's wishes to be buried at her ancestral home next to her late father at Jukia Hill Ward, Juba village, Nebbi district in accordance with her custom as their culture demands;
5. The 1st respondent and his relatives communicated a contrary position in a meeting at the State House that the deceased would be buried at the 1st respondent's ancestral home in Arra parish, Pachara Sub-county, Adjumani district; the 2nd respondent communicated a burial arrangement to the general public indicating that the deceased shall be buried in Adjumani district contrary to the wishes of the deceased; yet the deceased lacked emotional or proprietary attachment to the Adjumani district; the 1st respondent never paid dowry for the deceased as custom demands and only contacted a civil marriage with her.
6. The applicants are comfortable with the deceased being buried at her ancestral place from where they shall be able to visit and pay respect to her; it is in the interest of justice that the deceased be buried as soon as possible to avert the psychological torture the applicants continue to suffer in the prevailing impasse.
7. In opposition, the 1st respondent filed an affidavit in reply stating that on 28th November 1996, he married the late Mary Stella Arach in Kampala in accordance with the Marriage Act Cap.251; they have been residing at Kinawataka Mbuya; he has never been estranged from the deceased; at no point during the twenty seven years of their



marriage did the deceased verbally, or in writing, express to the 1st respondent any desire to be buried at Jukia Hill Ward in Nebbi district or not to be buried at Araa in Adjumani district where he hails from;

8. That together with the deceased, they established a retirement home in Adjumani and another home at a location nearby at Araa where the 1st respondent hails from which is their burial ground; the deceased also spent some Christmas holidays at her ancestral home in Nebbi as a way of keeping in touch with her family where she came from;
9. It is a notorious, religious and cultural custom including among the Madi to which community he belongs, that a lady who is deceased is buried in the burial grounds of the family where she is married in proximity with her spouse and that becomes her ancestral home, unless she wills otherwise or was divorced at the time of death; and therefore, as a surviving spouse, and in absence of any written communication to the contrary by the deceased, he enjoys a pre-eminent position to determine where she should be buried and the rites to be performed;
10. The 1st respondent denies knowledge of, and objects to any cultural rituals that the applicants intend to perform on his late wife; that according to the African culture, the deceased should be buried at her husband's home; if the deceased is buried in Adjumani, the applicants and all the family are welcome to attend the burial and after burial visits; however, he states that if court grants the orders in the application, it would deprive him of the right to bury his wife or visit the grave in light of the overt animosity being expressed against him and his family; that this application lacks merit and prays that it is in the interest of justice and urgency that this application be dismissed so that his late wife is given an expected dignified burial.
11. The 2nd respondent filed an affidavit deposed by Pius Bigirimana the Permanent Secretary/Secretary to The Judiciary; who states that the National organising committee received a letter from the 1st respondent which was communicating that the late Hon. Justice Stella Arach Amoko was to be buried in Adjumani District and the burial programme issued by the Judiciary was founded on the advice of the known next of kin who is the 1st Respondent, the deceased's husband;
12. On 20th June he received a petition against the decision to bury the deceased in Adjumani; and the petitioners wanted to bury in Nebbi according to the deceased's wish; following the petition the Chief Registrar by letter dated 22nd June 2023, communicated that the burial of the late Hon. Justice Stella Arach Amoko had been postponed and new dates were to be communicated; that it is not the duty of the 2nd defendant to determine where the deceased should be buried; and there is no cause of action displayed against the 2nd defendant;



13. The Applicants filed an affidavit in rejoinder deposed by the 5th applicant where she states that: as the deceased's sister, caretaker and next of kin, she witnessed how the deceased did not have a cordial and happy relationship with the 1st respondent; the 1st respondent did not take care of the deceased while she was admitted in hospital and at no time did he spend a single night at the hospital with the deceased but only paid brief casual visits; whenever the 1st respondent visited the deceased, he neither spoke to her and nor did the deceased want to speak to him;
14. The rituals and customs that are to be performed at the deceased's burial are not inconsistent and contrary to the beliefs of the Catholic church to which the deceased belonged; the most important custom the 'Kwano Te Kwaro Pa Aligo Nyakwar Rot Mary Stella Arach' is a dramatized recital of the deceased's lineage performed at the funeral of a princess and culturally can only be performed at Royal Burial grounds and on Ragen land; it demonstrates the enormous loss to the clan and to honour the late as a person of great stature and pre-eminence; the custom is innocent and not in any way repugnant or immoral although they are of great significance to the Jonam people;
15. As the caretaker to the deceased, the deceased communicated her wish to her as well as to the other applicants concerning her desire to be buried at Jukiya Hill Juba Ward Nebbi district; the deceased never recognised the house in Adjumani district as her place of burial; the wishes of the deceased can be verbal and must not as a legal requirement be expressed in a will or in writing unless it touches the distribution of property; the deceased did not communicate her wishes to the 1st respondent because when he visited her in hospital he never talked to her; that the deceased was not interested in talking to the 1st respondent and when she did she asked him whether he had come to check if she had died;
16. The deceased owned a home at Jakiya Hill Juba Ward Nebbi District where she wished to be buried as per her expressed wishes; the said home is an extension of the Royal burial grounds and the deceased personally purchased an extension to this land for purposes of establishing a home in preparation of her final resting place and she never recognised the land and the house at Adjumani as her home and place of her burial; that a home and a house are two different things because while a house can be sold a home has burial ground and cannot be sold or mortgaged; that the fact that the deceased owned property elsewhere including Adjumani did not change her home which is in Nebbi; as a princess the deceased will not be the first female to be buried at her family burial ground instead of her husband's home; because her aunt Julia Angeyo next to whom the late justice Stella Arach wished to be buried is buried there; the only way a princess can be buried elsewhere is if her husband is also a royal;
17. The deceased did not only visit Nebbi to spend some Christmas holidays there but went to her home in Nebbi at least every month and even when she got leave from work she would spend her leave days there in Nebbi where her home and farm are situated; the



deceased only went to Adjumani occasionally out of courtesy and the number of times she went there are much less if not countable;

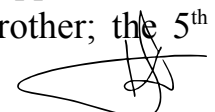
18. The 1st respondent's claim that the notorious Madi custom that a wife who predeceases the man must be buried in the burial grounds of her husband's family overrides the deceased's wishes as well as her right to practice her own customs is not supported; The 1st respondent was previously married twice where he had 5 children before he married the deceased Hon. Justice Arach but none of the deceased two former wives is buried on the 1st respondent's burial grounds so the custom is observed by the 1st respondent in breach; and the 1st respondent seeks to selectively observe the custom against the late Justice Stella Arach yet she expressed her wishes on where she wanted to be buried.
19. The 1st respondent does not enjoy a position of pre-eminence in determining the deceased's place of burial to the exclusion of all her other close relatives; the 1st respondent does not deny a family meeting hosted at his home in Mbuya where it was resolved to bury the late Stella Arach at Jukia Hill Juba Ward Nebbi District in accordance with her expressed wishes and customs; the 1st respondent half-heartedly qualifies his earlier admission to the deceased's wishes by half-heartedly subjecting it to his consent and the consent of his clan; that based on the outcome of the family meeting to go according to the deceased's wishes a communication was made to the wider family, the central organising committee of the funeral and the Judiciary Top management; the 1st respondent having attended the family meeting and agreed to the resolution to bury the deceased at Nebbi is estopped from turning around and presenting a contrary position;
20. The family of the late Stella Arach is peaceful and amiable and would not at any point be hostile to the 1st respondent or his family whenever they come to Nebbi for the burial of the late Stella Arach or to pay their respects to her.

Representation:

21. The applicants are jointly resented by counsel Adubango Richard, counsel Roger Mugabi, counsel Pius Katumba and counsel Stanely Okecho; while the 1st respondent is represented by Senior Counsel Simon Peter Kinobe together with counsel Ernest Kalibala, counsel Apollo Katumba, counsel Abraham Mumbere and counsel Baku Raphael Obudra; State Attorney Mugisa Lydia represents the 2nd respondent.

Background

22. Hon. Lady Justice Mary Stella Arach Justice of the Supreme court of Uganda got married to the 1st respondent Ambassador Idule Amoko on 28th November 1996; they have no children together but each has their children; the 1st, 2nd and 3rd Applicants are the children of the deceased while the 4th applicant is the deceased's brother; the 5th



Applicant is the deceased's sister; The 2nd respondent is the Attorney General of Uganda; Hon. Lady Justice Mary Stella Arach Amoko died at Nakasero on 17th June 2023; a funeral program was issued by the Judiciary showing that the deceased justice was to be buried in Nebbi; another one issued showing that she would be buried in Adjumani on 23rd June 2023; a Cease and Desist was served on the Judiciary by the applicants through their lawyers M/s GEM Advocates on 19th June; on 22nd June 2023 vide the Chief Registrar's letter a postponement of the burial program was communicated; new dates were to be communicated later; On 22nd June 2023 this application was filed challenging the burial place of Adjumani and in favour of Nebbi;

23. When the matter came up for hearing on 23rd June 2023 at 3.30, counsel from both sides and the parties together with their relatives were in court; court however on request of counsel proceeded in chambers where only counsel and their clients attended; court was informed that the 1st respondent had made a proposal which the applicants and their family needed time to consider; to give time for possible amicable settlement the matter was adjourned to 24th June 2023 at 10.00am; again in chambers, both counsel to the parties agreed that they would proceed by affidavit evidence; neither wanted to cross examine, and at the end of the hearing oral submissions would be made; the matter then proceeded in open court where court was informed that mediation had failed.

Issue for court's determination and counsel's submissions

24. Counsel for the applicants framed the issue as Whether the late Hon. Lady Justice Stella Arach Amoko should be buried in Nebbi District or in Adjumani District; counsel for the 1st respondent framed the issue that as between a surviving spouse and other family members who has the right to determine how to deal with the person who has died; Having listened to the submissions of the counsel the issue is as proposed by counsel for the applicants because either way the question raised by counsel for the 1st respondent shall be addressed;

Issue: Whether the late Hon. Lady Justice Stella Arach Amoko should be buried in Nebbi District or in Adjumani District.

25. Counsel for the applicants submitted that there was a family consensus for the burial venue in a meeting convened, hosted and guided by the 1st respondent in his Kinawataka Mbuya home in the wake of the passing of the deceased; he referred court to paragraph 11 of the affidavits in support deposed by the 1st and 4th applicants and paragraphs 4,5 and 6 of the affidavit deposed by Dr. Onegi Obel; and paragraph 16 of the affidavit deposed by Christine Onyok the 5th Applicant; a fact un rebutted by the 1st respondent who half heartedly admits it in paragraph 16 of his affidavit in reply in his attempt to give a new alternative to undermine consensus of the family and escape its force;

26. The 1st respondent is estopped from departing from the said family consensus concerning the burial of the deceased at Nebbi; counsel cited section 114 of the Evidence Act to submit that by the conduct of the 1st respondent, he intentionally caused or permitted all those in attendance, the public and stake holders to act on burial arrangements that the deceased would be buried in Nebbi; therefore, he is bound by the principle of estoppel; Counsel invited court to give effect to the family consensus; and pursuant to Order 6 rule 10 of the Civil Procedure Rules, court should reject the 1st respondent's vague allegations that he held several meetings at his home regarding burial preparations for he does not specify which home and dates upon which those meetings were held unlike the 18/6/2023 meeting at Kinawataka; that the appropriate forum for the 1st respondent to raise an objection to the Nebbi venue was during the family meeting before reaching a consensus;
27. Counsel referred to paragraph 48 of the affidavit in rejoinder and paragraph 11 of the affidavit in support deposed by the 1st applicant and annexure E- a program released by the Judiciary showing that burial was to be in Nebbi; and annexure K to the affidavit in support deposed by the 4th applicant - a Daily Monitor Newspaper article also to the same effect; the said information was acted upon by the family members, the tribe elders and the public; so the 1st respondent cannot and should not be allowed to make a U turn; he is estopped; that it is wrong for him to claim that the consensus was tentative subject to that of his and his clan;
28. Further that the 1st respondent is estopped by the past conduct material to the matter at hand, the undisputed fact that two of his deceased former wives and mothers to his five children in his blended family; were not buried in Adjumani at his burial grounds contrary to his averments in paragraph 13,14 and 16 of his affidavit in reply; about his alleged burial grounds and notorious binding Madi custom to the effect that a lady who is married to a Madi must be buried at the burial ground of the family where she is married; counsel wondered why the 1st respondent should impose the custom only in the case of the late Lady Justice Stella Mary Arach; and argued therefore, that the custom is invalid, inapplicable and has only been observed by breach on previous two occasions when the 1st respondent had an opportunity to uphold the said custom; therefore, the 1st respondent's proposal that the deceased be buried in Adjumani rather than Nebbi is in bad faith;
29. Further that the custom alleged in support of the Adjumani venue is non-existent, unproved and repugnant; On the test of non-repugnance, counsel submitted that the 1st respondent's interpretation and application of the said alleged custom is repugnant in so far as it purports to strip a woman of her bundle of rights guaranteed under Article 21,

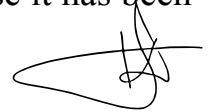


33(1), 33(4) and 37 of the 1995 Constitution of the Republic of Uganda; that upon contracting a marriage to a Madi man, when determining repugnancy, the underlying point to take into consideration is whether a woman loses her right to practice her culture as an individual by merely contracting a marriage; counsel invites court to answer the question in the negative;

30. Counsel drew court's attention to paragraph 3(2), (3) and 24 of the National Objectives and Directive Principles of State Policy; which compels the court and the 1st respondent to do everything in their power to promote a culture of cooperation and respect of each other's customs and beliefs; to argue that the constitution bars the 1st respondent in pursuit of his cultural beliefs from subjugating those of his wife and her relatives; that the Madi culture whether it exists or not, must yield to the constitutionally prescribed norms and standards without oppression and discrimination of women;
31. On the reason that the custom in support of Nebbi venue is duly proven, valid and applicable; counsel drew court's attention to the affidavit of Dr. Geoffrey A Onegi-Obel who testifies as prime minister of Ker Kwaro Kaal Jonam the community from which the deceased hails from; he identifies the deceased as royal princess; Nebbi venue as the cultural heritage; counsel argued that Dr. Geoffrey A Onegi-Obel's credentials, competence and credibility on the applicable customs and culture as corroborated by the evidence of the 1st, 4th and 5th applicants particularly that even the father of the deceased justice and Julia her aunt were buried according to custom; have not been disputed by the respondent; counsel submitted that the custom is not repugnant and entitled to judicial recognition under section 15 of the Judicature Act;
32. Counsel submitted that it is trite that before a custom can be judiciary noticed or even enforced by a court of law, it must pass a two-part test of existence or validity and secondly non repugnance; on validity, counsel cited the case of **Bruno Kiwuwa v. Ivan Serunkuma & Juliet Namazi HCCS No.52 of 2006**; that whereas the 1st respondent states that the custom is notorious, he has never followed it as it has been disapproved in the affidavit in rejoinder deposed by the 5th applicant, it therefore fails the test; counsel cited section 46 of the Evidence Act and argued that the custom was not independently verified and deposed to by an independent 3rd party who is conversant with the custom to prove its existence; therefore, that 1st respondent who has the burden to prove the custom under section 101(2) of the Evidence Act has failed;
33. Counsel then referred court to paragraph I of the National Objectives Article 2 and Article 8A of the 1995 Constitution that render paragraph 19 a binding Constitutional provision; to argue that the family as the natural and basic unit is entitled to protection by society and the state; he therefor argued that the family consensus on Nebbi as the burial ground for the late Hon. Justice Stella Arach is entitled to judicial protection.



34. On the reason that **the Nebbi venue is supported by the ascertainable wishes of the deceased** counsel submitted that the ascertainable wishes of the deceased are known; he cited Black's Law Dictionary 10th Edition and parts 7 to 27 of the Succession Act and stated that a will is simply an instrument for the distribution of the property of a deceased person; he cited **Namusoke Annet Kiwanuka vs Eva Amuge & 2 Ors HCCM No.4/2023** for the proposition that there is no property in a dead body; that evidence shows in the affidavits deposed by the applicants that the deceased's wish to be buried in Nebbi was expressed to close family members who were by the deceased's bedside in final moments of her life; which were then communicated to the family members who attended a meeting on 18/6/2023; the wishes have not been meaningfully respected by the 1st respondent yet they are consistent with her custom; they have not been found repugnant or unlawful;
35. That the **Nebbi venue is appropriate as a dignified resting place of the deceased**; it is conflict free and the customary ancestral burial grounds of the royal family to which the deceased belonged as proved by the affidavit of Dr. Onegi Obel, the affidavit deposed by the 1st, 4th and 5th applicants; the Nebbi ground is an extension of the royal estate unlike the Adjumani venue; the Nebbi Venue is open and more readily accessible to the 1st respondent and any other person who may have legitimate cause to visit or attend;
36. The applicants' wishes are eligible for the grant of the equitable remedy sought; because counsel argued that, the evidence shows that the applicants are not distant relatives but biological children and siblings of the deceased respectively and the Nebbi venue is more convenient to the deceased's close family who are the care takers of the burial grounds and who would suffer the greatest grief and anxiety if the proven custom of the deceased is not followed according to the affidavit deposed by Dr. Onegi Obel, the affidavit of the 1st applicant and the 5th applicant's affidavit; counsel wondered what it would benefit the 1st respondent to be intolerant and to refuse to honour the deceased's culture; that the intolerance is selfish, inconsiderate, insensitive, repugnant, unfair and has no grounding in law; and causes grief yet the applicants have demonstrated a strong formal bond and affection of the deceased; that the position that the spouse having supremacy on the decision where to bury his/her deceased spouse is rebuttable (he cited **Namusoke vs Eva Amuge** (supra)); that it is a matter of discretion or judicial grace applied based on circumstances of a particular case so court should find that it does not apply in this case;
37. In the totality of the circumstances, there are weightier considerations versus the Adjumani venue urged by the 1st respondent as the spouse of the deceased; Counsel argued that the presumption of spousal precedence should not apply because it has been



rebutted by the 8 factors, 5 in customary law and the rest rooted in equity; the 1st respondent has not been truthful while seeking an equitable remedy; while families are not always perfect, according to the affidavit in rejoinder at paragraphs 39 -45; the depth of fissures and U turns/ zigzags from the consensus on Nebbi to Adjuman; the plentiful painful embarrassing evidence on record; the pre-existing strain, tension, disharmony and fissures in the 1st respondent's relationship with the deceased dispute the portrait painted by the 1st respondent; the presumption of spousal precedence should not apply and the Nebbi venue should be upheld;


38. The applicants are wholly blameless in how this dispute arose; because it is the 1st respondent's U turn which instigated this action; the applicants sought amicable settlement to no avail and his actions should disqualify the 1st respondent from judicial grace of spousal precedence; that the wishes of the spouse are neither absolute nor unqualified; counsel submitted that the applicants have executed the litigation with extra ordinary dispatch not to prolong the grief; the case is not frivolous or vexatious and it should be resolved in favour of Nebbi as the burial place of the late Justice Stella Arach and the costs should be awarded to the applicants.

Submissions for the 1st respondent:

39. It was submitted for the respondent that the deceased and the 1st respondent got married in 1996 and have lived as husband and wife; the 1st respondent acknowledges the 18/6/2023 meeting but any decision to bury the deceased other than in Adjumani was tentative; further, that the applicants did not attach the consensus; since the affidavit of the 1st respondent shows that the deceased during her lifetime never told him about her preference to be buried in Nebbi or the rejection of Adjumani, counsel prays that court finds that the applicants have not demonstrated that an understanding was arrived at concerning Nebbi;

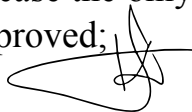
40. On estoppel, counsel submitted that it is settled that estoppel is not a sword, but a shield and cannot be applied to override settled written law; he cited section 114 of the Evidence Act and argued that there is nothing to show what position was altered to the detriment of the applicants since no proof that a grave had been dug or that money was spent; and it being a state funeral, no status has been altered, hence estoppel should be rejected;

41. On custom counsel acknowledged the constitutional provisions cited by counsel for the applicant and also article 31; counsel cited section 104 of the Evidence Act that he who alleges must prove and there is no proof or evidence showing the alleged persons who were wives to the 1st respondent died and where they were buried; he argued that a family is created by man and woman and there is no provision that everything in it must be dictated by the children; no law states that the consent of the family takes precedence



to the views of the spouse who enjoys pre-eminence position; he invited court to recognise that position;

42. Counsel cited Kyobe Julius Luseleka & 5 Others V. Aida Namalwa No. 167 of 2021) [2021] UGHCFD 3 (23 November 2021 at page 15; where court held that no law determines burial grounds, a person must state his or her wishes; where the wishes are not known, court applies inherent powers and if no wish of the deceased is expressed, the spouse is next to the exclusion of all others; he argued that since the person closest to the deceased is the 1st respondent with whom they lived and had a joint acquisition of property in Adjumani, counsel invites court to follow court's decision in Kyobe Julius Luseleka & 5 Others V. Aida Namalwa (supra); that the right to culture is applicable to people who are alive and the right is not absolute under Article 44 of the Constitution;
43. That section 46 of the Evidence Act does not bar a litigant from demonstrating or alluding to a custom; as long as he knows the custom which the 1st respondent at 75 years knows; that it is possible to depart from custom and burying in a place not the royal grounds is not repugnant; but rather it is repugnant for the deceased to be taken away from a spouse just because it is the wish of the deceased's children and relatives; there is no clarity on the existence of the customs raised by the applicants since according to Dr. Onegi Obel the custom was last performed in 1993; yet the affidavit in rejoinder shows that the same custom was applied to the late Julia Angeyo who died in 2017;
44. Concerning the ascertainable wishes of the deceased, counsel argued that such wishes must be independently provided in order for them to be reliable; hence no satisfactory evidence to show the ascertainable wishes to remove the pre-eminence of the deceased's spouse;
45. On claim that Nebbi is conflict free, counsel submits that no evidence has been led to prove this or that Adjumani has a conflict or that there are no decent burial grounds in Adjumani; there is no proof that the deceased had no connection with Adjumani; the issue of Nebbi being open and convenient for the applicants cannot be preferred over the spouse; the applicants are also always welcome to Adjumani;
46. On the 5th applicant's averments that there was disharmony between the 1st respondent and the deceased; counsel submits that the allegations are premised on the ill health suffered by the deceased in the last 6 months; the 1st respondent being 75 years old and working in Juba could not manage to sleep in hospital attending to the deceased; there is no evidence of strife and in any case the only bar to spousal precedence are divorce and separation which have not been proved;



47. Counsel then prayed that court considers grant of letters of administration to the 1st respondent; that unless there is separation or divorce, court has no power to tamper with spousal rights; that given that the deceased is not to be buried at royal grounds at Kaal Ragem in Pakwach district as per affidavit of Dr. Onegi-Obel, in accordance with the custom of burying the royals; this application is based on the wishes and interest of the applicants which makes them not blameless;
48. That counsel for the applicants' submission on evasive denial and reliance on Order 6 rule 10 of the Civil Procedure Rules which refers to pleadings and does not apply to affidavits which are purely evidence; was wrong; the wishes of where one is to be buried are subject to a will and court should strike a balance between interpreting the constitution and applying it; that the submissions of counsel for the applicants is geared towards interpretation rather than application which makes this court a wrong forum; counsel also faulted the affidavit in rejoinder for offending rules of procedure by introducing new matters;
49. Therefore, counsel submitted that nothing has been presented to satisfy court that there is anything repugnant, unlawful, undesirable or contrary to any law that would deter court from upholding that the deceased be buried in Adjumani the place where she is married. Counsel then prayed that the 1st respondent be granted letters of administration and the order to bury his wife; and in the spirit of peace and harmony each party bears their own costs.

Submissions for the 2nd respondent:

50. State Attorney Mugisa Lydia submitted that the 2nd respondent is faulted for printing the burial programme yet the program was printed on the instructions of the 1st respondent as a husband to the deceased; and when the applicants petitioned challenging the burial to be in Adjumani, the 2nd respondent officially responded by postponing the burial until a clear legal position had been received.

Applicants' submissions in rejoinder:

51. Counsel submitted that the authorities of the case of Kyobe Luseleka and Others v Namalwa (supra) relied upon by counsel for the 1st respondent are distinguishable from the facts of this case; because in this case the deceased is the mother to the 1st, 2nd and 3rd applicants and a wife to the 1st respondent; the relationship between applicants and the deceased is natural and organic and is still growing through grandchildren; while with the 1st respondent the relationship with the deceased has come to an end since there are no biological children birthed between them; therefore the issues of the children of the deceased must be taken into account in determining the burial place of the deceased;



52. Counsel invited court to note that in family meetings there are not always minutes or videos; therefore the evidence of the applicants is efficient; the rationale of spousal precedence is considered not by virtue of the office they hold as spouses, but their proximity/ relationship to the deceased; in this case it has been proved that the biological children and siblings of the deceased are closer in proximity; that the deceased's wishes whether formal or informal must be respected; concerning the constitutional interpretation, counsel asked court to instead be guided by section 14 of the Judicature Act which gives this court jurisdiction in matters of custom.

Analysis: Whether the late Hon. Lady Justice Stella Arach Amoko should be buried in Nebbi District or in Adjumani District.

53. I have considered the submissions of counsel; I appreciate the position of the law as helpfully availed by both counsel; I shall resolve the issue by combining the alleged family consensus and the matter of estoppel for they are intertwined; followed by spousal rights and end with cultural rights/obligations. I shall be guided by the following questions.

- I. *Did the deceased express her wish as to where she should be buried?*
- II. *Should the wishes of the deceased on where she wanted to be buried be overtaken by the 1st respondent's culture?*
- III. *And should the late Justice Stella Arach Amoko be buried according to her custom? and;*
- IV. *Finally where the late Justice Stella Arach Amoko be buried?*

A. Did the deceased express her wish as to where she should be buried? and is it that wish that led to the consensus?

54. The applicants led evidence to show that the deceased during her lifetime expressed her wish to be buried at her family ancestral home next to her late father and aunt Julia at Jukiya Hill Ward, Juba village, Nebbi district; that this wish was expressed to the deceased's family members and friends.

55. The affidavit in support deposed by the 4th applicant the deceased's biological brother shows that at the start of June 2023, his sister's health deteriorated and was in and out of various hospitals; that the deceased made a dying wish as to where she wished to be buried; he states at paragraphs 8 and 9 and I quote; ***"That on 11 June 2023, I received a phone call from the late, on the 1st respondent's telephone, inviting me to visit her in the hospital and that she had something important to discuss and I travelled from Nebbi District and visited her in Nakasero Hospital on 12 June 2023; that she informed me that she wished to be buried at Jukiya Hill Ward, Juba Village, Nebbi district next to our late father and our Aunt Julia."***; This is corroborated by the evidence as stated in the affidavit in support deposed by the 5th applicant, who also testified as a biological sister to the deceased that she stayed with the deceased at



Nakasero hospital at all material times; and on the 10 June 2023 in the presence of Nancy Okwong, her niece, the deceased communicated her wish to be buried in Nebbi district, next to her late father so that she can rest peacefully.

56. According to the 1st respondent's evidence his deceased wife never verbally, or in writing express to **him** any desire to be buried at Jukia Hill Ward in Nebbi district; (highlighted for emphasis);

Determination.

The law.

57. There is no express law governing burial disputes especially for persons who die intestate (see **Jovia Matsiko v. Emmanuel Wandera Miscellaneous Cause No.141 of 2021 UGHCFD No.141 of 2021**) ; but the following laws grant powers to this court in situations like the one at hand; The Constitution of the Republic of Uganda 1995-objective 24; Article 139(1); section 98 of the Civil Procedure Act that gives powers to make orders for the ends of justice to be made, sections 14(1) provides that The High Court shall, subject to the Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by the Constitution or this Act or any other law; 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;'; Sections 184(2); Section 190(2) and section 277 of the Succession Act, cap 162; as amended; to be reproduced later in this ruling.
58. The position of the law therefore is that the Court has the power to intervene in order to resolve disputes as to who is to undertake the task of disposing of the body and as to the manner and place of disposition; where like in this case the family members of the deceased (in this case the spouse, the biological children and the family) fail to agree on the place of burial where they can lay the deceased in a dignified manner, court has no option but to step in; but taking into consideration the following; there is no property in a dead body, (see: **John Omondi Oleng and Anor Versus Sueflan Radal (2012) Eklr**; and that the deceased's body is incapable of ownership by any person (See **Buchanan Vs Milton [1999] 2 FL R 844**); where the wishes of the deceased can be ascertainable they should be given effect as long as they are not illegal, unreasonable or repugnant; the persons closest to the deceased must be considered;
59. In **SAN Vs. GW, Civil Appeal No. 01 of 2020 [2020] eKLR the Court of Appeal (Ouko (P), Gatembu & Murgor, JJA)** held that; "...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...Rarely can material assets be a factor for consideration in burial dispute. The main issues for consideration in a burial dispute is the wishes of the deceased if any had been expressed and the kind of relationship the contestants had with the deceased. Those are more relevant to burial dispute than question for disposal of material assets and related claims and things. They, rather than the succession regime should prevail in determining questions of burial.”;

60. The nature of the dispute calls for court to apply a flexible balancing of common law principles, equity and practical considerations approach taking into consideration the need to determine what is going to provide the most justice; mindful of the position the deceased held in this country; the seemingly mixed customs and the expectation of society.
61. The duty of court is to make orders to accommodate the fundamental requirements, in a manner that is still compatible with the deceased's wishes as to the place of burial; the position of the law in Uganda is that a Will must be in writing, signed by the testator and witnessed by 2 persons who shall each write their names and sign on each page where the testator's signature is appended;(section 50 of the Succession Act as amended);
62. Black's Law Dictionary 11th Edition defines a Will as '*the legal expression of an individual's wishes about the disposition of his or her property after death.. a document by which a person directs his or her estate to be distributed upon death;*'(emphasis applied); the question I ask myself is: does a dead body form part of the deceased's estate? The law stated above in **John Omondi Oleng and Anor Versus Sueflan Radal; Buchanan Vs Milton; and SAN Vs. GW,;(all supra)**, is that the deceased's body is incapable of ownership by any person because it has no property value; the courts have decided that he who is most entitled to administer the estate should be responsible to bury and so should determine where to bury; in my view this is not determined on the basis of right to the dead body but to responsibility to ensure the deceased is accorded a decent send off with the deceased's resources at the "administrator's" disposal; if there are no funds it is the close family of the deceased to mobilise the funds;
63. In essence the decision on where to bury does not affect the entitlement whoever is making the decision has, to the deceased's estate and in my view it is misleading to attach the decision to succession and not to responsibility; I shall elaborate on this later;



having said that, since there is no value in a dead body the wishes of the deceased should as much as possible be considered and not doubted especially if they are corroborated; must they be in writing? in my view considering the definition of the word 'Will' above they do not have to; must they be communicated to the spouse?; in ideal circumstances 'yes' but they do not become invalid if are not, depending on the circumstances at the time the deceased made them; having considered the affidavit evidence my considered view is that just because the deceased never expressed her wish to the 1st respondent as to where she should be buried does not mean that she could not have communicated the said wishes to the applicants or other family members; In *Ugle v Bowra & O'Dea* [2007] WASC 82, McKechnie J said that the views of the deceased, while not decisive, should nevertheless be given considerable weight. In *Spratt v Hayden*, [2010] WASC 340 Le Miere made reference to **Heather Conway's 'Dead, But not Buried: Bodies, Burial and Family Conflicts' (2003) 23 Legal Studies 423; to wit:** *'If an individual can determine what should happen to his or her body when alive on the basis of religious or cultural beliefs, these should be accorded equal respect when an individual is determining the posthumous fate of his or her body. Moreover, where the person with legal responsibility for burial is intending to bury the deceased in a manner contrary to his or her religious or cultural beliefs, other relatives and those with close ties to the deceased should be able successfully to challenge this decision...However, the position would be different where the deceased's loved ones are challenging the form of burial because of their own religious and cultural values, despite the fact that the deceased did not espouse those values while alive. In these circumstances, the final decision should rest with the persons having legal responsibility for burial (especially where they are acting in accordance with what the deceased wanted); the views of the deceased's relations should be ignored, as would be the case under the current framework'*. I hold the same view.

64. It appears to me that the views of the late Justice Stella Arach Amoko were shared by the close relatives with the family at the 18th June 2023 Kinawataka Mbuya family meeting, and based on that a funeral program was communicated because it is inconceivable to imagine that such important information could be communicated without the 1st respondent's knowledge or acceptance; according to his affidavit at paragraph 16 the 1st respondent appears to add the clan as if he had not been with the clan at the meeting; and when the clan representatives came then things changed because; that the 1st respondent was at the 18th June 2023 meeting is not denied; that he later changed his mind and did not call another meeting of the same family that had sat is also not disputed;

65. Counsel for the applicants were put to task to present the minutes or video of the meeting where the consensus on Nebbi as burial place was reached; he could not present them; he told court that in meetings of this nature such record is not kept; I would agree and also add that by the time the meeting was held there was no suspicion amongst the family members including the 1st respondent so there was no need; the 1st



respondent according to his counsel held meetings to arrive at Adjumani as the place of burial; this is evidence from the bar and court shall not consider it; I therefore find that the wishes of the deceased are ascertainable; and were communicated to the family including the 1st respondent. I would answer the questions **‘Did the deceased express her wish as to where she should be buried? and is that wish that led to the consensus?’**; in the affirmative;

B. Estoppel

66. **S.114 of the Evidence Act Cap 6** provides that;

“When one person has, by his or her declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he or she or his or her representative shall be allowed in any suit or proceeding between himself or herself and that person or his or her representative, to deny the truth of that thing.”;

67. This doctrine of estoppel has been considered by courts (See **Arch. Joel Katerega & Ors Vs Uganda Post Limited]: T/A POSTA Uganda HCT-00-CC-CS-0020-2010** where ***Buildtrust Constructions Limited vs Martha Rugasira HCCS N0. 288 of 2005*** to the effect that *“Where a person derived a benefit from another, like in this case, following a renovation of a house, and retains that benefit, the common law will not allow that person to retain the benefit without compensation on grounds that it is outside the terms of the contract.”*

In the latter cited case **Fibrosa Spolka vs Fairbain Lawson Combe Ltd [1943] AC 32 at 61** was cited where **Lord Wright** held that; *“It is clear that any civilized system of law is bound to provide remedies for unjust benefits. Such remedies in English Law are generally different from the remedies in contract or Tort and are now recognized to fall within the third category of Common Law which has been called Quasi-contract or restitution.”*

68. In **Inwards & Others v Baker [1965] 1 All ER**; court stated that:- *“If a party is made so to believe in a certain state of facts and that party acts on those facts, to his detriment, and the other party stands by and does not stop him from so acting, that other party is estopped from changing his stand. If one says to A ‘go ahead, this is land, but you may build on it, spend money, we will go into formalities of transfer later’ and A does all the other party is estopped from denying the right accrued to and acquired by A;”*

69. It was submitted for the 1st respondent that the consensus was tentative, the applicants did not act on the understanding from the consensus; that they did not dig a grave or do anything to benefit from the doctrine of estoppel because the funeral is state organised and financed; while estoppel is mostly cited in transactions a statement that informs the



general public and family about the burial of a loved one prepares the minds of the relatives that a closure to the grief is near; I do not agree that the statement did not affect the applicants for it even led to this litigation; the 1st respondent knew the wishes of the deceased and let the applicants prepare based on the consensus only to change his mind; he can not be allowed to benefit from the confusion and disorganisation he caused; he is estopped from denying that he was part of the family meeting that agreed on Nebbi as a burial place;

70. Counsel for the applicants submitted that the statement by the 1st respondent under paragraph 16 of the affidavit in reply amounts to evasive denial hence offending rules of procedure under Order 6 rule 10 of the Civil Procedure Rules; this was objected to by the 1st respondent's counsel who stated that Order 6 rule 10 refers to pleadings and does not apply to affidavits which are purely evidence. I agree with counsel for the 1st applicant for that is the position of the law;

71. **Order 6 rule 10 of the Civil Procedure Rules** provides that; *“When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he or she must not do so evasively, but answer the point of substance. Thus, if it is alleged that he or she received a certain sum of money, it shall not be sufficient to deny that he or she received that particular amount, but he or she must deny that he or she received that sum or any part of it, or else set out how much he or she received. If the allegation is made with divers circumstances, it shall not be sufficient to deny it along with those circumstances.”*

Such evidence however must be cogent and that is why annexes are attached to affidavits to confirm veracity.

72. While I have found that the 1st respondent knew about the wishes of the deceased and was actually part of the meeting that reached a consensus to bury in Nebbi only to change his mind; and therefore he ought not to have caused the release of the burial program indicating Adjumani; in the interest of closure there are other matters that this court must pronounce itself on particularly;

C).Should the wishes of the deceased on where she wanted to be buried be overtaken by the 1st respondent's culture? I shall here be guided by the following questions:

Who has the right to choose where the deceased should be buried; Should the deceased's wishes be considered in this case when she was married; Whose culture should be applied ?

73. At paragraph 14 of his affidavit in reply the respondent avers that he holds a pre-eminent position to determine where his deceased wife should be buried; court was referred to **Namusoke v Amuge and Others (Miscellaneous Cause No 4 of 2023) 2023 UGHCFD 5 (20 March 2023)**; in that case court laid the hierarchy of rights that accrue on death based on the right to administer the deceased's estate; *“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. of these factors, the fourth is generally considered to be the most important consideration for the court, also referred to as the 'overriding factor'. "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...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."

74. In **Jovia Matsiko v. Emmanuel Wandera Miscellaneous Cause No.141 of 2021 UGHCFD No.141 of 2021**; Justice Alice Komuhangi while considering **section 5(1) of the Administrator Administrator-General Act and Section 201 of the Succession Act Cap 162**; stated that; *the above provisions therefore recognize the rights of the widower and the widow as the most entitled persons to apply for Letters of Administration of the deceased's estate. Other relatives including parents will only come in where there is no widower, widow and children or where the children are still minors.*(see also **Luseleka and Others v Namalwa (Miscellaneous Application No. 167 of 2021) [2021] UGHCFD 3 (23 November 2021)** and the Australian case of *Jones v Dodd South Australia vs Smith (2014) 119 SASR 247*;

75. In **SAN vs. GW [2020] eKLR**, the Kenyan 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.;*"

76. **Section 277 of the Succession Act** provides that it is the duty of the executor to perform the funeral of the deceased in a manner suitable to his or her condition, if the deceased has left property sufficient for that purpose; court in **Luseleka and Others v Namalwa (supra)** stated that "*The above provisions empower the executor of the deceased to perform the funeral. Whereas it does not specifically mention an administrator, it is trite that the administrator plays the exact same role as an executor.*"(emphasis supplied);

77. The above cited case law follows the common law principles, to the extent that they are relevant, having regard to the extent of interest in the estate and eligibility to apply for a grant of letters of administration in intestacy, rather than on "kinship" in determining the entitlement to dictate the place of burial of the deceased; in my view the principles

are no more than a convenient method of approach to some cases, rather than a hard and fast rule to others;


78. While courts have found that the primary and paramount right to possession of the body and control of the burial is vested in the surviving spouse, the right is dependent on the peculiar circumstances of each case. The position of both the executor or executrix and the one entitled to administer the estate (the spouse); has changed since the **Succession Amendment Act 2022** came into force; they have been subjected to court's discretion; the said supremacy (preference according to the construction of the law), is therefore no longer automatic;

79. **Section 184(2) of the Succession (Amendment) Act 2022** provides: *'Notwithstanding anything in this Act, court shall have the discretion to determine whether a person who is otherwise qualified to be granted probate, is fit and proper and court may defer the appointment of an executor or executrix to a later date or refuse to grant probate where an applicant is not suitable.'* Section 190(2) of the same act provides that *'Notwithstanding anything in this Act, court shall have the discretion to determine whether a person who is otherwise qualified to administer an estate under this Act, is fit and proper to do so and the court may defer the appointment of an administrator to a later date or refuse to grant letters of administration where an applicant is not suitable.'*(underlined for emphasis);

80. Section 201 provides;(1) *The surviving spouse shall have preference over any other person in the administration of the estate of a deceased intestate. (2) The preference of the surviving spouse under subsection (1) may be disregarded by the Administrator General where- (a) the surviving spouse is not a fit and proper person to administer the estate of the deceased spouse or (b) the Administrator General finds it necessary, in the circumstances of the estate, to grant the administration of the estate to another person.* (emphasis supplied);

81. If the closeness and right to administer the estate of a deceased spouse determines who to be in charge of the burial including choice of the burial place, then the above provisions mean that a surviving spouse would not automatically qualify as the best person to determine the burial place of a deceased spouse; each case's peculiar circumstances must be considered;(see *Namusoke Annet vs Eva Amuge*(supra);

82. In this instant case, the dispute is between the spouse of the deceased who is the step-father to the deceased's children, the children and the siblings of the deceased of the deceased. In the South African case of **Finlay and Another v Kutoane 1993 (4) SA 675 (W)**, it was held that: *"Also in deciding between competing persons, the law should ideally mirror what the community regards as proper and as fair. That perception will be partly the result of views on social structures, mainly of family relationships and marriage, and on the vesting of authority and the finality of decisions. There may be*



views about the impropriety of not complying with requests of the deceased. Religious views, cultural values and traditions may play a role;”

83. It is my considered view that when courts have to decide burial matters and taking into account all the parties involved, they must be cautious as these matters are sensitive in nature, because of grief, tragedy and loss of their loved one; made worse also by the failure to bury the deceased in time; court must consider the expectations of the community; the relationship between the deceased (whilst still alive) and the persons disputing the spouse, fairness and reasonableness of such decision, proper respect and decency and the need to save family relationships;

84. ***In the Australian case of Calma v Sesar (1992) 106 FLR 466,452 (Martin J):*** stated “... issues such as these could take a long time to resolve if they were to be properly tested by evidence in an adversary situation. A legal solution must be found; not one based on competing emotions and the wishes of the living, except insofar as they reflect a legal duty or right. That solution will not embrace the resolution of possibly competing spiritual or cultural values.” He went on to say: “The conscience of the community would regard fights over the disposal of human remains such as this unseemly. It requires that the court resolve the argument in a practical way, paying due regard to the need to have a dead body disposed of without unreasonable delay, but with all proper respect and decency.” ;

85. In The Australian Court of Appeal in **Marschall v Elson [2023] SASCA 1**, In reviewing past authorities, the Court of Appeal stated the key propositions in burial disputes to be among others that; “... *It is not always necessary to resolve all disputes that may emerge on the evidence, and the Court must be mindful that the dignity of the deceased, and the conscience of the community, require that a declaration as to the mode and place of burial be made promptly, albeit with all proper respect and decency for the interests of those involved;*

86. While different jurisdictions may have different lenses on things circumstances surrounding a deceased person and burial are similar across the globe; one dies and one ‘s remains must be disposed of; and life must continue; In the above regard therefore I have chosen not to consider issues of the alleged rift between the deceased and the 1st respondent; because they are not relevant since the couple was neither separated nor divorced;

87. I shall instead consider whether the deceased had no right to choose a burial place simply because she was married to a Madi and can only be buried at the husband’s ancestral home and any other way has to be cleared by the husband and the clan according to paragraphs 13 and 16 of the 1st respondent’s affidavit in reply; I have considered the decisions of court relied upon by counsel; in *Namusoke Annet Kiwanuka vs Amuge (supra)* where the ‘widow was claiming the body of her husband against



another 'widow' together with the deceased's relatives; court found that none of the 'widows' was married to the deceased; court gave the body to the deceased's mother; in Kyobe Julius Luseleka & Ors vs Aida Namalwa (supra); the relatives of the deceased were claiming the body of their deceased relative from his widow; court decided in favour of the widow; in Jovia Matsiko vs Emmanuel Wandera MC 141/2021 where the mother of the deceased was claiming the body of her daughter from the deceased daughter's husband; court decided that the mother and the relatives had no right; all the decisions have been where the facts are that parents of the deceased or siblings or the clan are challenging a spouse over who should determine where a deceased person should be buried; the pre-eminent status of a spouse over others concerning her/his deceased spouse was upheld;

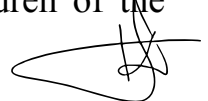
88. In Kyobe Julius Luseleka & Ors vs Aida Namalwa (supra) it was stated that a Christian married couple being one under the Christian faith would mean that they are one to the exclusion of the rest; and the rights of each one to the other, including the right to choose burial place (where the deceased person did not ascertainably reveal during her/his life time) lies with the surviving spouse;

89. It would appear to me that decision to bury a person in one place and not the other is informed by the emotional need for preservation of family ties that existed immediately before death; unlike other jurisdictions where the culture of burial in cemeteries is practiced; the practice in most societies in Uganda is for people to be buried at or near the family home; in some cultures the ancestral home and in others the home where the deceased had chosen to call home; I believe the burial place is as near home as possible to allow family members to heal but also not to completely forget their loved one; to continue the ancestral thread by recounting to the future generations in relation to the deceased;

90. 'Family' is defined by Black's Law Dictionary 11th Edition as ***'A group of persons connected by blood, by affinity or by law especially within two or three generations; a group consisting of parents and their children...'***

The 1st respondent referred to his family as a 'blended family'; a 'blended family' is defined by the same Black's Law Dictionary as ***'The combined families of persons with children from earlier marriages or relationships'***; (emphasis applied).

91. Counsel for the applicants submitted that the authorities of the case of Kyobe Luseleka and Others v Namalwa (supra) relied upon by counsel for the 1st respondent are distinguishable from the facts of this case; because in this case the deceased is the mother to the 1st, 2nd and 3rd applicants and a wife to the 1st respondent who is not the 1st, 2nd and 3rd respondents' father; the relationship between the applicants and the deceased is natural and organic and is still growing through grandchildren; while with the 1st respondent the relationship with the deceased has come to an end since there are no biological children birthed between them; therefore the issues of the children of the



deceased must be taken into account in determining the burial place of the deceased; for the 1st respondent it was argued that the deceased was married to the 1st respondent and that is enough;

92. The affidavit evidence presented in this case shows that the children of the deceased are not the biological children of the surviving spouse; and the deceased built a home which she shared with her biological children at her ancestral home in Nebbi; it is in no contention that the biological children have no blood ties with the surviving spouse and his relatives; the affidavit evidence shows that the deceased's biological children have never lived with the said spouse in the home in Adjumani; it would appear to me that if a blended family is a combination of families, when one of the parents dies unless otherwise clearly defined, the blend is no longer there; in the case at hand none of the 1st respondent's children swore an affidavit to confirm that the biological children of the deceased are welcome to the home in Adjumani; there was no rebuttal to the 1st, 2nd and 3rd applicants' evidence through the affidavit deposed by the 1st applicant that they had never been introduced to the Adjumani home;

93. While the 1st respondent deposed that the deceased frequently referred to the home in Adjumani district as the couple's retirement home, it is not proved that the deceased had an emotional attachment to this home if she had never taken her children there; the 1st, 2nd and 3rd applicants led evidence that the home in Nebbi is where the deceased spent her Christmas holidays and her leave from work; this was not disputed by the 1st respondent; evidence was also led to show that the deceased went to Nebbi at least every month and no such frequency was proved concerning Adjumani; the 1st, 2nd, and 3rd applicants aver that the home in Nebbi is the only one they know; that in fact, they have never been to the home in Adjumani and have no connection there.

94. I have considered the peculiar circumstances in this case and the fact that the pre eminent position of the spouse must be subjected to the circumstances I find the cited cases distinguishable; in **Nice Bitarabeho Kasango vs Rose Kabise Eseza MC No. 17/2021** court stated; 'where the relatives of the late Bob Kasango wanted him burried in Tororo as opposed to his wish according to his spouse court stated; *'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 ...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. 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.'

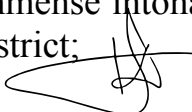
95. The holding in the above case was in favour of the spouse but the needs and views of the children and the oneness of the family albeit with a deceased parent were considered because then as a family they would be near the grave in a familiar and accessible environment; I find the spirit in that case similar to the case at hand; and in my view, the wishes of the deceased's children whatever age carry very great weight in the circumstances of this case; while the decided cases have all favoured the spouse against all; I find this case peculiar and distinguishable;

96. In *Jones v Dodd (1999) 73 SASR 328*. In his judgment, *Perry J* observed. *"In my opinion, the proper way in cases such as this is to have regard to the practical circumstances, which will vary considerably between cases, and the need to have regard to the sensitivity of the feelings of the various relatives and others who might have a claim to bury the deceased, bearing in mind also any religious, cultural or spiritual matters which might touch upon the question."*;

97. I have also considered the fact that the deceased while alive and ill was being taken care of by her family according to the affidavit of Christine Onyok the 5th applicant; which evidence was not rebutted; while if it had been the 1st respondent against them without the children, and the deceased's wishes were not known; I would have decided otherwise; now coupled with the peculiar circumstances, the fact that the deceased's elderly mother would find it inconvenient to visit the deceased's grave if she was to be buried in Adjumani, the combination of factors tilt the preference for the deceased to be buried in Nebbi according to her wishes;

D). Should the wishes of the deceased on where she wanted to be buried be overtaken by the 1st respondent's culture? Or should the late Justice Stella Arach Amoko be buried according to her custom.

98. The applicants contend that the deceased was the grandchild of Chief (Rwot) Dacaunder Kaal Ker Kwaro Jonam Kapita tribe and culturally should only be buried on the royal grounds at Kaal Ragem in accordance with, and observation of culture and customs; that given the deceased's position in the tribe, there are cultural rituals of immense intonation that must be performed at her burial on Kaal Ragem land in Nebbi district;



99. The affidavit in support of the application deposed by Dr. Geoffrey A Onegi-Obel the prime minister of Ker Kwaro Kaal Jonam states that in a family meeting held on 18th June 2023 at Mbuya Kampala; attended by the applicants and the 1st respondent and other relatives; it was unanimously agreed that the deceased be buried at her ancestral home in Nebbi next to her late father; the burial has to be celebrated in accordance with their tribe customs, rites and culture; he contests the burial of the deceased at the 1st respondent's ancestral home in Adjumani district on the ground that it is in total disregard of her culture; that Jukiya Hill ward is historically an extension of Kaal Ragem; further that the deceased being a Princess referred to as Nyakwar Rwot Daca Mary Stella Arach could only be buried on the royal grounds at Kaal Ragem in Pakwach district; that the royal grounds is where the rituals and last passage rites could be done for the deceased to peacefully pass on to her ancestors; however, that the deceased opted to be buried in Nebbi Distral; and in her lifetime was very passionate about their culture, customs and that is why she established a home at Jukaya Hill ward, Juba village, Nebbi district;

100. The 1st respondent denies knowledge and objects to any cultural rituals that the applicants intend to perform on his late wife that is contrary or repugnant to the deceased's religious believes; he deposed that it is a notorious religious and cultural custom among the Madi to which community he belongs that a lady who is deceased is buried in the burial grounds of the family where she is married, in proximity to her spouse and that becomes her ancestral home unless she wills otherwise or was divorced at the time of her death;

101. In the affidavit in rejoinder deposed by the 5th applicant it was averred that the deceased being a catholic did not take away her rights to belong to or observe the customs of the Jonam; the customs and rites are intended to demonstrate enormous loss to the clan and to honour the late Judge; that the alleged notorious Madi custom that the wife must be buried in the burial grounds of her husband's family does not override the deceased's own expressed wishes as well as her right to practice her own customs; at paragraph 21 of the affidavit in rejoinder she refers to '***Kwano Te Kwaro Pa Aligo Nyakwar Rot Mary Stella Arach***' as the most important custom to be performed at the funeral; entailing a cultural recital of the deceased's lineage; and that the customs are not in any way contrary or inconsistent with the catholic beliefs;

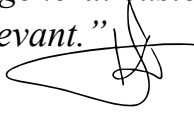
102. In further rebuttal, the 5th applicant contends that the 1st respondent was previously married twice where he had five children before his third wife the late Mary Stella Arach but none of the 1st respondents' deceased two former wives is buried on any of the said burial grounds; therefore, the 1st respondent is in breach of his own custom; hence he cannot impose this custom on the late Mary Stella Arach; counsel for the 1st respondent challenged the allegation because there was no proof that the deceased's wives died and that they were buried at Adjumani; then he also applied for a



grant of Letters of Administration in favour of the 1st Respondent; I shall not consider both issues in the spirit of *Marschall vs Elson* (supra) because it is not in the interest of harmonious sending off of the late Hon. Justice Stella Arach Amoko;

103. ***Black's law Dictionary 11th Edition page 1164*** defines the term custom as “***A practice that by its common adoption and long, unvarying habit has come to have the force of law.***” A valid custom must be of immemorial antiquity, certain and reasonable, obligatory, not repugnant to Statute Law, though it may derogate from the common law” (see *Osborne's Concise Law Dictionary*, Ninth Edition (Sweet and Maxwell, 2001).; the preamble to 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.*”
104. Section 15(1) of the **Judicature Act Cap.13**; Act states 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*”. Lady Justice Lydia Mugambe in ***Nice Bitarabehe Kasango Versus Rose Kahise Ezeza(supra)***; stated 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”.
105. Court in ***Magbwi v MTN (U) Limited & Anor (Civil Appeal No. 27 of 2012) [2017] UGHCLD 53 (12 April 2017)*** defined customary law in the following terms; “*Customary law ... concerns the laws, practices and customs of indigenous peoples and local communities. It is, by definition, intrinsic to the life and custom of indigenous peoples and local communities. What has the status of 'custom' and what amounts to 'customary law' as such will depend very much on how indigenous peoples and local communities themselves perceive these questions, and on how they function as indigenous peoples and local communities. Defining or characterising 'customary law' typically makes some reference to established patterns of behaviour that can be objectively verified within a particular social setting or community which is seen by the community itself as having a binding quality. Such customs acquire the force of law when they become the undisputed rule by which certain entitlements (rights) or obligations are regulated between members of a community.*”



106. **Article 37 of *The Constitution of the Republic of Uganda, 1995***, guarantees to every citizen, the right as applicable, to belong to, enjoy, practise, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others; **Article 33(1)** accords women with full and equal dignity of the person with men; then **Article 33(6)**, prohibits laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status;
107. In all cases where there is a dispute as to the burial place of the deceased, consideration should be given to cultural, spiritual and religious factors, where such factors are present. So far, the 1st respondent has not successfully rebutted the customary royal position of the deceased amongst the Ragem chiefdom or that as a princess she is culturally qualified to be buried; the 1st respondent objects to his wife being buried away from his ancestral home contrary to his culture; counsel for the applicants submitted that just because she is a woman she should not be denied the right to practice her culture for that is discriminatory;
108. **Section 46 of the Evidence Act cap.6** stipulates that; *“When the court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of that custom or right, of persons who would be likely to know of its existence if it existed, are relevant.”*; in this case the 1st respondent claims a custom;
109. In ***Ernest Kinyanjui Kimani v Muira Gikanga [1965] EA 735 at 789***, the court stated: “As a matter of necessity, the customary law must be accurately and definitely established. ...The onus to do so is on the party who puts forward the customary law. ...This would in practice usually mean that the party propounding the customary law would have to call evidence to prove the customary law as he would prove the relevant facts of his case.”
110. **In Obitre Jackson V. Abdu Matua Charles High Court Civil Appeal No. 0024 of 2011 (Arua) ; Stephen Mubiru.J** in reference to the decision in *Ernest Kinyanjui Kimani v Muira Gikanga (supra)*; held as follows; *“In the last category, are cases where the customary rules are neither notorious nor documented. In such cases, the customary law must be established for the Court’s guidance by the party intending to rely on it. As a matter of practice and convenience in civil cases the relevant customary law, if it is incapable of being judicially noticed, should be proved by evidence of persons who would be likely to know of its existence, if it existed, or by way of expert opinion adduced by the parties since under s. 46 of the Evidence Act, which permits the court to receive such evidence when the court has to form an opinion as to the existence of any general custom or right, such opinions as to the existence of that custom or right, are relevant.”*
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111. The customary and cultural beliefs of Kaal Ragem chiefdom to which the deceased belongs are not written down; the prime minister of Ker Kwaro Kaal Jonam as deposed an affidavit as an expert showing that the deceased was a princess with a title of *“Nyakwar Rwot Daca Mary Stella Arach”*; that there were passage rites that are meant to be performed at the burial of the deceased which customs can only be conducted at the ancestral burial grounds located at Jukiya Hill Ward in Nebbi district an extension land of the royal grounds at Kaal Ragen in Pakwach district.
112. The 1st respondent did not present an expert witness to swear an affidavit on the notoriousness or existence of the cultural belief to the effect that amongst the Madi culture, a wife must be buried in proximity to her husband at the husband’s ancestral burial grounds. (see: **section 101 and 103 of the Evidence Act**);counsel for the 1st respondent attempted to submit from the bar that the 1st respondent at 75 knew the culture; this was not deposed by the 1st applicant so it was evidence from the bar which court shall not consider.
113. **Article 31(1) of the 1995 Constitution of the Republic of Uganda** reads: *‘Men and women of the age of eighteen years and above have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution’*:(emphasis supplied);women and men have equal rights to practice their culture; women just like men cannot be assimilated in someone else’s culture unless they expressly consent; the deceased opted to continue to practice her culture as a princess among the Jonam; if the culture is repugnant the 1st respondent did not prove the repugnance; simply because the Jonam culture takes the deceased to be buried at her home has not been proved to be repugnant;

The case against the 2nd Respondent.

114. The case against the 2nd respondent has not been proved for it simply printed the program sent by the 1st respondent; the applicants did not prove any mischief against it; there is no cause of action proved by the applicants against the 2nd respondent. (see: **Auto Garage vs Motokov (No. 3) [1971] E. A. 514. And In Ismail Serugo vs Kampala City Council & Anor. – Supreme Court Constitutional Appeal No. 2 of 5 1998**);
115. Before I take leave of the matter I have found it prudent to state that :
- A) While culture is good, the practice of some of the aspects have been improved through time, education and exposure and transformed especially by the 1995 Constitution on the rights of women; by the time the deceased decided to build a home and have a farm at her ancestral home in my view shows that the couple had decided to leave a blended culture; it would therefore not be fair todisregarg her wishes when she cannot defend herself; the 1st respondent did not tell court whether he has been visiting the Nebbi home or not but it is my hope that he will keep visiting the deceased’s children and visit her grave without any hindrance; considering the loving picture he painted to this court;



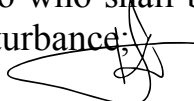
the 1st, 2nd and 3rd applicants are also enjoined to receive and respect their deceased mother's spouse because they were neither separated nor divorced;

B) A senior citizen who has risen through the ranks from Pupil State Attorney to the highest court of the land is not being mourned by the family alone but by the whole nation; this is confirmed by section 23 of The Administration of Judiciary Act 2020, schedule 3 part 1 which provides that a Justice of the Supreme Court who dies in service shall be accorded a state funeral; any further delay to bury the late Hon. Lady Justice Stella Arach Amoko is not in the interest of the nation and the family for it will keep not only her family in mourning but the whole nation as well; in the African culture death is a communal affair and prolonging it is emotionally draining considering also that the tax payer is shouldering the cost; therefore any decisions to appeal this ruling shall not further delay the official burial of the late Hon. Justice Stella Arach Amoko; any attendant future efforts shall be at the cost of the parties and not the nation;

116. In **CONCLUSION** the wishes of the late Hon. Lady Justice Stella Arach Amoko made known to the applicants and the family including the 1st respondent in a meeting of 18/06/2023 held at Kinawataka Mbuya Kampala informed the program that showed that the deceased would be buried at Jukiya Hill Ward in Nebbi District; the said wishes are encapsulated in her position as a princess in her tribe; no justification has been made for not honouring the deceased's wishes; The late Justice Stella Arach Amoko is entitled to her culture even in death; and she is entitled to be buried according to the culture and customs of the Jonam people in the Ragem chiefdom in Nebbi District; Since the children of the late Justice Stella Arach Amoko have their home in Nebbi where together with her they used to call home it is prudent that she be buried near/at the said home;

The application against the 1st Respondent is allowed with the following orders;

1. The application against the 1st Respondent succeeds.
2. The late Hon. Justice Mary Stella Arach-Amoko shall be buried at Jukiya Hill Ward, Juba Village Nebbi District;
3. The 2nd Respondent in consultation with the applicants and the 1st respondent is directed to immediately commence the burial arrangements of the late Hon. Justice Mary Stella Arach-Amoko who shall be buried at Jukiya Hill Ward, Juba Village Nebbi District;
4. The 1st respondent and his family members shall freely attend the funeral of the late Hon. Justice Mary Stella Arach-Amoko who shall be buried at Jukiya Hill Ward, Juba Village Nebbi District; without any disturbance;



5. The burial of the late Hon. Justice Mary Stella Arach-Amoko shall not be further delayed by any party's intended responses/reactions to this Ruling;
6. The case against the 2nd Respondent is dismissed.
7. Each party shall bear their costs.



Ketrach Kitariisibwa Katunguka-

Judge

27/06/2023

Delivered by email
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