

BURIAL DISPUTES IN KENYA: ARE ALTERNATIVE FORMS OF  
DISPUTE RESOLUTION AN OPTION FOR RESOLVING BURIAL  
DISPUTES IN KENYA?

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**Declaration**

I KAREN JEPKEMBOI KIPROP, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:  .....

Date: 28<sup>th</sup> July 2021.

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:  .....

Dr Peter Kwenjera

Date .. 30th July 2021 .....

## **Abstract**

*Burial disputes in Kenya have been with us since time immemorial. This study investigated whether alternative forms of dispute resolution are an option for resolving burial disputes in Kenya. In addition, the study also analyses the role of the Constitution of Kenya on burial disputes in Kenya. The scope of the study is burial disputes in Kenya and particular reference is given to cases from the year 2010. The research methodology includes a google survey that was carried out to collect data on the writing of wills in Kenya. The major findings are that there is no uniform law and policy on burials in Kenya. There is a quasi-property right attached to a corpse in so far as to grant the kin the right to dispose of the corpse. The results from the google survey shows that over 90% of the participants do not have written wills. The recommendations made in the study include the need to adopt alternative dispute resolution mechanisms in the resolution of burial disputes in Kenya and the need to enact legislation on burials in Kenya that will encompass the different factors that come into play such as culture, marriage ,and religion. These factors have been unpacked to show how they contribute to burial disputes and how wills and legislation can help to resolve burial disputes in Kenya.*

## LIST OF CASES

1. *CEMIRIDE(Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, ACmHPR, 276/2003.*
2. *Darcy v Duckett (2016), Supreme Court New South Wales*
3. *Dow v Hoskins (2003), Supreme Court of Victoria*
4. *Edwin Otieno Ombajo v Martin Odera Okumu (1996)eKLR*
5. *Eunice Moraa Mbeche and another v Grace Akinyi (1994)eKLR.*
6. *Floyd v Atlantic Coast (1954), The Supreme Court of the United States.*
7. *Frith v Schubert (2010), Supreme Court of Queensland.*
8. *Jacinta Nduku Masai v Leonida Mueni Mutua (2018)eKLR*
9. *Jones v Dodd (1999), Supreme Court of South Australia*
10. *Kandie and 2 others vs Cherogony (2002)eKLR*
11. *Keller v Keller( 2007), Supreme Court of Victoria.*
12. *Lubin v Sydenham (1943), The Supreme Court of the United States.*
13. *Martha Wanjiru Kimata and another v Dorcas Wanjiru and another (2015)eKLR.*
14. *Mellinger v City of Houston (1887), The Supreme Court of Texas.*
15. *M’imanene M’rutere v Lewis Kirimi and 2 others(2018)eKLR.*
16. *Pauline Ndete Kinyota vs Rael Kinyota Maingi (1984)eKLR.*
17. *Re NMM(Deceased) (2017)eKLR*
18. *Ruth Wanjiru Njoroge v Jemimah Njeri Njoroge (2004)eKLR.*
19. *Sakina Sole Kaittäny and Another v Mary Wamaiitha (1995)eKLR.*
20. *Smith v Tamworth City Council (1997), Supreme Court New South Wales.*
21. *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo and another (1987) eklr.*

## **LIST OF LEGAL INSTRUMENTS:**

### **Kenya:**

The Constitution of Kenya (2010).

The Marriage Act Kenya ( Act No 4 of 2014).

Judicature Act ( Act No 16 of 1967).

Kenya National Blood Transfusion Bill

The Law of Succession Act Kenya .Cap 160.

Penal Code (Act No 81 of 1970).

### **Australia:**

Burial and Cremation Act (2013).

Cemeteries and Crematoria Regulations (2003)

Cremations Act (2003)

The Queensland Act.

## 1.0 CHAPTER ONE:

### 1.1 Introduction

This study seeks to analyse whether burial disputes can be resolved through alternative dispute resolution mechanisms. The study establishes that there is no legislation that governs burial disputes in Kenya. The background of the study gives the context of burial disputes in Kenya. It entails the customary context of burial disputes in Kenya. In addition to this will also be a literature review section which will give a brief overview of what other authors have concluded on similar research done related to the study.

### 1.2 Background:

In Kenya, there are 42 tribes and that results in different cultures that often influence how a person is to be buried in Kenya. The diverse cultural beliefs also bring about a rise in the burial disputes in Kenya. This study is based on burial rights in Kenya as it seeks to determine whether a property right exists in a corpse. The study has been influenced by the various cases of conflict that arise between families when one of their members die and a decision as to the disposal of the corpse must be made. The case that made headlines over a long period of time is the *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo and another*,<sup>1</sup> which is commonly referred to as the SM Otieno Case, regarding who was entitled to bury the deceased between his widow, Wambui and the *Umira Kager* clan of the Luo Community.<sup>2</sup>

The question that arises is whether these disputes occur because there is an existing property right attached to the corpse. There are various other factors that influence the disposal of bodies which include the religion that the deceased person practised as well as their cultural beliefs that vary from one culture to the next. The background of the study has been influenced by the various cases in our Kenyan courts that arise due to burial disputes.

In the case of *Pauline Ndete Kinyota Maingi vs Rael Kinyota Maingi*,<sup>3</sup> the high court dismissed provisions of a will and upheld the Kamba customary law which was the deceased's custom.<sup>4</sup> This case brought out the position regarding wills in resolving burial disputes, but further developments were made as highlighted in the case of *Eunice Moraa Mbeche and another v Grace Akinyi*.<sup>5</sup> In this case, the court validated the wishes of the deceased and underlined the

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<sup>1</sup> *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo and another* (1987) eKLR.

<sup>2</sup> *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo and another* (1987) eKLR.

<sup>3</sup> *Pauline Ndete Kinyota v Rael Kinyota Maingi* (1984) eKLR.

<sup>4</sup> *Pauline Ndete Kinyota vs Rael Kinyota Maingi* (1984) eKLR.

<sup>5</sup> *Eunice Moraa Mbeche and another v Grace Akinyi* (1994) eKLR.

right of an individual to make a will. The dispute involved the widow to the deceased and some members who had agreed that the deceased be buried at a Muslim cemetery in conformity with Islamic rights. The deceased's mother on the other hand insisted that he be buried in Kisii as a Christian and insisted that the deceased had never converted to Islam. The deceased had stated in the will that the place of burial was at a Muslim cemetery.

Furthermore, the case of *Sakina Kaittany vs Mary Wamaitha* upheld the common law principle that there can be no property in a dead body, that a person cannot dispose of his body at will and that after the death, the custody and possession of the body belonged to the executors until it was buried.<sup>6</sup> The courts also upheld customary law in the case *Edwin Otieno Ombajo v Martin Odera Okumu* where the deceased was buried in accordance with Luo customs.<sup>7</sup> In the absence of a will regarding preferred burial site, courts have upheld the traditional customs so long as these were not repugnant to justice and morality or to a written law.<sup>8</sup> Courts were later to determine that besides the customary laws and traditions, other circumstances surrounding the death and life of the deceased had to be considered like the relationships of the claimants to the deceased as was established in the case of *Ruth Wanjiru Njoroge v Jemimah Njeri Njoroge*.<sup>9</sup>

In addition, is the case of *Danvas Omare v Justus Ogendi*.<sup>10</sup> The three deceased's persons were from one family and were victims of murder. The accused person was accused of murdering his wife and two children. The argument was that the accused's family had the right to decide where the deceased should be buried and must be in accordance with the customary laws of Abagusii and not in the United States as the family of the deceased's intended. It was stated that it was a case of cultural conflict and the United States government asked the Kenyan government for interpretation of the customary law to enable it to advise the warring parties.

The S.M. Otieno case leaves behind a legal precedent that will be echoed many years to come in the burial disputes in Kenya. The more than three decades old case that has been subject of academic and social debates will for a long time, act as a reference point and a case study on the evolution of jurisprudence regarding burial disputes in Kenya.<sup>11</sup> This study will highlight

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<sup>6</sup> *Sakina Sole Kaittany and Another v Mary Wamaitha* (1995)eKLR.

<sup>7</sup> *Edwin Otieno Ombajo v Martin Odera Okumu* (1996)eKLR

<sup>8</sup> *Kandie and 2 others vs Cherogony* (2002)eKLR.

<sup>9</sup> *Ruth Wanjiru Njoroge v Jemimah Njeri Njoroge* (2004)eKLR.

<sup>10</sup> *Danvas Omare v Justus Ogendi* (2010)eKLR.

<sup>11</sup> Muleu J, 'Concept Paper on Need for Disposal of Dead Body Legislation in Kenya,' Kenya Law Reform Commission, 2014,1.

the various developments in burial disputes in Kenya regarding whether there is a property right in a corpse as mentioned in the SM Otieno case and the various factors that influence how burial disputes are resolved in Kenya today.

Furthermore, Justice Ojwang in the case of *Ruth Wanjiru Njoroge v Jemimah Njeri Njoroge*,<sup>12</sup> stated that “ In the Social Context prevailing in this country the person who is first in line of duty in relation to the burial of any deceased person is the one who is closest to deceased in legal terms. Generally, the marital union will be found to be the focus of the closest chain of relationships touching on the deceased.”

The Constitution of Kenya(2010) recognises the importance of the family unit as it states that “The family is the natural and fundamental unit of society and the necessary basis of social order and shall enjoy the recognition and protection of the State.”<sup>13</sup> It also states that “Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”<sup>14</sup> This provision in the constitution influenced the decision made in the case of *Jacinta Nduku v Leonida Mueni*,<sup>15</sup> as the appellant who was married to the deceased was given the body to bury by virtue of being the wife. The claimant’s marriage to the deceased person suspended the other rights raised by the respondents.

The other provision of the law that touches on issues of disposing of dead bodies is section 137 of the Penal Code which makes it an offence for any person to unlawfully hinder the burial of the dead body of a person or without lawful authority exhume, dissect, or harm the dead body of any person or being under a duty to cause the dead body of any person to be buried, fail to perform that duty.<sup>16</sup>

In addition, is the relevance of the Law of Succession in the determination of burial disputes in Kenya. Testacy rules in the law of succession may create a certain property right in a corpse that can be expressed in a will. If the deceased dies before the creation of a will, the rules of intestacy may apply.

### 1.3 Statement of the problem:

From the background it is evident that there is no universal rule that exists to show as to whom the right to burial is granted. In the SM Otieno case decided in 1987, there was a dispute as to

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<sup>12</sup> *Ruth Wanjiru Njoroge v Jemimah Njeri Njoroge* (2004)eKlr

<sup>13</sup> Article 45(1), *Constitution of Kenya* (2010).

<sup>14</sup> Article 45(3), *Constitution of Kenya* (2010).

<sup>15</sup> *Jacinta Nduku Masai v Leonida Mueni Mutua* (2018)eKLR

<sup>16</sup> Section 137, *Penal Code* (Act No 81 of 1970).

whom the right of burial was granted between the widow and the deceased's clan. There is no Statute or Act of Parliament that states who has the exclusive right to the corpse regarding burial once the death occurs.

Secondly, in common law there has been no conclusion as to whether there exists a property right in a corpse. In the SM Otieno case, the judge stated that burials denote not just ownership but also belonging. The use of the term ownership may bring out the question as to whether there exists a property right to the corpse. There is a need to determine whether the corpse is property and whether there is an existing property right attached to it.

Third, is that there is no codified statute or Act of Parliament to guide on burial disputes. Section 137 of the Penal Code guides burial disputes in Kenya only if there is hinderance of the burial process without any legal basis. The Law of Succession Act provides for a law that applies to intestate and testamentary succession.

#### 1.4 Objectives of the study:

- To highlight the different property rights in law and assess whether there is a property right attached to a corpse.
- Investigate the other factors that contribute to the burial disputes arising regarding the disposal of the corpse including culture, religion, and marriage.
- Assess the law that regulates the right as to who the right of burial is granted in Kenya.
- Highlight the impact of the Constitution of Kenya (2010) on burial disputes in Kenya.

#### 1.5 Hypotheses:

The hypothesis that can be drawn regarding the study include:

- Testacy rules in the law of succession may create a certain property right in a corpse that can be expressed in a will. If the deceased dies before the creation of a will, the rules of intestacy may apply. Therefore, if more people wrote wills giving directions on how they want to be buried, burial disputes in Kenya will reduce.
- Despite having the rules of intestacy as well as testamentary succession there are various other factors that may influence the burial of the corpse in Kenya which include the religion, culture, and marriage of the deceased's person.

- Enacting uniform laws and policies that regulate the disposal of dead bodies encompassing all factors affecting burial disputes in Kenya will provide a reliable framework and reduce the frequent occurrence of burial disputes in our courts.

#### 1.6 Justification of the study:

This study is important as it may assist in solving various burial disputes that arise in our Kenyan courts and which take a long period of time before their determination. The study will also assist in the recognition of the fact that there ought to be legislation that will aid the determination of these disputes.

#### 1.7 Literature Review:

This section will analyse what various authors have stated on the study of burial disputes and how they can be resolved. Balganes S in his article on property rights stated that common law adopted the position that there was no property right or ownership interest whatsoever in a corpse.<sup>17</sup> He also introduces the term quasi-property rights which applies when referring to the entitlements and liabilities associated with the burial of a corpse. The author stated that the term Quasi-property emerged as the common law term for the possessory or custodial interest that members of a deceased's family had over the deceased's remains for purposes of burial.<sup>18</sup>

In Stroud's article,<sup>19</sup> who brings out the instance in which the deceased has a will. He states that a will does not govern the disposition of a dead body in the same way that it governs the disposition of other things. Instead, a corpse is only quasi-property, meaning that there are times when some individuals, relatives, for example can exercise a limited amount of control over what happens to a corpse.

Jacob Mwendwa Muleu in an article published by The Kenya Law Reform Commission on the need for disposal of dead body legislation in Kenya, stated that the preference of the deceased concerning the disposition of his or her body is a right that is usually strictly enforced.<sup>20</sup>

David Ngira states that the means and place of interring the dead body has become an issue of legal contest, both within the formal and informal dispute resolution systems in Kenya. The

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<sup>17</sup> Balganes S, 'Quasi-property: Like, But Not Quite Property' 160 *University of Pennsylvania Law Review* 7, 2012, 1895.

<sup>18</sup> Balganes S, 'Quasi-property: Like, But Not Quite Property', 1895.

<sup>19</sup> Stroud S, 'Law and the dead body: Is a Corpse a Person or a Thing' 14 *Annual Review of Law and Social Science* 14, 2018, 116.

<sup>20</sup> Muleu J, 'Concept Paper on Need for Disposal of Dead Body Legislation in Kenya', 2.

contention over the place of burial has been problematic not only due to its effect on succession but also due to its implication on the social status of the dead person's surviving relatives.<sup>21</sup>

Washington Odongo appreciates the common law practices regarding disposal of the corpse. He states that common law in relation to the disposal of dead bodies is based on the considerations of decency and respect regarding disposal of the body and the protection of public health.<sup>22</sup> He also concludes his paper by stating that Kenya needs to take a step further to develop legislation on disposal of dead bodies.<sup>23</sup>

Thomas Muinizer in the critical review of Burial Law with a view to its development, states that there is a hierarchy when it comes to fulfilment of the burial system. To facilitate this system the law has established a hierarchy. Executors appointed by the deceased will sit at the top of the hierarchy and thereby take the priority claim in fulfilling the burial. If no executor has been appointed and the deceased has died intestate, then burial responsibility passes to the deceased's personal representative.<sup>24</sup>

Remigius Nwabueze in the article on Legal Control of Burial Rights stated that burial wishes which are fulfilled upon the exercise of burial rights, raised significant concerns that involve contestations of power, identity, religion, and culture. Where the deceased expressed no burial wishes, it is suggested that the law should empower the surviving spouse or civil partner to determine the place, time, and manner of burial.<sup>25</sup>

Lisa Owino states the importance of considering customary law in settling of burial disputes in Kenya. The article states that the law of the deceased and his or her family should be applied. The customary law of the person affected by the transaction should be applied.<sup>26</sup> She quotes the SM Otieno case and states "that the court directed that the deceased be buried in accordance

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<sup>21</sup> Ngira D, 'Re-examining Burial Disputes in Kenyan Courts through the lenses of Legal Pluralism' 8 *Onati Socio Legal Series* 7, 2018, 4.

<sup>22</sup> Odongo W, 'Burial and the Law of dead Bodies: Comparative analysis of legislations and best practices' *Academia*, 2016, 10.

<sup>23</sup> Odongo W, 'Burial and the Law of dead Bodies: Comparative analysis of legislations and best practices' 10.

<sup>24</sup> Muinizer T, 'The Law of the Dead: A Critical Review of Burial Law, with a View to its Development' 34 *Oxford Journal of Legal Studies* 4, 2014, 791-793.

<sup>25</sup> Nwabueze R, 'Legal control of Burial Rights' 2 *Cambridge Journal of International and Comparative Law* 6, 2013, 196.

<sup>26</sup> Owino L, 'Application of African Customary Law: Tracing its Degradation and Analysing the Challenges it Confronts.' *Strathmore Law Review*, 2016, 15.

with the customs of his Luo clan and stated that there is no way in which an African citizen can divest himself of association with the tribe of his father.”<sup>27</sup>

Vyonna Bondi in the article titled *Death and Burial in the African Context: A Case Study on Kenyan Customs and Kenyan Customary Law*, stated that the disputed burial of SM Otieno brought out the conflict that was bound to arise between traditional practices and modernity.<sup>28</sup> She also states that the Kenyan Courts use the customary law of any tribal group as a guide in civil cases so long as it does not conflict with statutory law.<sup>29</sup>

Peter Nemeth on legal rights and obligations to a corpse states that a right to burial is among the legal rights that exist and is a legal right protected by the courts. It is only natural that a paramount right to the dominion over the dead person's body, exists in the surviving spouse.<sup>30</sup> It is a fundamental legal concept that where there is a right there is a corresponding duty and therefore the heirs or survivors entitled to possession of the dead body are responsible for a decent burial.<sup>31</sup>

Walter Kuzenski stated that there is no commercial property in a dead body.<sup>32</sup> He added that the right to bury a corpse and to preserve its remains, is a legal right, which the courts of law will recognize and protect. In the absence of any testamentary disposition, belongs to the next of kin.

Reginius Nwabueze states that most western legal systems recognize the right of a surviving wife to control the disposition of the remains of her deceased husband. In the USA, the surviving wife is the appropriate person to determine the time, manner, and place of burial of her deceased husband. Although she is expected to take the wishes of other members of the family into consideration, her own sepulchral wishes are controlling and paramount in the event of a conflict.<sup>33</sup>

Ngunjiri Ngare in his dissertation on the need for burial law in Kenya, encompasses Kenya's legal framework governing issues arising upon death. He states that there is no written law

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<sup>27</sup> Owino L, 'Application of African Customary Law: Tracing its Degradation and Analysing the Challenges it Confronts.', 15.

<sup>28</sup> Vyonna Bondi, 'Death and Burial in the African Context: A Case Study on Kenyan Customs and Kenyan Customary Law.' *Hitchhikers guide to law*, 2015, 2.

<sup>29</sup> Vyonna Bondi, 'Death and Burial in the African Context: A Case Study on Kenyan Customs and Kenyan Customary Law.' 2.

<sup>30</sup> Nemeth P, 'Legal Rights and Obligations to a Corpse' 19 *Notre Dame Law Review* 1, 1943, 70.

<sup>31</sup> Nemeth P, 'Legal Rights and Obligations to a Corpse' 71.

<sup>32</sup> Kuzenski W, 'Property in Dead Bodies' 9 *Marquette Law Review* 1, 1924, 18.

<sup>33</sup> Nwabueze R, 'Legal Approaches to the burial rights of a surviving wife.' 1 *Amicus Curiae* 73, 2008, 12.

governing burial matters in Kenya. However, other than customary law, parties in a dispute usually invoke Marriage Law and the Law of Succession.<sup>34</sup> He also adds that customary law is inadequate in dealing with the issues that arise in burial disputes.<sup>35</sup>

Winfred Kamau states that The Constitution retains the pluralistic base of family law by providing for enactment by Parliament of legislation that recognizes marriages concluded under any tradition, or system of religious, personal or family law, as well as any system of personal and family law under any tradition, or adhered to by persons professing a particular religion.<sup>36</sup> She also included that *Article 45(3) of the Constitution of Kenya* which ‘provides that parties to a marriage are entitled to equal rights at the time of, during and at the dissolution of the marriage.’<sup>37</sup> This relates to burial disputes as more often than not personal law is used in the determination of these disputes.

In conclusion, this paper seeks to highlight the impact of *Article 45(3) of the Constitution of Kenya* on burial disputes especially considering the place of equality of parties to a marriage in burial disputes in Kenya.

#### 1.8 Limitations of the study

- Due to the covid-19 pandemic there is limited access to hard copy books that were easily accessible in the library.
- I have been limited only to the google survey for the data collected in this research.
- The google survey sent out reached a certain number of participants as discussed.

#### 1.9 Scope of the study:

The scope of this work is the impact of the Constitution of Kenya (2010) on burial disputes in Kenya. It is limited to the Luo, Agikuyu and Kalenjin communities as these communities account for a large population in Kenya. The focus will be on burial disputes that have arisen within the last ten years. Pre-2010 cases will only be used as a form of reference as to the developments of the law. The data collected will be limited to the google survey conducted.

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<sup>34</sup> Ngunjiri N, ‘Burial Disputes in Kenya: A case for legislation’ published, University of Nairobi, Nairobi, 2006, 29.

<sup>35</sup> Ngunjiri N, ‘Burial Disputes in Kenya: A case for legislation’, 29.

<sup>36</sup> Kamau W, ‘Judicial Approaches to the Applicability of Customary Law to Succession Disputes in Kenya.’ *East African Law Journal* 1, 2015, 143.

<sup>37</sup> Article 45(3), *Constitution of Kenya* (2010).

#### 1.10 Research Methodology:

The research methodology will be inclusive of a comparative study between Australia and Kenya. The reason for this is that Australia is quite similar in terms of following the common law regarding burials. In Australia, the position of the courts in relation to funeral and burial instructions is well settled as a person's wishes with respect to the disposal of their body are not legally binding.<sup>38</sup> Australian courts have also identified the aspect of culture which is necessary in this study as seen in the cultural context of burial disputes in Kenya. The comparative study between Australia and Kenya will give the aspect of culture, will relate to whether there is a property right in a corpse and will also encompass who has the right to dispose of the corpse if there is a burial dispute.

Furthermore, this study will include a hybrid of a theoretical and conceptual framework that will analyse various concepts such as the theory of property in relation to the bundle of sticks, the concept of a person (before death), the concept of a dead person and the concept of burial.

The study will also include a google survey that will entail questions about the writing of wills. The google survey is the most adequate method of data collection during the covid-19 pandemic because of limited movement. The survey has been annexed in the research. The google survey will be sent out via email and the whatsapp app and the data collected will be analysed in the fourth chapter of the study.

#### 1.11 Chapter Breakdown:

Chapter one has the background section as well as the introduction section of the study. The background of the study has given a brief analysis of the context of burial disputes that occur in Kenya. There is the literature review, the limitations of the study as well the scope of the study. This chapter also includes the research methodology.

Chapter two analyses the conceptual and theoretical framework of the thesis. These include the concept of property, the concept of a corpse, the concept of a person before they die as well as the concept of burial. The theory that has been discussed in this study is the theory of property as a bundle of sticks whose proponent is Honore.

Chapter three analyses the legal framework of the study. This section has highlighted and discussed the various law that surrounds burial disputes in Kenya. These laws include any the

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<sup>38</sup> Smith v Tamworth City Council (1997), Supreme Court New South Wales.

Law of Succession, the Marriage Act, Customary law as well as the Constitution of Kenya (2010). In addition, courts have relied on the principle of precedent these laws in burial disputes.

Chapter four analyses the comparative study between Australia and Kenya. This section analyses the burial laws in Australia and compares the practices between the two countries.

Chapter five gives the overall conclusion of the study. This section proposes recommendations made through the research.

## 2.0 CHAPTER TWO: CONCEPTUAL AND THEORETICAL FRAMEWORK

This chapter will discuss the various concepts involved in this study. The various concepts that will be discussed include the concept of property, the concept of a person (before death), the concept of a dead person and the concept of burial.

### 2.1 Concept of Property:

The term property is derived from the Latin word *proprius* which means one's own.<sup>39</sup> This can also be that which a person owns to do what he or she likes with.<sup>40</sup> In most jurisdictions the law is regarded as the foundation of property rights and the law takes a key role in defining property.<sup>41</sup> It is only prudent to now explain the relationship between the property and law. In the case *Mellinger v City of Houston*,<sup>42</sup> the judge stated that a right is a well-founded claim which should be recognised by law. Therefore, property rights will exist only and to the extent that they are recognised by a particular legal system.<sup>43</sup>

#### 2.1.1 Property as Rights:

Property can be manifested as rights. A right is a legally recognised interest in, to, or against a person or a thing.<sup>44</sup> Property rights are not inherent to all human beings by virtue of being a human being but there must be an additional legal claim.<sup>45</sup> In legal regimes the rights of persons to hold property is guarded by legislation and the courts.<sup>46</sup> In the case of *CEMIRIDE(Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*,<sup>47</sup> the African Commission noted that the right to property is also interlinked with numerous other rights. An infringement on property rights amounts to violation and interference with the enjoyment of other rights, such as the right to water, shelter, housing, development, and many others.<sup>48</sup>

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<sup>39</sup> Kariuki F, Ouma S and Ng'etich R, 'Concept of Property' in Kariuki F(eds)*Property Law*, 1<sup>st</sup> ed, Strathmore University Press, Nairobi, 2016, 2.

<sup>40</sup> Kariuki F, Ouma S and Ng'etich R, 'Concept of Property', 2.

<sup>41</sup> Kariuki F, Ouma S and Ng'etich R, 'Concept of Property', 2.

<sup>42</sup> *Mellinger v City of Houston* (1887), The Supreme Court of Texas.

<sup>43</sup> Kariuki F, Ouma S and Ng'etich R, 'Concept of Property', 2.

<sup>44</sup> Beale J, 'A treatise on conflict of laws' Harvard University Press, Cambridge MA, 1916, 139.

<sup>45</sup> Kariuki F, Ouma S and Ng'etich R, 'Concept of Property', 2.

<sup>46</sup> Kariuki F, Ouma S and Ng'etich R, 'Concept of Property', 2.

<sup>47</sup> *CEMIRIDE(Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACmHPR, 276/2003.

<sup>48</sup> *CEMIRIDE(Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACmHPR, 276/2003.

## 2.2 Theoretical Framework: Property as a 'bundle of sticks'

Honore is the proponent of this theory. He states that property is a bundle of sticks. Common law conceived of property as a bundle of rights conferring powers on owners and implying obligations and liabilities on others.<sup>49</sup> The sticks that make up the bundle and that are used to define property are the right to exclude others, the right to possess and use and the right to transfer.<sup>50</sup>

The three sticks in the bundle are discussed by Honore as analysed below. This discussion is necessary in determining whether either of the three sticks can be attached to a corpse.

### 2.2.1 Right to exclude:

The right to exclude is the entitlement to keep out or prevent others from the use or possession of property.<sup>51</sup> The right to exclude is the essential constituent of property as it is the total exclusion of the right of any other individual in the universe.<sup>52</sup> Today, the right to exclude is not an absolute right as there are limitations placed upon property owners. In Kenya, property can be taken away to fulfil public purposes such as building roads, railway lines, hospitals, and many others.<sup>53</sup> The holding of property is also subject to the development control or police power of the state in the interest of public safety, public order, and public health.<sup>54</sup>

In addition, the right to exclude does not mean exclusiveness especially where there is co-ownership of the property.<sup>55</sup> The right to exclude goes hand in hand with the right of control over things. The owner must have control over the thing.<sup>56</sup> If the control is temporary then it does not amount to property unless certain conditions are fulfilled. These conditions are that the possession must be recognised by others and in being a right, in relation to permanent things, the right must have certain permanence and the control must be exclusive since if the control is shared with others, then it is not private property.<sup>57</sup>

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<sup>49</sup> Kariuki F, Ouma S and Ng'etich R, 'Concept of Property', 5.

<sup>50</sup> Sprankling J, 'Understanding Property Law' University of the Pacific, McGeorge School of Law, 2017, 4-7.

<sup>51</sup> Kariuki F, 'Concept of Property', 7.

<sup>52</sup> Blackstone W, *Commentaries on the laws of England*, facsimile ed of 1765-69, Chicago University Press, Chicago, 1979, 2.

<sup>53</sup> Article 40, *Constitution of Kenya* (2010).

<sup>54</sup> Article 66, *Constitution of Kenya* (2010).

<sup>55</sup> Munzer S, *A theory of property*, Cambridge University Press, Cambridge, 1990, 89-90.

<sup>56</sup> Kariuki F, Ouma S and Ng'etich R, 'Concept of Property', 9.

<sup>57</sup> Lobhouse L, 'The historical evolution of property, in fact and in idea' in Gore C(ed), *Property: Its duties and rights*, Clarendon Press, Oxford, 1913.

### 2.2.2 Right to transfer:

The right to transfer involves the right to transfer the holder's property rights to others, either during his lifetime or by operation of law.<sup>58</sup> Operations of law may include bankruptcy or insolvency or liquidation as well as due to death. It is the right of disposal of one's ownership rights in property to another person to renounce such rights.<sup>59</sup> The law imposes certain restrictions on this right to transfer. For instance, the law does not permit the transfer of title by a bankrupt person. The transfer of property cannot impose unnecessary conditions incident to the transfer of the property.<sup>60</sup> That certain types of property cannot be traded in the market such as body parts and others cannot be transferred at death such as a life estate.<sup>61</sup>

### 2.2.3 Right to possess and use:

The right to possess means that an owner can keep and manage property under his ownership, while the right to use means an owner can exploit the utility and enjoy the fruits and profits from the property.<sup>62</sup> Traditionally, a person who owned land could generally use his land in any way he wished, if the use were not a nuisance and no other person held an interest in the land.<sup>63</sup>

In conclusion, the theory of property as a bundle of sticks does not attached any property right to a corpse. The next section will explain the concept of quasi-property rights which will help us understand the rights attached the corpse.

## 2.3 Quasi-property Rights Attached to a Corpse:

Generally, common law adopted the position that there was no property right or ownership interest whatsoever in a corpse.<sup>64</sup> In the case of *Lubin v Sydenham*,<sup>65</sup> the court stated that 'There is no right of property in a dead body in the ordinary sense, but it is regarded as property so far as necessary to entitle the surviving spouse or next of kin to legal protection of their rights in respect to the body.'<sup>66</sup> As the law developed there was introduction of quasi-property

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<sup>58</sup> Kariuki F, Ouma S and Ng'etich R, 'Concept of Property', 9.

<sup>59</sup> Kariuki F, Ouma S and Ng'etich R, 'Concept of Property', 9.

<sup>60</sup> Kariuki F, Ouma S and Ng'etich R, 'Concept of Property', 9.

<sup>61</sup> Kariuki F, Ouma S and Ng'etich R, 'Concept of Property', 9.

<sup>62</sup> Honore A, 'Ownership' in Coleman J(ed), *Readings in the philosophy of law*, Garland Publishing, New York, 1999, 563.

<sup>63</sup> Kariuki F, Ouma S and Ng'etich R, 'Concept of Property', 9.

<sup>64</sup> Balganes S, 'Quasi-property: Like, But Not Quite Property' 160 *University of Pennsylvania Law Review* 7, 2012, 1895.

<sup>65</sup> *Lubin v Sydenham* (1943), The Supreme Court of the United States.

<sup>66</sup> *Lubin v Sydenham* (1943), The Supreme Court of the United States.

rights. Equity courts began using the term “quasi-property” to describe interests that resembled property rights in their functioning even when they were not property rights.<sup>67</sup>

Quasi-property rights applied when referring to the entitlements and liabilities associated with the burial of a corpse. Quasi-property emerged as the common law term for the possessory or custodial interest that members of a deceased's family had over the deceased's remains for purposes of burial.<sup>68</sup> In the case *Floyd v Atlantic Coast*,<sup>69</sup> the court recognized a quasi-property right in the nearest relatives, including the right of custody for burial.' With this, we can conclude that there is a quasi-property right attached to a corpse and it includes the right of custody for burial to the next of kin

The next concept we need to discuss is the concept of a human person before death to determine whether there are property rights attached to a person during their lifetime.

#### 2.4 The Concept of a Person

The Constitution of Kenya states that a person includes a company, association, or other body of persons whether incorporated or unincorporated.<sup>70</sup> The concept of a person is concerned with every individual human being.<sup>71</sup> The legal definition of a person is a human being (natural person) or corporation (artificial person) having rights and duties recognized by law.<sup>72</sup> A person is a being that has certain capacities such as reason, morality and being a part of a culturally established form of social relations such as kinship, ownership of property or legal responsibility.

In addition, there is also a distinction between material bodies and a person. Material bodies and persons are entities, for they both have physical attributes; but they are distinct from one another, for whereas material bodies have only physical attributes, persons have mental, as well as physical, attributes.<sup>73</sup> With this view, we have two aspects. The first being that in the concept of a person- the concept of a living human being we ascribe ourselves properties, such as height, colouring, physical location and the same is ascribed to material objects.<sup>74</sup>

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<sup>67</sup> Balganes S, 'Quasi-property: Like, But Not Quite Property', 1895.

<sup>68</sup> Balganes S, 'Quasi-property: Like, But Not Quite Property', 1895.

<sup>69</sup> *Floyd v Atlantic Coast* (1954), The Supreme Court of the United States.

<sup>70</sup> Article 260, *Constitution of Kenya* (2010).

<sup>71</sup> Ayer A, *The Concept of a Person*, 5<sup>th</sup> ed, The Macmillan Press Ltd, London, 1973, 82.

<sup>72</sup> Teichman J, 'The Definition of a Person' 60 *Cambridge University Press* 232, 1985, 178.

<sup>73</sup> Burstein N, 'Strawson on the Concept of a Person' 80 *Oxford University Press* 319, 1971, 450.

<sup>74</sup> Hacker P, 'Strawson's Concept of a Person' 102 *Oxford University Press*, 2002, 22.

Secondly, as living beings we ascribe to a wide range of features, states of consciousness, thoughts, perceptions, and sensations.<sup>75</sup> Therefore, by virtue of being a person, there are certain things that I can do legally for example writing a will, owning property, and achieving things in my life that I think will aid in the fulfilment of my purpose. As a person, I have duties and rights that are recognisable by law. After discussions on the concept of a person, discussions on the concept of a corpse are necessary to determine whether any property rights exist in the corpse.

### 2.5 Concept of a Corpse:

A corpse is defined as dead body especially of a human being.<sup>76</sup> A corpse cannot own property.<sup>77</sup> In addition to this, body parts are not property and cannot be owned.<sup>78</sup> The corpse is relevant in the advancement of science and for medical training. Anatomy would not have developed without the study of corpses.<sup>79</sup> One thing that makes the argument for property rights in body parts undesirable is the fact that it encourages a market for organs.<sup>80</sup> The buying or selling of blood, organs, or tissues for a valuable consideration unless when regulated by law is prohibited.<sup>81</sup>

In addition, according to the common law, it is the duty of a mortuary to deliver a dead body relatively in good condition to the relatives of the deceased person. A mortuary must do its duty with utmost care and attention.<sup>82</sup> Lastly, after a body has been buried, it is in the custody of the law; therefore, disinterment is not a matter of right. The disturbance or removal of an interred body is subject to the control and direction of the court.<sup>83</sup> The next section will discuss the concept of burial as a method of disposal of the corpse.

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<sup>75</sup> Hacker P, 'Strawson's Concept of a Person', 22.

<sup>76</sup> Merrism Webster Dictionary, 4 ed.

<sup>77</sup> -< <https://onlinelibrary.wiley.com/doi/full/10.1046/j.1365-2141.2002.03578.x>> on 28 September 2020.

<sup>78</sup> -< <https://onlinelibrary.wiley.com/doi/full/10.1046/j.1365-2141.2002.03578.x>> on 28 September 2020.

<sup>79</sup> Giordano S, 'Is the Body a Republic?' 31 *Journal of Medical Ethics* 8, 2005, 470.

<sup>80</sup> Douglas S, 'The argument for property rights in body parts: scarcity of resources' 40 *Journal of Medical Ethics* 1, 2014, 24.

<sup>81</sup> Report of the Kenya National Blood Tranfusion Bill; *Final draft*, 2020, 15.

<sup>82</sup> -< <https://www.stimmel-law.com/en/articles/rights-and-obligations-human-remains-and-burial>> on 28 September 2020.

<sup>83</sup> -< <https://www.stimmel-law.com/en/articles/rights-and-obligations-human-remains-and-burial>> on 28 September 2020.

## 2.6 The Concept of Burial

In most cultures around the world there are certain rituals and ceremonies that take place, which revolves around caring for the body, the afterlife as well as the disposal of the corpse.<sup>84</sup> Disposal of dead bodies takes various forms. It includes burials, cremation, and entombment.<sup>85</sup>

Burial takes the form of interring a person in the ground and is probably the simplest and most common method of disposing of a body. It is generally accepted to be one of the earliest evident forms of religious practice. The concept of final resting place is important in this as the government does compulsory acquisition. However, before the process begins location of protected sites including cemeteries needs to be done to determine whether the land will be acquired.<sup>86</sup>

Entombment is another form of disposing off a dead body. It is the act of placing human remains in a structurally enclosed space, or burial chamber. This differs from burial in that the body is not put directly to the earth, but rather is kept within a specially designed sealed chamber.<sup>87</sup> Cremation is also another form of disposing a dead body. It is the process of reducing dead bodies to basic chemical compounds in the form of gases and bone fragments.<sup>88</sup> Hindus cremate their dead, believing that the burning of a dead body signifies the release of the spirit and that the flames represent the creator.<sup>89</sup>

Furthermore, is the disposal of dead bodies through Mass burials. It happens mostly in the case of a disaster. A mass grave is simply a singular location in which multiple human remains are interred.<sup>90</sup> Human burial practices are the manifestation of the human desire to demonstrate respect for the dead.

Among the Luo, Abaluhya and Kalenjin communities in Kenya, disposal of the dead is through burial. Various factors influence this and that includes the various cultures and practices among the different communities. An example of this is seen among the Luo where burial customs were influenced by the individual's status in society, the nature of his death, his good and bad deeds, as well as the way the ancestors performed the rituals.<sup>91</sup> For the Luo Community, death

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<sup>84</sup> Vyonna Bondi, 'Death and Burial in the African Context: A Case Study on Kenyan Customs and Kenyan Customary Law.' Hitchhikers guide to law, 2015, 2.

<sup>85</sup> Muleu J, 'Concept Paper on Need for Disposal of Dead Body Legislation in Kenya,' 1.

<sup>86</sup> Fao Land Tenure Studies, 'Compulsory acquisition of land and compensation', 2008, 20.

<sup>87</sup> Muleu J, 'Concept Paper on Need for Disposal of Dead Body Legislation in Kenya,' 1.

<sup>88</sup> Muleu J, 'Concept Paper on Need for Disposal of Dead Body Legislation in Kenya,' 1.

<sup>89</sup> Muleu J, 'Concept Paper on Need for Disposal of Dead Body Legislation in Kenya', 1.

<sup>90</sup> Muleu J, 'Concept Paper on Need for Disposal of Dead Body Legislation in Kenya', 1.

<sup>91</sup> Muleu J, 'Concept Paper on Need for Disposal of Dead Body Legislation in Kenya', 2.

and burial is the most important rite of passage. Among the Luhya the ritualistic slaughter of animals and the serving of food and drinks are done to console the mourners at the time of the funeral. The funeral itself is viewed as an intrinsic custom aimed to please the ancestral spirits.<sup>92</sup> The Agikuyu started burying their dead after colonization.

### 2.7 Conclusion:

This chapter aimed to give the theory by Honore as well as the concepts that are involved in the study such as the concept of burial, property, a corpse, and a human person. The connection between the theory of property as a bundle of sticks and the various concepts discussed in this chapter is to determine whether the theory by Honore or the concepts discussed attach any property right to a corpse.

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<sup>92</sup> Muleu J, 'Concept Paper on Need for Disposal of Dead Body Legislation in Kenya', 2.

## 3.0 CHAPTER THREE:LEGAL FRAMEWORK OF BURIAL DISPUTES IN KENYA

### Introduction:

This chapter discusses the various laws involved in burial disputes in Kenya. The most important thing to note is that there is no codified statute or Act of Parliament that governs burial law in Kenya. There are however different laws that can be used to determine where a deceased person should be buried.

Furthermore, there are various factors which influence burial disputes in Kenya, and these will be covered under customary law and marriage law. The various factors include the customs of the deceased, the religion that the deceased chose as well as whether the deceased was in a monogamous or polygamous marriage. These factors will be discussed in depth under the various laws which apply to each of the factors.

We also need to add that place of burial of a person in Kenya is closely linked to three things; the person's wishes, though not absolutely binding on his personal representative, the duty imposed on those so closely related to the deceased during his lifetime for example the spouse, his/her children and or parents to bury the deceased and whether the person had established his own home. It will also be dependent on the custom to which the deceased is subject to.<sup>93</sup>

### 3.1 Law of Succession:

This section will be divided into testate and intestate succession.

#### 3.1.1 Testate Succession

Testate succession refers to the distribution of property through a valid will.<sup>94</sup> The Law of Succession Act defines a will as a "legal declaration by a person of his or her wishes or intentions regarding the disposition of his property after his death, duly made and executed."<sup>95</sup>

The Act provides that a person may by will appoint an executor or executors.<sup>96</sup> Where there is a Will, the executor and if there is more than one, then the executors jointly unless contrary intention is expressed in the Will has the right and responsibility to arrange for the disposal of the deceased person's body.<sup>97</sup>

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<sup>93</sup> M'imanene M'rutere v Lewis Kirimi and 2 others (2018)eKLR

<sup>94</sup> -< <https://dictionary.thelaw.com/testate-succession/>> on 31 August 2020.

<sup>95</sup> Section 3(1), *Law of Succession Act*, Cap 160.

<sup>96</sup> Section 6(1), *Law of Succession Act*, Cap 160.

<sup>97</sup> Section 83, *Law of Succession Act*, Cap 160.

In the case *Smith v Tamworth City Council*,<sup>98</sup> the court held that there are principles regarding the right to dispose of a body. One of the principles included in the case is ‘A person named as an executor in the deceased will has the right to arrange for the burial of the deceased’s body.’ An executor of a will in the Law of Succession Act is defined as ‘a person to whom the execution of the last will of a deceased person is, by the testator’s appointment, confided’.<sup>99</sup>

The backbone of testate succession is in testamentary freedom. Testamentary freedom is enshrined in Section 5 of the Law of Succession Act as the ability of every person who is of sound mind and not a minor to dispose of all or any of his free property by will and may make any disposition by reference to any secular or religious laws that he chooses.<sup>100</sup> Testamentary freedom ensures that any person can choose where they would want to be buried and the executor will facilitate the process. This was the view of the court in the case of *Sakina Sote Kaityany and another v Mary Wamaitha*,<sup>101</sup> where the deceased executed a will in which he expressed his desire to be buried at the home of his father in Iten in accordance with the rites of the Presbyterian Church of East Africa. In the will, he appointed the respondent the sole executrix of the same and the judge held that the respondent had the obligation to bury the deceased as was stated in his will despite all other claims brought by the family in contestation of the same. The judge stated that it was a “*testamentary declaration by the deceased of considerable significance which must be given due weight.*”

Furthermore, the decision that the deceased made as to the disposal of his or her body is not legally binding but his or her wishes should be given effect as far as this is possible.<sup>102</sup> The duty lies on the executor.

In conclusion, if the deceased made a will with a decision as to where his or her burial was to take place the executor has a duty to comply with the wishes as far as is reasonably possible. Despite having this in mind, we need to accept that not everyone has a will or has written a will and because of this in the event of a burial dispute the rules of intestacy apply. In view of the fact that testate succession is a major tool to the solving of burial disputes in Kenya, the analysis of the google survey on the writing of wills and place of burial is below:

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<sup>98</sup> *Smith v Tamworth City Council* (1997), The Supreme Court of New South Wales

<sup>99</sup> Section 3(1), *Law of Succession Act*, Cap 160.

<sup>100</sup> Section 5, *Law of Succession Act*, Cap 160.

<sup>101</sup> *Sakina Sote Kaityany and another v Mary Wamaitha* (1995)eKLR

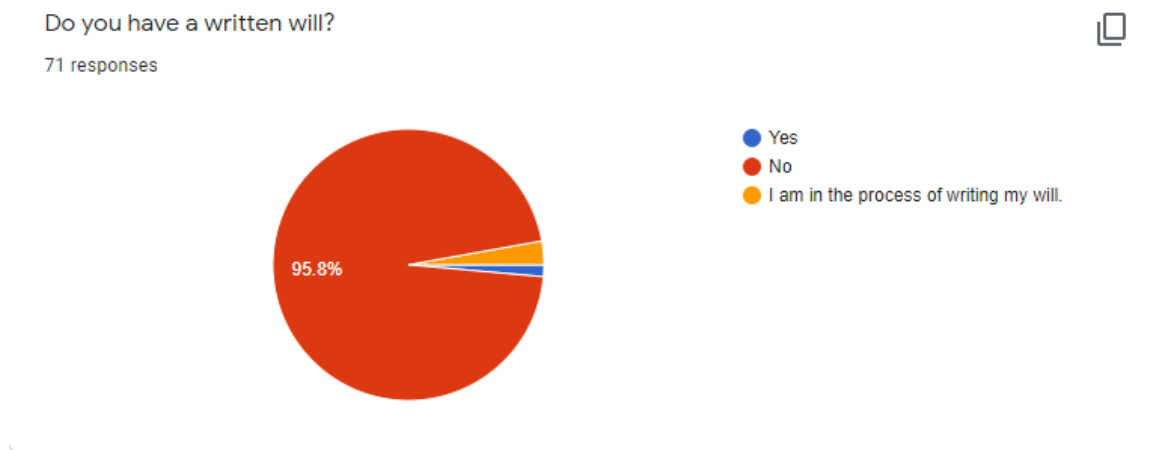
<sup>102</sup> *Sakina Sote Kaityany and another v Mary Wamaitha* (1995)eKLR

### 3.1.2. Analysis of the data collected via the google survey:

The data collected via the google survey was mainly to collect information on the participants input on the questions that will be analysed in the next section. The survey was able to reach 71 participants (aged between 22 and 60) and the survey had six questions as will be discussed in the next section. I will highlight the questions and responses and with the same, I will be able to draw a conclusion at the end. The survey has been annexed as appendix 1 in the dissertation.

#### 1. Do you have a written will?

Out of the 71 participants, 68 of them do not have written wills which amounts to 95.8% of the participants. 2 participants are in the process of writing their will, and one other participant has a written will. Out of the 71 participants, only one has a written will.

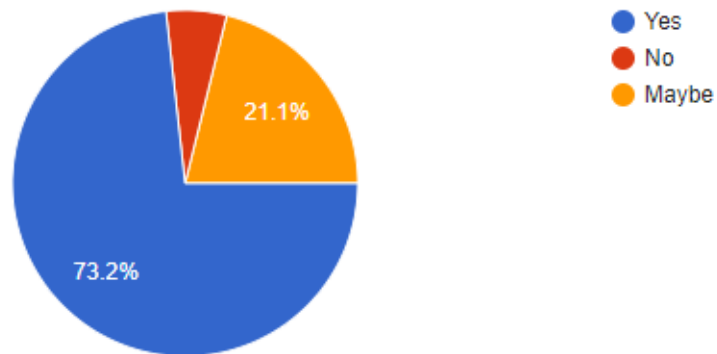


#### 2. If you do not have a will, would you be willing to write one?

The possible answers were Yes, No and Maybe. Out of the 71 participants, 52 participants stated that they would be willing to write a will. 4 participants would not be willing to write wills and the other 15 participants fell in the maybe category.

If you do not have a will, would you be willing to write one?

71 responses

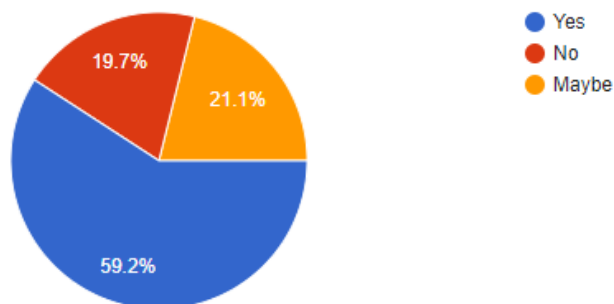


**3.If you have a will or if you are planning to have one, would you stipulate your place of burial in detail?**

Out of the participants, 42 participants stated that they would stipulate their place of burial in detail. 14 participants stated that they would not stipulate their place of burial and 15 participants were not sure whether they would stipulate their place of burial in their wills.

If you have a will or if you are planning to have one, would you stipulate your place of burial in detail?

71 responses



**4.If you do not have a will or are not planning on having one, what are the reasons for your decision ( If the participant is willing to share)**

This was an optional question, and I was able to get 26 responses. Out of the 26 one of the most common responses was the fact that the participants were Africans and in African culture we do not talk about death. In addition to that, it was a bad omen to have a written will unless one had reached old age. Furthermore, another common response was the fact that the participants were still amassing property and that it was unnecessary to have a will until they were able to acquire all the wealth that they intended to acquire in their lifetime. Lastly, one of the participants stated that it is quite clear who their next of kin was and that there would be no need to have a will. The findings will be annexed at the end of the document.

**5. Where would you like to be buried? An example would be through the various customs( in their ancestral home) or in the urban cemetery?**

Out of the 71 participants, 55 participants stated that they would like to be buried in their ancestral homes. 7 participants would like to be cremated and not buried. 4 participants preferred to be buried in the urban cemetery. 1 participant stated the fact that if they were to be buried, they would prefer it to be in their spouse’s home. 2 participants stated that they would like to be buried in land that they themselves would have purchased in their lifetime. 1 participant stated that they could be buried anywhere. Lastly, one participant stated the fact that they would prefer for their organs to be donated for research, but they feel inhibited by their culture. The table below summarises the place of burial vs the number of participants.

ANCESTRAL HOME - 55
CREMATION - 7
URBAN CEMETERY -4
SPOUSE’S ANCESTRAL HOME -1
THEIR PERSONAL PROPERTY -2
DONATION OF ORGANS -1
ANYWHERE -1

**6.Is burial the only option for the disposal of your corpse? Would you explore other methods of disposal such as cremation?**

Out of the 71 participants, 41 participants stated that burial is their only option for disposal of their corpse. 23 participants stated that they would prefer their corpses to be cremated. 3 participants were not sure, 1 participant did not mind either burial or cremation, 2 participants wanted to donate their corpses for research purposes. 1 participant stated that they had never thought about the options available for the disposal of their corpse

BURIAL -41
CREMATION-23
NOT SURE -3
EITHER BURIAL OR CREMATION -1
DONATION OF ORGANS FOR RESEARCH -2
NEVER THOUGHT ABOUT IT--1

**What Conclusions Can We Draw from the Survey?**

In conclusion, most of the participants do not have written wills and there are still several participants who think that there is taboo talking about death and the writing of wills. As seen in the responses we prefer burials over any other method of disposal of our corpses meaning that burial disputes will still arise. In addition, as seen there are still participants who have no wills and who do not see the need to write wills at all. Therefore, if we still have citizens who do not have wills and are not willing to write wills, these burial disputes will not cease. However, if we have more citizens who are willing to write wills and stipulate their place and manner of burial in the wills it will lead to a reduction of these burial disputes brought before our Kenyan Courts. There is need to advocate for testate succession to help in the settling of burial disputes.

### 3.1.2 Intestate Succession:

Intestate refers to dying without a legal will. When a person dies intestate, it means that they did not leave any express wishes in a will as to where they would want to be buried and this is a ground for burial disputes in Kenya. The question that often arises is who is at the top of the hierarchy when it comes disposing of the deceased's body.

In the Law of Succession Act the hierarchy when it comes to instances of inheritance is that the spouse of the deceased's and the children are given priority. In the instance where one has no spouse or children, the Act provides that the next persons to be considered are the father or if dead, the mother or if dead, brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares or if none half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.<sup>103</sup> If this does not apply, the responsibility lies on the State.

The judge in the case of *Martha Wanjiru Kimata and another v Dorcas Wanjiru and another*,<sup>104</sup> stated that "In the Social Context prevailing in this country the person who is first in line of duty in relation to the burial of any deceased person is the one who is closest to deceased in legal terms. Generally, the marital union will be found to be the focus of the closest chain of relationships touching on the deceased. And therefore, it is only natural that the one who can prove this fundamental proximity in law to the deceased, has the colour of right of burial, ahead of any other claimant."<sup>105</sup>

However, despite this hierarchy of people closest to the deceased's person there are other factors that influence the decisions to be made. They include, whether the deceased was in a monogamous or polygamous marriage. Is the first wife more entitled to bury the deceased more than the second wife? In addition, what customs did the deceased subscribe to and if they differ to the family's customs what will happen in that instance? In the instance of SM Otieno, the deceased had died intestate and that caused a wrangle between his wife and the *Umira Kager Clan*. The respondents claimed that the deceased needed to be buried in accordance with Luo customary law.<sup>106</sup>

The next section will discuss Customary Law and its application to burial disputes in Kenya

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<sup>103</sup> Section 39, *Law of Succession Act*. Cap 160

<sup>104</sup> *Martha Wanjiru Kimata and another v Dorcas Wanjiru and another* (2015)eKLR.

<sup>105</sup> *Martha Wanjiru Kimata and another v Dorcas Wanjiru and another* (2015)eKLR.

<sup>106</sup> *Virginia Wambui Otieno v Joash Otieno Ougo* (1988)eKLR

### 3.2 Customary Law

In most systems of customary law in Africa, no individual can claim the sole right to determine the time, place, and manner of burial of a deceased family member. Burial is a family affair. The duty of burial belongs to the family in entirety.<sup>107</sup>

Courts have applied customary laws in burial dispute as there is a cultural dimension to these matters.<sup>108</sup> The Constitution of Kenya states that ‘Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.’<sup>109</sup> The repugnancy clause provided states that customary law is applicable in Kenya to the extent that it is not repugnant to justice and morality.<sup>110</sup> Traditional dispute resolution mechanisms are also provided for under the Constitution and they apply in so far as they do not contravene the bill of rights, are repugnant to justice and morality or inconsistent with the Constitution and any written law.<sup>111</sup>

The use of customary law in burial disputes thus is only a last resort due to the absence of other laws dealing with the matter. This shows that customary law ranks the lowest in the hierarchy of legal norms, and courts only apply it where there is a legal gap.<sup>112</sup> In the SM Otieno case both the High Court and the Court of Appeal held that an African man could only be buried according to the customs of the community since he could not completely disassociate himself from the customs and practices of his tribe.<sup>113</sup> The landmark case stated that according to Luo community the death of a married Luo man entails that his customs takes charge in determining his place of burial.<sup>114</sup>

In addition, in the case of *re NMM(deceased)*,<sup>115</sup> the High Court in 2017 asked about the culture to which the Deceased belonged. The Deceased and her family came from Murang’a and she belonged to the Kikuyu tribe. The Plaintiff who was the husband of the deceased

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<sup>107</sup> Dr Nwabueze R, ‘Legal Approaches to the burial rights of a surviving wife’ *Amicus Curiae* Issue 73, Spring 2008, 12.

<sup>108</sup> Kariuki F, ‘Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems’, *Strathmore Law Journal*, 2015, 6.

<sup>109</sup> Article 2(4), *Constitution of Kenya* (2010).

<sup>110</sup> Section 3(2), *Judicature Act* (Act No 16 of 1967).

<sup>111</sup> Article 159(3), *Constitution of Kenya* (2010).

<sup>112</sup> Kariuki F, ‘Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems’, 6.

<sup>113</sup> *Virginia Wambui Otieno v Joash Otieno Ougo* (1988)eKLR.

<sup>114</sup> *Virginia Wambui Otieno v Joash Otieno Ougo* (1988)eKLR.

<sup>115</sup> *Re NMM(Deceased)* (2017)eKLR

wished to bury the Deceased in accordance with his own tribal customs and not those of the Deceased. The court stated that it is the personal customs of the Deceased that prevails.<sup>116</sup>

Furthermore, in the case of *M'imanene M'rutere v Lewis Kirimi and 2 others*,<sup>117</sup> the High court placed emphasis on the burial dispute that arose involving the practices of the Kalenjin community in Kenya in the case of *Kandie and 2 others v Cherogony*,<sup>118</sup> where the High court held that burial disputes often follow the personal law of the deceased person and that includes the customs which the deceased person practised during his or her lifetime.

In the case of *Pauline Ndete Kinyota Maingi v Rael Kinyota Maingi*,<sup>119</sup> the High court dismissed the provisions of a will of the deceased, which stated the manner of disposal of his body and applied Kamba customary law. The Court held that the wishes in the will could be affected only if the executor proved that the customary laws were repugnant to justice and morality.<sup>120</sup>

Therefore, we can conclude that customary law influences where a deceased's person is buried especially where they died intestate. However, the customary law must be in accordance with the Constitution and other laws.

### 3.3 Marriage Law:

Marriages are guided by the Marriage Act in Kenya. This law has a particular relevance to *Article 45(3) of the Constitution of Kenya* on equality of parties to a marriage. The Act states the importance of the provision on equality. The Act provides that 'Parties to a marriage have equal rights and obligations at the time of the marriage, during the marriage and at the dissolution of the marriage.'<sup>121</sup>

The Act also provides for different kinds of marriages. A Christian, Hindu, or civil marriage is monogamous while a marriage celebrated under customary law or Islamic law is presumed to be polygamous or potentially polygamous.<sup>122</sup> In all burial dispute matters the issue of marriage and its legality become central.

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<sup>116</sup> *Re NMM(Deceased)* (2017)eKLR

<sup>117</sup> *M'imanene M'rutere v Lewis Kirimi and 2 others*(2018)eKLR.

<sup>118</sup> *Kandie and 2 others v Cherogony* (2002)eKLR.

<sup>119</sup> *Pauline Ndete Kinyota Maingi v Rael Kinyota Maingi* (1984)eKLR

<sup>120</sup> Kariuki F, 'Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems', 6.

<sup>121</sup> Section 3(2), *Marriage Act* (Act No 4 of 2014).

<sup>122</sup> Section 6(3), *Marriage Act* (Act No 4 of 2014).

Most western legal systems recognize the right of a surviving wife to control the disposition of the remains of her deceased husband.<sup>123</sup> The prioritization of a widow's right to bury her deceased husband reinforces her pre-eminent status as the closest person to the deceased. It also gives expression to the binding character of marriage and the precedence that it attracts in family relations.<sup>124</sup>

It has long been established that the closest person to a deceased person is the surviving spouse. In the case of *Jacinta Nduku Masai v Leonida Mueni Mutua and 4 others*,<sup>125</sup> the court stated that the rights as a surviving spouse which have long been held to supersede those of the relatives of the deceased in burial disputes were being ignored and not considered because the court did not decide on the marriage and its legality.<sup>126</sup>

Justice Ojwang stated that *"In the Social Context prevailing in this country the person who is first in line of duty in relation to the burial of any deceased person is the one who is closest to deceased in legal terms. Generally, the marital union will be found to be the focus of the closest chain of relationships touching on the deceased. And therefore, it is only natural that the one who can prove this fundamental proximity in law to the deceased, has the colour of right of burial, ahead of any other claimant."*<sup>127</sup> This statement is backed up by Article 45 of the Constitution. The Constitution states the importance of the Family as it states that 'The family is the natural and fundamental unit of society and the necessary basis of social order and shall enjoy the recognition and protection of the State.'<sup>128</sup> In addition, the Constitution also states that Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage which has been reiterated by Section 3(2) of the Marriage Act as seen above.

With this provision of the Constitution, all parties to a marriage are equal regardless of whether it is a monogamous or polygamous marriage. However, despite this provision, for example, a widow's priority is subject to the burial wishes of her deceased husband. If the deceased wishes are ascertainable and clear, courts will enforce them. Accordingly, the widow's priority is lost where the deceased husband gave directions regarding the disposition of his remains. In

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<sup>123</sup> Dr Nwabueze R, 'Legal Approaches to the burial rights of a surviving wife' Amicus Curiae Issue 73, Spring 2008,12.

<sup>124</sup> Dr Nwabueze R, 'Legal Approaches to the burial rights of a surviving wife',12.

<sup>125</sup> *Jacinta Nduku Masai v Leonida Mueni Mutua and 4 others* (2018)eKLR

<sup>126</sup> *Jacinta Nduku Masai v Leonida Mueni Mutua and 4 others* (2018)eKLR

<sup>127</sup> *Ruth Wanjiru Njoroge v Jemimah Njeri Njoroge* (2004)eKLR

<sup>128</sup> Article 45(1), *Constitution of Kenya* (2010).

polygamous marriages, if wives are in dispute, they ought to agree where the deceased needs to be buried. If not, the court intervenes and decides on the place of burial.

### 3.4 Penal Code:

The Penal Code offers protection of corpses. Section 137 deals with the hindering of burial of the corpse. It states that ‘Whoever unlawfully hinders the burial of the dead body of any person, or without lawful authority in that behalf disinters, dissects or harms the dead body of any person, or being under a duty to cause the dead body of any person to be buried, fails to perform that duty, is guilty of a misdemeanour.’<sup>129</sup>

### 3.5 Conclusion

In conclusion, this chapter has given the laws that are involved when it comes to burial disputes in Kenya and there is need for a uniform codified statute or Act of Parliament. In addition, *Article 45(3) of the Constitution* as well as the Marriage Act have clarified the status of equality when it came to Parties to a Marriage (both monogamous and polygamous) and with this equality, none of the Parties is given top priority to dispose of the deceased’s body more than the other.

However, we should note that the equality referred to in the Constitution and the Marriage Act applies to the two parties to the marriage. For example, when the deceased has two wives, there is no equality between the two wives, but the equality is in reference to the deceased and his first wife and the deceased and his second wife. When there is dispute between the two wives as to where the deceased should be buried, reference is often made to the customs of the deceased person. In some customs, hierarchy is often given to the first wife, and this is often repugnant to justice. However, in most cases the deceased is often buried in their ancestral land according to their customs. In instances where there is still conflict despite invoking the customary law, the Magistrates courts have the jurisdiction to determine such matters under law.

Furthermore, this chapter has shown that the law of succession especially testate succession acts as a tool to determine burial disputes in Kenya. As seen, the wishes of a deceased’s person as to where they will be buried in the will is enforced as far as is reasonably possible.

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<sup>129</sup> Section 137, *Penal Code*, Cap 63.

## 4.0 CHAPTER FOUR :

### 1.COMPARATIVE STUDY BETWEEN BURIAL DISPUTES IN AUSTRALIA AND KENYA

#### 4.1 Introduction:

This chapter is a comparative study between the nature of the burial disputes in Kenya and Australia. Australia is quite similar in terms of following the common law regarding burials. In Australia, the position of courts in relation to funeral and burial instructions is well settled as a person's wishes with respect to the disposal of their body are not legally binding.<sup>130</sup> This chapter will highlight the reasons for the disputes and how the courts have handled the disputes as they occur. It will be divided into cultural factors and the wishes of the deceased.

#### 4.1.2 Cultural factors:

Burial disputes are currently decided by the Supreme Court of Western Australia. Disputes about burial of Aboriginal people are often between a spouse and the deceased's family.<sup>131</sup> For many Aboriginal people, being able to die and be buried in their traditional homelands is very important.<sup>132</sup> Under Aboriginal customary law, the deceased person's family usually has the right to bury the body of their relative. The family's wishes about how and where the body will be buried will therefore come before the wishes of the deceased person's spouse or *de facto* partner.<sup>133</sup>

Like Kenya, there is a conflict between the customs of the deceased's person and the spouse of the deceased. According to Australian law, the right to bury rests with the person who has the highest entitlement to inherit any property the deceased person has left behind or if the deceased person made a will, the executor of the will.<sup>134</sup> The hierarchy in the highest entitlement is similar as to that applied in Kenya. The person with the highest entitlement is the surviving spouse (or *de facto* partner) followed by the children of the deceased person, the deceased person's parents, the deceased person's brothers, or sisters, then other specified family members.

This conflict arises because of the difference between customary law and Australian law. Usually, the conflict will be between the Aboriginal deceased person's family (who wish to bury the person in their traditional Aboriginal homelands) and the deceased person's non-

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<sup>130</sup> Smith v Tamworth City Council (1997), Supreme Court New South Wales.

<sup>131</sup> Muleu J, 'Concept Paper on Need for Disposal of Dead Body Legislation in Kenya', 7.

<sup>132</sup> Muleu J, 'Concept Paper on Need for Disposal of Dead Body Legislation in Kenya', 7.

<sup>133</sup> Muleu J, 'Concept Paper on Need for Disposal of Dead Body Legislation in Kenya', 7.

<sup>134</sup> Muleu J, 'Concept Paper on Need for Disposal of Dead Body Legislation in Kenya', 7.

Aboriginal spouse (who may wish to bury the person close to their home so that they and any children can visit the grave).<sup>135</sup>

In the case of *Darcy v Duckett*,<sup>136</sup> the court stated various principles that would affect who would be given the right to bury the deceased. One of the principles stated in the case is that ‘If a person has named an executor in his or her will and that person is ready, willing and able to arrange for the burial of the deceased’s body, the person named as executor has the right to bury the deceased.’<sup>137</sup>

In the case of *Jones v Dodd*,<sup>138</sup> the deceased’s father had the right to dispose of the deceased, and not the likely administrator, who was the mother of the deceased’s minor children. Despite conflicting evidence as to whether the deceased had abandoned his Aboriginal cultural beliefs and converted to Christianity, the court released the body to the father of the deceased in accordance with Aboriginal tradition.<sup>139</sup> Furthermore, in the case of *Dow v Hoskins*,<sup>140</sup> the court observed and held that the court may consider cultural factors where they ‘substantially arise on the evidence before the court.’<sup>141</sup>

In the two cases mentioned above, there was no estate left by the deceased. However, in the case of *Keller v Keller*,<sup>142</sup> where there was an estate, the court held that cultural and religious factors should be considered where ‘the attitude of the deceased to such issues is not substantially in dispute.’<sup>143</sup> These cases show how cultural factors come into play when it comes to burial disputes in Australia.

#### 4.1.3 Wishes of the deceased:

The wishes of the deceased regarding the disposal of their body play an important role in the court’s decision to award the right of disposal to someone other than the likely administrator. In discussing the wishes of the deceased, we will highlight the decision made in the case *Frith v Schubert*.<sup>144</sup> In this case, the deceased was an Aboriginal man who had been adopted. As the adoption had not been formalised, the family with whom he had spent most of his life had no

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<sup>135</sup> Muleu J, ‘Concept Paper on Need for Disposal of Dead Body Legislation in Kenya,’7.

<sup>136</sup> *Darcy v Duckett* (2016), Supreme Court New South Wales.

<sup>137</sup> *Darcy v Duckett* (2016), Supreme Court New South Wales.

<sup>138</sup> *Jones v Dodd* (1999), Supreme Court of South Australia.

<sup>139</sup> *Jones v Dodd* (1999), Supreme Court of South Australia.

<sup>140</sup> *Dow v Hoskins* (2003), Supreme Court of Victoria.

<sup>141</sup> *Dow v Hoskins* (2003), Supreme Court of Victoria.

<sup>142</sup> *Keller v Keller* (2007), Supreme Court of Victoria.

<sup>143</sup> *Keller v Keller* (2007), Supreme Court of Victoria.

<sup>144</sup> *Frith v Schubert* (2010), Supreme Court of Queensland.

claim to administer the estate. The adoptive brother and then partner of the deceased successfully applied for a limited grant of letters of administration to bury his body.<sup>145</sup>

In addition, the deceased's *ex de facto* spouse, who was the mother of his children, applied to the court to have the order set aside so that she could bury the deceased in a family plot in accordance with Aboriginal tradition. The applicant was supported by the deceased's biological father.<sup>146</sup> The court stated that although the statutory hierarchy favoured the *ex de facto* spouse, the body was given to the adoptive brother for burial. The reason for this was that the judge gave substantial weight to the fact that the deceased had told his adoptive brother on several occasions that he wished to be buried next to his adoptive parents.<sup>147</sup>

The court also considered the lifestyle and relationship factors, such as the deceased's close relationship with his adoptive family, his plans to purchase property near his adoptive family and the fact that he had had little contact with his biological family.<sup>148</sup> Therefore, in such instances the wishes of the deceased were respected, and the usual hierarchy had to be set aside. With this in mind, we need to highlight whether there is any burial legislation in Australia that tries to solve the recurring nature of burial disputes.

#### 4.1.4 The Law Governing Burials in Australia:

In Australia, the common law position in relation to funeral and burial instructions is settled—a person's wishes with respect to the disposal of their body are not legally binding.<sup>149</sup> The person with the right to dispose of the body may do so in any manner they choose, provided it is not unlawful, wholly unreasonable or exercised in a way that prevents family and friends from reasonably and appropriately expressing affection for the deceased.<sup>150</sup>

Excluding Tasmania and Victoria, every Australian state and territory upholds peoples' wishes to be cremated and/or their wishes not to be cremated in certain circumstances. Victoria only recognises the wishes of people not to be cremated when a magistrate orders the disposal of the body of a person with limited resources.<sup>151</sup> In New South Wales and Queensland, when the

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<sup>145</sup> *Frith v Schubert* (2010), Supreme Court of Queensland.

<sup>146</sup> *Frith v Schubert* (2010), Supreme Court of Queensland.

<sup>147</sup> *Frith v Schubert* (2010), Supreme Court of Queensland.

<sup>148</sup> *Frith v Schubert* (2010), Supreme Court of Queensland.

<sup>149</sup> *Smith v Tamworth City Council* (1997), Supreme Court of New South Wales.

<sup>150</sup> *Smith v Tamworth City Council* (1997), Supreme Court of New South Wales.

<sup>151</sup> Victorian Law Reform Commission, *Funeral and Burial instructions in Legislation*, 2020, Chapter 4.

deceased has expressed a desire to be cremated in written instructions the law prohibits the cremation being carried out other than in accordance with those instructions.<sup>152</sup>

In Western Australia, when the deceased has expressed a desire to be cremated in written instructions, legislation( the Cremation Act) obliges the administrator of the deceased's estate to use all reasonable endeavours to carry out the deceased's wishes regarding their cremation.<sup>153</sup> When a personal representative or next of kin objects to the cremation of the deceased, legislation awards primacy to the wishes of the deceased where the deceased has left signed or attested written instructions expressing a desire to be cremated.<sup>154</sup> On the other hand, if a deceased leaves instruction expressing a desire not to be cremated, it is unlawful to cremate the body contrary to those instructions.<sup>155</sup>

In Australia, the law regarding burials follows the common law, judicial precedent, and the enacted legislation regarding the disposal of the corpse. Next, we will discuss whether the courts are the only mode of dispute resolution in determining burial disputes in Australia.

#### 4.1.5 Resolving disputes

Burial disputes are usually determined by the courts and specifically the supreme court and the county courts. However, Parties to a Supreme Court or County Court proceeding may ask the Court to refer the matter to mediation, or the Court may order the parties to undergo mediation at any stage of the proceeding.<sup>156</sup> The cost of mediation is shared by the parties unless the court orders otherwise.

The Law Reform Commission of Western Australia recommended that wherever practicable, the hearing of funeral and burial disputes be preceded by mediation.<sup>157</sup> To that end, it further recommended that the Department of the Attorney-General liaise with stakeholders to establish which organisation/s might be best placed to offer culturally appropriate and immediate mediation.<sup>158</sup> The main point of emphasis on this is the fact that Australia embraces other modes of dispute resolution other than the courts.

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<sup>152</sup> Section 7(3), *The Queensland Act*, Section 7(1-2), *Cremations Act* (2003) and Regulation 77(2), Public Health Regulations (2012).

<sup>153</sup> Section 13(2), *Cremation Act* (1929)

<sup>154</sup> Section 9(3), *Burial and Cremation Act* (2013).

<sup>155</sup> Regulation 8(3), *Cemeteries and Crematoria Regulations* (2003), Cremation Act.

<sup>156</sup> Rule 50, Supreme Court General Civil Procedure Rules (2005).

<sup>157</sup> Law Reform Commission of Western Australia, *Final draft*, Number 27 Recommendation 79(2).

<sup>158</sup> Law Reform Commission of Western Australia, *Final draft*, Number 27 Recommendation 79(3)

#### 4.1.6 What can Kenya borrow from Australian burial laws and practices?

In my opinion, the first thing that Kenya can borrow is the presence of burial legislation. As seen in the cases studied in this chapter, the courts have relied on the Cremation Act and the Burial and Cremation Act just to name a few. The presence of the legislation does not entirely mean that the burial disputes do not arise, but it acts as a guideline when the matters do arise ,and the judges can easily refer to the same when resolving these matters.

Secondly, Kenya can borrow mediation as a form of dispute resolution. The Law Reform of Western Australia recommended mediation as a precedent to the solving of burial disputes. In addition, the mediation will include the important cultural aspect of the Parties which we have concluded plays a major role the disposal of corpses not only in Australia but Kenya as well. In conclusion, these are just but a few aspects that Kenya can borrow from Australian burial laws and practices.

## 5.0 CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

This chapter highlights all the conclusions made in the carrying out of this study. This study addressed burial disputes in Kenya and whether there is a property right attached to a corpse. Based on the conclusions made, various recommendations are made on the state of burial disputes in Kenya. The conclusions are as follows:

### 5.1 Conclusions:

The first conclusion is on quasi-property rights attached to a corpse. Common law adopted the position that there was no property right or ownership interest whatsoever in a corpse. However, as the law developed there was introduction of quasi-property rights. As discussed in the second chapter, we can conclude that there is a quasi-property right attached to a corpse and it includes the right of custody of burial to the next of kin.

The third Chapter highlighted the legal framework of burial disputes in Kenya. The analysis concluded that there is need for a uniform codified statute or Act of Parliament that will address burial disputes when they arise. The Law of Succession, especially testate succession acts as a tool to determine burial disputes in Kenya. The wishes of a deceased's person as to where they will be buried if stipulated in the will is enforced as far as is reasonably possible.

In addition, there is the aspect of equality of Parties to a Marriage and who has the right of disposal of the corpse. Article 45(3) of the Constitution as well as the Marriage Act have clarified the status of equality when it came to Parties to a Marriage (both monogamous and polygamous) and with this equality, none of the Parties is given top priority to dispose of the deceased's body more than the other. The Parties will both have an equal say as to the disposal of the deceased if there was no will if they agree. If there is no agreement, the court is forced to intervene on the place of burial.

However, we should note that the equality referred to in the Constitution and the Marriage Act applies to the two parties to the marriage. For example, when the deceased has two wives, there is no equality between the two wives, but the equality is in reference to the deceased and his first wife and the deceased and his second wife. When there is dispute between the two wives as to where the deceased should be buried, reference is often made to the customs of the deceased person. In some customs, hierarchy is often given to the first wife, and this is often repugnant to justice. However, in most cases the deceased is often buried in their ancestral land according to their customs. In instances where there is still conflict despite invoking the

customary law, the Magistrates courts have the jurisdiction to determine such matters under law.

This study hypothesised that despite having the rules of intestacy as well as testamentary succession there are various other factors that may influence the burial of the corpse in Kenya which include the religion, culture, and marriage of the deceased's person. The study has analysed culture as a very important factor when it comes to burial disputes in Kenya. Burial of persons in this country is deeply rooted in one's cultural beliefs. This has been elaborated in the background of the study especially by the SM Otieno Case. Chapter three discussed the importance of having customary law as well as marriage law as an aid in the determination of these disputes.

In addition, the study concludes that enacting uniform laws and policies that regulate the disposal of dead bodies encompassing all factors affecting burial disputes in Kenya will provide a reliable framework and reduce the frequent occurrence of burial disputes in our courts. The comparative study between Australia and Kenya showed that in other countries there has been passed legislation on the disposal of corpses. Australia has the Cremation Act and the Burial and Cremation Act as seen in Chapter Four.

We should note that the presence of the legislation does not entirely mean that the burial disputes do not arise, but it acts as a guideline when the matters do arise, and the judges can easily refer to the same when resolving these matters. This Study also concluded that there are various methods to resolve burial disputes other than the various courts. Australia has taken the mediation route as a form of dispute resolution. The Law Reform of Western Australia recommended mediation as a precedent to the solving of burial disputes.

The google survey highlighted various issues. Most people do not have written wills and if this is the trend, testamentary succession in the solving of burial disputes cannot be a viable option. Testamentary succession can only be a tool if people are willing to write wills. If a higher percentage wrote valid wills, then there would be a reduction in burial disputes.

## 5.2 Recommendations:

As a result of the findings drawn from the study, the recommendations that we need to consider are that we need to enact a uniform law and policy dealing with burial disputes and all matters to do with disposal of a corpse. This law should also keep in mind that we are a very cultural-based society and matters to do with culture, marriage and religion should be considered in the

making of this law. The law makers, who are the legislators should be able to make and enact legislation on the same.

In addition, is the importance of education of citizens on the importance of writing of wills. The citizens need to be educated and enlightened that there is no taboo associated with the writing of wills. The writing of wills may also be a tool to avoid family wrangles and conflict if they are to occur, not only in burial disputes but also in the normal distribution of property. This education needs to be done by experts in the field of law and especially succession matters who will be able to give sound advice to the citizens.

Another recommendation would be the embracing of other methods of dispute resolution even when it comes to burial disputes. This may include mediation, negotiation, or arbitration in the resolving of these disputes instead of solely relying on our Kenyan courts which has proved to be a very long and tiresome process. The alternative methods may lead to the expeditious settling of these disputes. There are various institutions in Kenya that have embraced alternative dispute resolution mechanisms and these institutions should explore the various options available in the resolution of burial disputes in Kenya. Once the various options have been explored, communication, engagement from all stakeholders and public participation should be made to all relevant parties to see if it is indeed a viable option. Culture plays an important part in burial disputes and Traditional Dispute Resolution Mechanisms should be an option.

## APPENDIX 1: Google Survey

1. Do you have a written will? \*

Yes

No

I am in the process of writing my will.

2. If you do not have a will, would you be willing to write one? \*

Yes

No

Maybe

3. If you have a will or if you are planning to have one, would you stipulate your place of burial in detail? \*

Yes

No

Maybe

4. If you do not have a will or are not planning on having one, what are the reasons for your decision (If the participant is willing to share)

Your Answer:

5. Where would you like to be buried? An example would be through the various customs (in their ancestral home) or in the urban cemetery? \*

Your Answer:

6. Is burial the only option for the disposal of your corpse? Would you explore other methods of disposal such as cremation? \*

Your Answer:

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