



**Wainaina & 3 others v Wanjiru (Miscellaneous Civil Case  
E172 of 2023) [2024] KEHC 10074 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 10074 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
MISCELLANEOUS CIVIL CASE E172 OF 2023**

**A MSHILA, J**

**JULY 26, 2024**

**IN THE MATTER OF THE BURIAL OF MARGARET WANJIRU KARIUKI (DECEASED)**

**BETWEEN**

**ELIUD MUNGARA WAINAINA ..... 1<sup>ST</sup> APPLICANT**

**DAVID MUTORA WAINAINA ..... 2<sup>ND</sup> APPLICANT**

**DANIEL MBUGUA WAINAINA ..... 3<sup>RD</sup> APPLICANT**

**WAINAINA HARDLEY NDICHU ..... 4<sup>TH</sup> APPLICANT**

**AND**

**ESTHER WANJIRU ..... RESPONDENT**

**RULING**

1. Vide the ruling of the court delivered on the 28<sup>th</sup> day of September, 2023 in respect of the Applicants Notice of Motion application dated 13<sup>th</sup> September, 2023 where the Applicants sought the following orders:-
  - a. Spent
  - b. That this Honourable Court be pleased to issue an order allowing the Applicants to bury the remains of the deceased at the rural home next to her late husband in accordance with the Kikuyu Customary Laws.
  - c. That this Honourable Court be pleased to issue an order directing the Applicants to proceed with the burial set on the 20<sup>th</sup> September, 2023 at their rural home.
  - d. That a mandatory injunction do issue restraining the Respondent either by herself, her agents, family members, relatives and/or any other person whomsoever acting under her instructions



from blocking access into the rural home for digging up of the burial site set on the 19<sup>th</sup> September, 2023.

- e. That a temporary injunction does issue restraining the Respondent either by herself, her agents, family members, relatives and/or any other person whomsoever acting under her instructions from interfering with the burial scheduled on the 20<sup>th</sup> September, 2023 in any manner whatsoever.
  - f. The Officer Commanding Station of the nearest Police Station to ensure compliance.
2. The Court herein noted that the application herein raises pertinent issues pertaining to marriage and land dispute that need to be addressed by way of viva voce evidence as such the parties were directed to file their material documents and witness statements in support of their respective arguments.
  3. Subsequently parties filed their respective witness statements.
  4. Wainaina Hardley Ndichu filed his witness statement dated 1<sup>st</sup> February, 2024. He stated that he is one of the children of Margaret and John. At the time of his demise, John, his father had two wives and eleven children which facts were recognized in his eulogy. His mother's remains still lie at KU funeral home as Esther (the Respondent) has refused for their mother to be buried at their ancestral home. He stated that the issue was presented to the Chief. All elders, family and close friends resolved that the deceased should be buried next to her husband but the Respondent has refused to give access to the burial site as such the court should grant the orders sought.
  5. Agnes Wangui filed her witness statement dated 1<sup>st</sup> February, 2024. She stated that Margaret was her friend as they lived together in Kasarani. John and Margaret had built a home on the land given to them by Mbugua Mutheki and that she accompanied John to Margaret's home where he had gone to introduce himself. At Gatundu, John stated that he had two wives. Margaret and Esther were in negotiations with regard to John's succession and that Margaret wished to be buried next to her husband upon her demise. The court was urged to intervene as the family would be left destitute without a place to bury their mother.
  6. Joseph Mathiyaka Gathego in his witness statement dated 1<sup>st</sup> February, 2024, stated that his father and the late John were business partners. John and Margaret opened a hotel together and started to live as husband and wife. Later John married Esther who was a regular customer at the hotel. The two wives were said to mingle freely. During the burial preparation, it was agreed that the deceased should be buried on the left side of her deceased husband.
  7. Esther Wanjiru In her witness statement dated 9<sup>th</sup> February, 2024, stated that she is the surviving spouse of the late John Wainaina having contracted a Kikuyu Customary union in 1985. She stated that John never contracted any other form of marriage as such Margaret was a stranger to the estate of John Wainaina. She averred that Kiganjo/Nembu/1225 the suit property herein belonged to Mbugua Mutheki as such she has been wrongly joined in the suit herein. She averred that the Applicants are not entitled to the orders sought.
  8. Jacinta Wanjiru Mbugua in her witness statement dated 9<sup>th</sup> September, 2024, one of the children of Mbugua Mutheki stated that property Kiganjo/Nembu/1225 is registered in her father's name. She listed the beneficiaries of Mbugua Mutheki and John Wainaina was named as one of the beneficiaries. The estate of Mbugua Mutheki is yet to commence succession proceedings as such the suit property forms part of the estate of Mbugua Mutheki hence no one is entitled to a share pending succession. John only had one wife who was Esther Wanjiru as such Margaret was a stranger to the estate of John



Wainaina Mbugua. The court was urged to protect the estate of John Wainaina from unjust and unfair actions of the Applicants.

9. Directions were issued that the matter proceed for hearing by way of viva voce evidence.
10. Wainaina Hardly Ndichu (PW1) wished to adopt his witness statement as his evidence. He stated that he is the last born of John and Margaret where they were six issues and that he was giving evidence on behalf of his family. He stated that his parents were married for 42 years. His father married Esther as a second wife and had five children. He produced the original birth certificate and Identity card of the Applicants. He stated that his father was buried in Gatundu on their grandfather's land as such the mother should be buried next to her husband but the Respondent had refused for the burial to take place. The matter had been mediated by the Chief to no success.
11. In cross examination, he stated that his family lived in Kasarani but they used to visit Nembu. His mother's body was taken to KU funeral home after consultations that she should be buried next to her husband. The title No. Kiganjo/Nembu/1225 was in the name of Mbugua Mutheki his grandfather and not in the name of the Respondent.
12. Agnes Wangui (PW2) wished to adopt her witness statement. She stated that she had known the deceased for 40 years. She knew Esther as the 2<sup>nd</sup> wife of John. She urged the court to direct that the deceased be buried next to her husband. In cross examination, she stated that Margaret was married to John under customary law. The shamba belonged to none of the parties herein as the same belonged to John's father. She stated that John had two wives and lastly that the deceased should be buried in Nembu.
13. Joseph Gathego (PW3) testified that he knew Margaret as John's wife as from 1980. The dispute involved the Respondent refusing the deceased to be buried next to her husband. They went for the first introduction to show that John had married the deceased. He produced pictures though he did not appear in any of them.
14. Esther Wanjiru (DW1) wished to adopt her witness statement as her evidence. She stated that the Applicants wanted to bury the deceased on the land owned by Mbugua Mutheki, John's father. She stated that she did not own the shamba. She denied knowledge of the deceased. She averred that she lived in Nembu where she has built a permanent structure. She testified that when she was summoned by the Chief, she informed all the people present that the shamba was not hers. Her husband had never informed her that he had another family.
15. Jacinta Wanjiru Mbugua (DW2) testified that Mbugua Mutheki was her father and that John Wainaina was her step brother. She further stated that Esther Wanjiru is the wife of John Wainaina Mbugua. She produced the title deed for Kiganjo/Nembu/1225 in the name of Mbugua Mutheki and that no one holds it in trust. Further, she testified that the succession for Mbugua Mutheki was started but not complete as such no distribution has been done on the ground. She stated that the shamba should be distributed for all to get their portion and that the same does not belong to her brother John.

### **Issues For Determination**

16. After reading the rival submissions this Court has framed the following issues for determination.
  - i. Who should bury the deceased
  - j. The deceased's wish on where she desired to be buried.
  - ii. Whether the Applicants are entitled to inter the remains of the Late Margaret at the rural home in accordance with Kikuyu Customary Law.



- iii. Whether to grant the Applicants permanent injunctive orders.
- iv. Who should bear the mortuary costs.

## **Analysis**

### **Who should bury the deceased**

17. The applicable law herein is Kikuyu Customary Law and the *Law of Succession Act*; It is not in dispute that the Applicants were the children of John and Margaret who are both deceased. Wainaina Hardley Ndichu produced Birth Certificates and their National IDs as evidence to support this fact; Both parents being deceased the provisions of Section 66 of the *Law of Succession Act* provide a general guide on the order of preference and priority as to who should be granted Letters of Administration; where the intestate has left no surviving spouse then the surviving children rank first in priority over and above the intestate's father, mother and siblings;
18. The Estate of Margaret has not reached the stage where the Letters of Administration are being sought for; the section in the Act is only being referred to emphasize the fact that in this instance Margaret's children would be first in the line of duty in relation to her burial;
19. This court is satisfied that the late Margaret's surviving children who are the Applicants herein are the persons entitled to bury her in consultation with the clan elders and the children and their late father being Kikuyu in line with Kikuyu Customary Law.

### **The deceased's wish on where she desired to be buried.**

20. From the averments and testimony of Agnes Wangui (PW2) a friend of the deceased which evidence was uncontroverted and unchallenged the wish of the deceased was to be interred on Kiganjo/Nembu/1225 where the late John had been interred.

### **Whether the Applicants are entitled to inter the remains of the Late Margaret at the rural home in accordance with Kikuyu Customary Law.**

21. The evidence of Esther Wanjiru (DW1) was that there was a permanent house built by the Late John Wainaina on a portion of the land known as Parcel No. Kiganjo/Nembu/1225 and that she resided thereon; She averred that she did not own the shamba and that the property belonged to Mbugua Mutheki (Deceased) who was the father to John Wainaina and was also her father-in-law; She denied knowledge of the deceased and that her husband had never informed her that he had another family. The Applicants wanted to bury their mother Margaret on the land owned by John's father. She testified that when she was summoned by the Chief, she informed all the people present that the shamba was not hers.
22. It is not in dispute that the property in issue that is land Parcel No. Kiganjo/Nembu/1225 is still registered in the name of Mbugua Mutheki (Deceased) who was the father of John and DW2; It is also not in dispute that the beneficiaries to the Estate of Mbugua Mutheki (Deceased) had taken out Letters of administration during the life time of John but to date the estate has not been distributed.
23. The evidence of DW2 who was a step sister to John confirmed in her evidence that even though the beneficiaries' exact portions were yet to be distributed, her late step-brother had gone ahead to build a permanent house on a portion of the estate and that he was later buried thereon.
24. The fact that a permanent house had been built on a portion of the estate and that John is interred there does not confer ownership of the property upon either the late John nor upon the Respondent.



Further by stating that the property where she resides is matrimonial property the Respondent (DW1) it would appear to be attempting to lay and to secure her claim in the estate; But never the less this court is satisfied that from the evidence and conduct of the late John that he had the intention to establish a permanent homestead and to lay claim on a portion of the estate of his late father.

25. The two remaining issues relate to where should the deceased Margaret be interred and who should pay the costs;
26. It is not in dispute that the subject property Kiganjo/Nembu/1225 is still in the name of Johns father Mbugua Mutheki (Deceased) and that the estate is yet to be distributed; It is a proven fact that John did not own the portion of land where he had built but it is a proven fact that he established a home on a portion of the property and that John had a stake in the property of Mbugua Mutheki by virtue of being his son and therefore a beneficiary;
27. DW2 in her evidence did not deny knowledge of Johns children with Margaret and the documentary evidence in the form of Birth Certificates corroborated the evidence of the witnesses that the Applicants are undisputedly Johns children; this fact would mean that the Applicants have a right and a stake as beneficiaries to their fathers portion in the estate of Mbugua Mutheki;
28. This court noted during the trial that the stumbling block was not DW1 but by her testimony and demeanour DW2 was the one who was hell bent in using DW1 in blocking out the Applicants; The Law of Succession Act at Section 35 provides that upon proof that DW1 is a spouse to John then she will be entitled together with all Johns surviving children to Johns portion in the estate of Mbugua Mutheki ; but the above notwithstanding the Applicants rights are protected by Section 29 of the Act and this court is satisfied that they have a beneficial interest in the subject property which therefore will entitle them to make a determination on how their portion will be utilized one such utilization being whether or not their late mother should be interred on the subject property;
29. This courts considered view is that there is need to limit the Applicants choice of burial site on the subject property because if this is not done this will interfere with the other family members rights to the property;
30. The court is satisfied that there was evidence adduced that there was a site for burial that was set apart by John; and that it would not be unfair or unjust to allow the Applicants to inter their late mothers remains on the site created and set apart by John Wainaina; and is further satisfied that the Applicants are entitled to inter their mothers remains beside Johns grave.

#### **Whether to grant the Applicants permanent injunctive orders.**

31. In order to be granted an injunctive order the Applicants must sequentially satisfy the conditions set out in the renowned case of *Giella vs Cassman Brown*; these conditions are as set out hereunder
  - i. Demonstrate they have a prima facie case
  - ii. Demonstrate that they will suffer irreparable injury that cannot be compensated by damages
  - iii. The balance of convenience tilts in whose favour?
32. The Applicants have provided proof that they are indeed children of the late John Wainaina who before his demise had a beneficial interest in his late fathers estate; the extent of Johns interest in the estate is an issue to be determined during the hearing and determination of any succession cause over both the estates of John Wainaina & Mbugua Mutheki; This court reiterates that the Applicants have established their relationship with the late John and have demonstrated a prima facie case.



33. On the second condition this court has to consider whether the Applicants have demonstrated that they will suffer irreparable loss that cannot be compensated by damages if the injunction is not granted; the subject matter herein relates to inheritance of John's portion of land which has sentimental and an emotive value to all the beneficiaries; the act of denying the Applicants access to the land is an attempt to steal a march on the Applicants by DW1 and DW2 and any loss of inheritance can never be redressed by damages.
34. This court is satisfied that the Applicants have satisfied the second condition.  
Who should bear the mortuary costs.
35. The Respondent and DW2 are the authors of this dispute and should be made to bear these costs. But in order to bring closure to the matter this court will suo moto review the order that directed the Respondent to bear the mortuary charges and directs both the Applicants and the Respondent to share the KU Funeral home storage fees equally.

### **Findings And Determination**

36. For the forgoing reasons this court makes the following findings and determinations;
  - a. This court finds the application dated 13/09/2023 to be partially successful.
  - b. The Applicants are found to be entitled to bury the deceased; the Applicants be and are hereby allowed to proceed to inter the remains of the deceased at the rural home next to John Wainainas' grave in accordance with the Kikuyu Customary Laws.
  - c. The Respondent is hereby restrained either by herself, her agents, family members, relatives and/or any other person whomsoever acting under her instructions from blocking access to the Applicants in any manner whatsoever into the rural home for preparation of the burial site and the interment of the deceased.
  - d. The Officer Commanding Station of the nearest Police Station to ensure compliance.
  - e. The parties to share the KU Funeral home storage fees be shared equally.
  - f. This being a family matter each party to bear their own costs.

Orders Accordingly

**DATED SIGNED & DELIVERED VIA TEAMS AT KIAMBU THIS 26<sup>TH</sup> DAY OF JULY, 2024**

**A. MSHILA**

**JUDGE**

In the presence of;

Mourice – Court Assistant

Kilima for Applicants

Mukubi for the Respondent

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