



REPUBLIC OF KENYA



**Ambiyo v Muhinja (Civil Case 4 of 2023)
[2023] KEHC 21865 (KLR) (Family) (18 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21865 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

CIVIL CASE 4 OF 2023

PM NYAUNDI, J

AUGUST 18, 2023

BETWEEN

VALENTINE ACHOLA AMBIYO PLAINTIFF

AND

ROSELAND MUHINJA DEFENDANT

JUDGMENT

1. The matter for determination by this Court is a burial dispute pitting the Plaintiff against the Defendant. The matter was initiated by a plaint dated 2nd May 2023, which was filed contemporaneously with Notice of Motion of even date by which the Plaintiff/ Applicant sought a temporary injunction barring the Defendant from removing the body from Shalom Hospital Mortuary pending the hearing and determination of the Application and the main suit.
2. On 9th May 2023, the Court granted interim orders pending the hearing of the Notice of Motion and directed that the Plaintiff would meet the mortuary costs. Subsequent to this the parties were referred to Court Annexed mediation. The Court appointed Mediator filed a report dated 19th June 2023 indicating that the parties had failed to agree.
3. The Court directed that the matter proceeds to hearing of the Substantive matter by of viva voce evidence. The matter proceeded to hearing on 28th July 2023 and at the close of the hearing, parties were directed to file submissions.

Summary of The Plaintiff's Case

4. PW 1- Valentine Achola Ambiyo He identified himself as the Plaintiff and that he resides in Kericho where he is working with the water services Authority. He met the deceased, Annastasia Wamwitha



- Muhinja in 2008 and after some time the two agreed to formalise their relationship by meeting their respective parents.
5. He testified that his family welcomed the deceased and he in turn attended a ruracio ceremony at the Kisumu home of the mother of the deceased on 15th November 2015. That on that day he was accompanied by his father (Hezekiah Ambiyio Liech), his mother (Mrs Anne Nekesa Othieno) among other relatives.
 6. That some uncles of the deceased were also present at the function including, Mr. Joseph Nyaga, Mr. Njuguna, Pastor Bayram, the mother to the Deceased (Roseland Muhinja- the Defendant herein), Mr. Joseph Kimani and a Mrs. Wanja along with other relatives.
 7. That they commenced cohabitation then as man and wife. The union was blessed with two children born in 2012 and 2016. In addition, the Deceased had a child out of a separate union, whom the Plaintiff stated he assumed responsibility for.
 8. It was his evidence that they did not proceed to formalise the marriage under customary law as the deceased fell ill soon thereafter and was diagnosed with cancer in 2019.
 9. He testified that he provided for both the deceased and the children of the marriage including them as dependants under his NHIF Cover. He also produced SACCO statements showing he had taken loans to support his family. He testified that he provided support to the deceased throughout the duration of her illness and when he was forced to be out of town, his sister would hold forte and visit and check on the deceased on his behalf. He testified that the statement from Texas Cancer Centre also demonstrated that he was making payments towards the treatment of the deceased.
 10. It was his evidence that he received a call from an uncle of the Deceased (Silvano Kariuki) who informed him that the deceased was critically ill and who urged him to come to Nairobi urgently. That he travelled that evening only to be informed that his wife had already passed away.
 11. That it was at that point he noticed all was not well as he was unable to talk to the defendant and was only able to view the body after making repeated requests. After leaving the hospital he went to his house at Donholm and found that the door had been locked. He asked for the keys from the Uncle of the Deceased (Silvano Kariuki) and he refused to grant him the keys to the house.
 12. It was also at this juncture that he learnt that the Deceased had been moved from their house at Donholm and taken to stay with her uncle in Kitengela. That the uncle had also moved his children to his Kitengela house.
 13. That he invited the Uncle to join them in planning for the deceased's burial at Ahero in Kisumu County, after some back and forth the Uncle informed him that the family of the defendant had decided to bury the deceased at Kinangop.
 14. He avers that the decision to bury the deceased at Kinangop was arrived at without consultation with him or any member of his family. That attempts to discuss the matter and resolve it were futile, forcing him to initiate this suit so that he can bury his wife.
 15. In Cross examination he confirmed that they commenced cohabiting in 2012 and that after the ceremony in Kisumu in November 2015 they were to go to the Deceased's rural home so as to complete the process. Among the things that was to happen on the subsequent visit was the payment of dowry. The visit never happened.
 16. During the Kisumu visit they had paid approximately Kshs 100,000 to the family of the deceased.



17. Since his job required him to work outside Nairobi, he would visit his family over the weekends. It is the deceased who signed the lease agreement for the house in Donholm, but he contributed towards the payment of rent. He admitted that the tenancy agreement did not have the signature of the deceased neither was it endorsed by the landlord.
18. He explained that it was the telephone number of the Deceased on the Texas cancer centre statement as he would forward money to her phone and then she would pay. He included the Deceased as a dependant on his NHIF Card on 17th September 2021.
19. He continued his support to her even in her last days. He had last seen her a month to her death as when he visited Nairobi then they had a misunderstanding. He took offense with the fact that she had not informed him that she was on palliative care. Between his last visit and when she died she was not picking his calls.
20. On re-examination, he clarified that it was the defendant who invited him and his family to her residence in Kisumu in November 2015. He does not understand Kikuyu culture. The intention of the visit was to introduce themselves to the family of the deceased.
21. He had all along been recognised by the family of the deceased as a spouse. He reiterated that the deceased was his wife as they had cohabited as man and wife. His culture requires that he buries the wife.
22. PW2- RANA AMBIYO She is a sister to the plaintiff and recognised the deceased as her sister-in-law. She testified that when they arrived at Shalom Hospital after the death of the deceased, they were not allowed to view the body initially. They were told this was because they had neglected her. It was the uncle to the Deceased, Silvanus Kariuki who denied them access to see the body.
23. She testified that she was a neighbour to the deceased at Donholm and checked on her often as her brother was away from Nairobi.
24. She met the deceased in 2013, she was working as a teacher and the deceased was a medic. She was close to the deceased and they invited each other for different events. Both the deceased and the Plaintiff, informed her of the visit to the home in November 2015 to formalise the union.
25. After that visit they lived together as man and wife together with the son of he deceased born out of a separate union.
26. She had checked on the deceased in April, when she went to her house at Donholm, but she did not find her there. She spoke to her using the son's phone. She was not informed that the deceased had been admitted in hospital.
27. As a family they had made contributions towards the treatment of the deceased and she would send to the deceased the money collected.
28. On cross examination she confirmed that she met the Deceased in 2013 and had accompanied her to her home in 2020. She was not aware that towards the last days the deceased was admitted. She had a good relationship with he deceased. She is not aware whether the deceased and the Plaintiff had a quarrel towards her last days.
29. As far as she is concerned the deceased and the plaintiff were husband and wife. Through the WhatsApp group they collected Kshs 43000 per month and sent it to the deceased.
30. In re-examination she was able to identify one such payment in the Texas Cancer Centre statement. She does not fully understand Kikuyu Culture but her understanding of the Ruracio ceremony in November 2015 was that it was similar to the Luo ceremony called 'Ayie'.



31. PW3- Hezekiah Ambiyu Liech. He is the father of the Plaintiff. It is his wish to have the deceased buried in his home according to his culture. He recognises the defendant as the mother- in-law to his son.
32. Soon after the Couple met at the workplace the deceased was introduced to him as the wife of the Plaintiff. The families formalised the union in November 2015 when they went to the Kisumu home of the Defendant, he was accompanied by his wife and other close relatives.
33. At the time the Deceased and the Plaintiff had 2 daughters. At the function the 2 declared to the parents that they were married. Relatives of the deceased including her uncles were present at the function.
34. They were warmly received and even escorted all the way to Ahero when they left (About 25kms from the home of the deceased's mother).
35. The deceased started falling ill in 2017 and it worsened in 2019. That is when they learnt she had cancer. He keenly followed the treatment she was receiving. He and his wife also contributed towards the deceased's treatment. He had a close relationship with the deceased.
36. After the visit to Kisumu, they were to have followed up with another visit to Kinangop, however before they could arrange the visit the deceased fell ill.
37. His understanding of the ceremony in November is that they were initiating the marriage. The Deceased answered in the affirmative when the question was put to her as to whether she was ready to marry the Plaintiff. On that occasion his family also agreed to adopt the deceased's son who was born out of a previous relationship.
38. In his view the Couple lived well, he was not aware of any disagreement between them, they had not informed him. He regards the defendant as family.
39. On cross examination, he stated that the deceased first went to his home in 2011 and she would accompany the Plaintiff to his home during the December holidays. A previous wife to the Plaintiff died during the Post-Election Violence in 2007/2008. He did not have children with that wife.
40. He had not yet gone to Kinangop, during the 2015 visit they gave a token of Kshs.100,000. The deceased never communicated to him where she wished to be buried.
41. In re-examination he stated in his culture, once the token is given the husband should bury the wife. They embraced the deceased as a wife after the visit in 2015, He stated that the culture of the girl dictates how the marriage is solemnised and that her place of burial was to be determined in the husband's culture.

Summary Defendant's Case

42. DW1, Roseland Muhinja. She is the Defendant and mother of the Deceased. The deceased died on 26th April 2023. She wants to bury her daughter as the defendant had not paid dowry for her. At the time of her death, she had 3 children. 2 of whom she had born with the Plaintiff.
43. The Plaintiff is known to her, he came to her Kisumu home in 2015. The house he came to is rental. She welcomed the Plaintiff and his family after the Plaintiff said he wanted to see her home. At that visit they explained to them Kikuyu Custom.
44. Her brother Nyagah was present along with other relatives. The Plaintiff was accompanied by his parents and other relatives. She testified that at 63 years old she understands Kikuyu culture and specifically ruracio.



45. She testified that after they explained their mission, they explained to them the culture and advised that they could not have ruracio. The outcome of the meeting in Kisumu was that they should prepare to go to Kinangop which is the ancestral home of the deceased.
46. She testified that the Plaintiff and his family did not come to Kinangop. She testified that after the visit the Plaintiff and the deceased lived separately. She was aware that the Plaintiff lived in Narok. She never found him in the house in her visits to Nairobi.
47. It was her evidence that the Deceased had complained to her that the Plaintiff would beat her and he was not providing for the children. In particular she was aggrieved that the Plaintiff had not supported the deceased during her illness.
48. She testified that when her daughter fell ill in 2019 she is the one who organised for her treatment in Kisumu. She also paid for the treatment that the Deceased received at the Texas Cancer Centre.
49. The relationship between her and the Plaintiff deteriorated and by the time the Deceased was admitted at MP Shah hospital they were not talking to each other. She asked her brother in law Silvanus Kariuki to take care of the deceased. With time as the Deceased was unable to access her unit at Donholm since it was on the 7th Floor they asked Silvanus Kariuki to house her at his house in Kitengela. They did not inform the Plaintiff and his family of this decision.
50. At this time, she had another child who was ailing from Cancer, he died two weeks after the deceased. At some point the Doctor advised them that she was too ill and beyond treatment. She travelled to Nairobi and confirmed that the deceased was very ill and then returned to look after her Son Joseph who was also unwell.
51. The deceased had informed her that she wished to be buried next to her late father. The deceased died on the night of 26th April 2023; she arrived the next morning. She stated that the Plaintiff also arrived the same morning. She denied that the Plaintiff and his family were barred from viewing the body. She stated that the Plaintiff and his family neglected the Deceased, they had not paid dowry for her, and the Court should honour her wish on place of burial.
52. On cross examination she stated that she was aware that her daughter kept reminding the Plaintiff to pay dowry, but he chose not to. She does not consider the Plaintiff and the deceased as married as dowry was never paid. She reiterated that she would like to bury the deceased in accordance with her wishes and that in any event the Plaintiff neglected the Deceased when she was alive.
53. She knows the parents of the Plaintiff; they came to her home in 2015. But they do not communicate. She does not have their numbers. She communicated to the Plaintiff and his parents through her brother-in-law Silvano Kariuki. She was communicating with them because the deceased and the Plaintiff had 2 children. She recognises the Plaintiff as the father of her grandchildren.
54. On the 2015 visit, she stated that her daughter informed her that she had a male friend who wanted to see their home. That she welcomed the guests. She confirmed that the Pastor of her church was present and he offered prayers.
55. She stated that in her culture, the first visit was introduction they were expected to follow this up with a visit to Kinangop. She confirmed that the Plaintiff expressed his wish to marry the deceased, but the plans did not materialise.
56. She indicated that the paternal relatives of the Deceased were not present at the Kisumu ceremony. The deceased informed her that the Plaintiff was not following up on this and she decided that she would not force the marriage.



57. She stated that the Deceased had raised the issue of violence with the father of the Plaintiff, although she knew about it she did not report to the police. She did not take up the issue of violence with the Plaintiff's parents.
58. As far as she is concerned since they had not paid dowry, they did not have a right to bury the deceased.
59. She testified that after the death of the deceased they advised the plaintiff to consult with the paternal relatives in Kinangop, but he failed to do so. She is not open to mediation now as the previous effort collapsed.
60. She stated that she was paying the medical bills of the Deceased and they removed the children from Donholm as the Plaintiff was not responding to their calls. She stated that a single woman can be buried at her home, and for a married woman the place of burial depends on how they were living.
61. On re-examination, she stated that the fact that the deceased and the Plaintiff had children, did not make their union a marriage. She reiterated that the Plaintiff did not follow up with the trip to Kinangop as advised and that she had no role in the rites that would have to be performed for the deceased to be buried in Ahero.
62. She would like to bury the Deceased in accordance with the deceased's wishes.
63. DW2- Anthony Nyaga Mwangi He is a brother to the Defendant. He was present when the Plaintiff and his family came to introduce themselves at the home of the Defendant in 2015.
64. He was aware that prior to this the two were living together. He stated that he explained to them that in accordance with Kikuyu Culture they would have to go to Kinangop.
65. He acknowledged that they were given some money. They understood that the Plaintiff and his family were making a request. The paternal uncles were not present at the event.
66. He stated that when the Deceased fell ill, they all contributed, the family of the plaintiff also contributed but fizzled out towards the end. They needed Kshs 150000 every three weeks.
67. He stated that the Deceased had indicated to him her desire to be buried at Kinangop just before she died when he visited her at Kitengela.
68. On cross examination he confirmed that in his witness statement filed in Court he did not mention that the deceased had expressed to him her wish on where she was to be buried. The visit in November 2015 was a starting point for the intended marriage. The Plaintiff was not given a time limit within which he was to make the trip to Kinangop.
69. He confirmed that the 2 cohabited and had 2 children. The Cohabitation did not amount to a marriage. In his view the Plaintiff was absent, he did not consider them husband and wife.
70. He did not expect a person from Kisumu to understand Ruracio but he explained to them what was expected of them going forward. He stated that as a maternal uncle he cannot receive dowry.
71. On re-examination, he stated they did not give conditions on the Ruracio. He reiterated the November 2015 meeting was a visit and it was not his place to remind the Plaintiff to pay dowry. Having accepted to marry the deceased under Kikuyu custom, they ought to have gone to Kinangop.
72. DW3- Silvano Mureithi Kariuki. He is a maternal uncle to the Deceased. When the deceased was too ill to access her unit on the 7th Floor at Donholm he took her in at his house in Kitengela.



73. She was living with a house help and her 2 children at Donholm. This was in February 28, 2023. He escorted her for her treatment sessions. He attempted to reach out to the Plaintiff, but he was nonresponsive. He continued updating him.
74. He did not recognise the two as married. The deceased had mentioned to him that she wished to be buried next to her father. She told him that she had also communicated this wish to the Plaintiff.
75. He continued to urge the Plaintiff to come and see the Deceased. He declined to come. He contributed by paying the medical fees for the deceased, tuition for the children.
76. He stated that on the day the deceased died he informed the Plaintiff of her wishes and at that time the deceased did not object. He confirmed that on the day the Plaintiff arrived in Nairobi, the Defendant was unable to speak to the Plaintiff.
77. On re-examination he stated that the door to the house at Donholm was locked by the son of the deceased.
78. He asked the Plaintiff to come on 25th April and he arrived on the 26th April. He was the link between the Defendant and the family of the Plaintiff. He was communicating with the Plaintiff between 17th March 2023 and 25th April 2023.
79. He stated that the deceased made the statement on where she wished to be buried after they received the letter from the oncologist. He was communicating to the Plaintiff as the father of the 2 children. He stated that he did not communicate to the Plaintiff about the children.
80. In re-examination he stated that the son had the key to the house in Donholm. He would come home from university to take care of his mother. He was the one calling the Plaintiff. The Plaintiff did not call him.
81. At the close of the hearing the Parties agreed to file written submissions. The Plaintiff's submissions are dated 6th August 2023. Those of the defendant are dated 4th August 2023.

Summary of The Plaintiff's Submissions

82. The Plaintiff identifies the following as the issues for determination;
 - a. What is the Applicable law in burial disputes?
 - b. Whether the Plaintiff and the deceased were married under Agikuyu Customary Law?
 - c. In the alternative whether the Court can presume the existence of a marriage between the deceased and the Plaintiff?
 - d. Where should the deceased's body be interred?
 - e. Whether the Plaintiff should inter the deceased's body in Kisumu County?
83. On the first issue, applicable law in burial disputes, the Plaintiff submits that it is the personal laws of the parties and in this case, it is the Luo Customary law that should apply. The plaintiff relies on the decision in SAN v GW [2020] eKLR where the court of Appeal stated that Kenyan Courts have variously resorted to customary law, common law, marriage law, succession law, human rights law, land law and other bodies of personal law in adjudicating burial disputes.
84. On the 2nd Issue On whether there was a marriage between the deceased and the plaintiff, the Plaintiff relies on the decision in M WK v AMW [2017] eKLR on the essentials of a valid Kikuyu marriage.



85. It is the plaintiff's case that there was a clear intention on the part of the parties to marry and that even if they failed to formalise the marriage the Court should presume a marriage on account of the long cohabitation. The Plaintiff relies on the decision in *Joseis Wanjiru v Kabui Ndegwa Kabui & another* [2014] eKLR and *MWK v A M W* (supra) in which Hon. Joel Ngugi J (as he then was) set out what he referred to as the quantitative and qualitative elements necessary for one to presume a marriage, which it is submitted the Plaintiff met.
86. On the fourth issue? Where the body of the deceased should be interred, the Plaintiff submits that applicable personal law dictates that the deceased being the wife of the Plaintiff she will be interred in accordance with Luo Custom.
87. It is submitted that it was not proved that the Deceased had expressed a wish on where she was to be buried and that applying culture it follows that as a married woman, she ought to be buried at her husband's home. It is therefore the plaintiff's prayer that he be allowed to bury the deceased at his home in Kisumu County.

Defendant's Submissions

88. The defendant identifies the following as the issues for determination.
 - a. Whether there was a legally recognised marriage between the plaintiff and the Defendant?
 - b. Who has the right to bury the deceased and where should the deceased be buried?
 - c. Who bears the cost of the suit?
89. On the 1st issue it is submitted that the plaintiff failed to discharge the burden of proof and did not establish that there was a marriage between the Plaintiff and the deceased. The plaintiff did not establish that there was marriage conducted in accordance with the tenets of Kikuyu Customary law and reliance is placed on the decision in *Eva Naima Kaaka & Anor v Tabitha Waithera Mararo* [2018] eKLR which referenced the essentials of a marriage under Kikuyu Customary law as set out in Cotran's 'Casebook on Kenya Customary Law'. The Defendant further cited the decision in *Mary Njoki vs John Kinyanjui Muthru* [1985] eKLR that reiterated that the elements that must exist for it to be deemed that there was a marriage.
90. On the 2nd issue it is submitted that having established that there was no marriage between the plaintiff and the Deceased, then the Court should hold that it is the deceased who has the right to bury the deceased at her ancestral home in Kinangop. It is submitted that this would be in keeping with the wishes of the deceased.
91. The Defendant also submits that owing to the treatment of the Deceased by the Plaintiff in the days leading her death he is not deserving to bury the deceased. For this proposition the plaintiff relies on the decision in *Samuel Onindo Wambi vs COO & Anor Kisumu Civil App. No. 13 of 2011* [2015] eKLR
92. The Defendant relies on the decision on *SAN VGW* [2020] eKLR to reiterate that the Plaintiff owing to his conduct in the days preceding the death of the Deceased should not be the one to bury her.
93. The Defendants urges that the wishes of the deceased should have primacy and relies on *Johnstone Kassim Mumbo & 2 others v Mwinzi Mumbo & Anor and Nduku Masai v Leonida Mueni Mutua & 4 Others* [2018] eKLR
94. It is submitted that the Plaintiff should meet the mortuary charges and each party bear its own costs for the suit.



Analysis and Determination

95. Having reviewed the pleadings, evidence submitted rival submissions, authorities cited and the law I discern that the issues that arises for determination are-
- a. Who has the right to bury the deceased?
 - b. Where should the deceased be interred?
 - c. Who should bear the costs?
96. On the 1st issue, Who has the right to bury the deceased in the case of *Njoroge v Njoroge & Another* [2004] Ojwang J (as he then was) held;
- As I have already stated earlier on, the person, in social context prevailing in this country, who is in the first line of duty in relation to the burial of any deceased person, is the one who is closest to the 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.
97. The existence of a marriage between the Plaintiff and the Deceased is therefore key to determining on who between the Plaintiff and the Defendant has the right to bury the deceased. It is not disputed that the Defendant is the mother of the deceased.
98. From the evidence I discern that the Plaintiff and the Deceased met sometime in 2008 and by 2015 were minded to formalise their marriage. This explains the visit to the home of the Defendant in 2015. It was a joyous occasion, and the Defendant warmly hosted the Plaintiff and his family. The Couple got the blessing of their parents, and it was agreed that the Plaintiff and his family would take the next step of going to Kinangop to finalise the formalities of the marriage
99. I find therefore that the *Marriage Act*, 2014 is the applicable legal regime in determining whether or not there was a marriage between the deceased and the Plaintiff. Section 3(1) of the Act defines Marriage to be-
- ..the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act.
100. Section 6(1) recognises the following kinds of Marriage-
- a. Marriages conducted in accordance with the rites of a Christian denomination
 - b. civil marriage
 - c. Marriages conducted in accordance with the customary rites relating to any of the communities in Kenya
 - d. Marriages conducted in accordance with the Hindu rites and ceremonies; and
 - e. Marriages conducted in accordance with Islamic law
101. Section 59(1) provides that a marriage may be proven in Kenya by-
- a. A certificate of marriage issued under this Act or any other written law;
 - b. A certified copy of a certificate of a certificate of marriage issued under this Act or any other written law;



- c. An entry in a register of marriages maintained under this Act or any other written law;
 - d. A certified copy of an entry in a register of marriages maintained under this Act or any other written law; or
 - e. An entry in a register of marriages maintained by the proper authority of the Khoja Shia, Shia imam, Ismaili or Bohra communities, or a certified copy of such an entry
102. Section 59(2) provides
- Despite subsection (1), a marriage may be proven in Kenya if it was celebrated in a public place of worship, but its registration was not required, by an entry in any register maintained at that public place of worship or a certified copy of such an entry
103. It is not in dispute that the follow up visit to Kinangop did not happen and that therefore as per the authorities cited on the essential elements of a Kikuyu Customary marriage, I find that the Couple did not fulfil the formalities and were therefore not married under Kikuyu Customary law.
104. As is borne out by the record the Plaintiff herein did not seek to prove his Marriage to the deceased in the manner provided for under Section 59. It can be concluded that this was because the parties did not formalise their marriage under any system that required registration.
105. The Plaintiff's invites the court to presume a marriage between him and the deceased on account of the long cohabitation along with the qualitative elements that include, living together, having children together, providing financial support, inclusion of the deceased on the medical card as his dependant. The Plaintiff demonstrated that he took loans to meet the educational needs of the children.
106. I have had opportunity to read the decisions relied on in which the courts were open to presuming marriages under circumstances similar to those described in the preceding paragraph, I observe that in those decisions did not, in my view, consider what the import is of Section 6 as read with Section 59 and Section 2 of the [Marriage Act](#)
107. According to Section 2 cohabit means
- ...to live in an arrangement in which an unmarried couple lives together in long term relationship that resembles a marriage.
108. My reading of these provisions makes it evident that there was a clear legislative intent to provide certainty and clarity on what constitutes a marriage in Kenya. Article 45 (1) of [the Constitution](#) of Kenya, 2010 recognises the family as the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the state.
109. Article 45 (4) mandates parliament to enact legislation that recognises marriages concluded under any tradition, or system of religious, personal or family law; and any system of family law under any tradition, or adhered to by persons professing a particular religion, to the extent that any such marriages or systems of law are consistent with this constitution
110. The [Marriage Act](#), 2014 has its underpinnings in [the Constitution](#). The primary objective of the Act was to ensure that all forms of marriage in Kenya enjoy equal legal status and to safeguard the rights of parties to marriage by providing the certainty that registration and certification provides.
111. We do this in other sectors of our lives. For instance, if one wishes to establish that they have academic credentials from an institution of learning, the conclusive proof is a certificate. One cannot argue for instance that long stay at that institution of learning qualifies them to be recognised as having the academic credential without meeting the prerequisites for its conferment.



112. Likewise, if one wants to prove ownership of land, they produce a title deed. If one is establishing ownership of a car, they produce a log book or the sale agreement, one cannot adduce evidence of an incomplete transaction and invite the adjudicator to infer from the original intention of the parties that the transaction was completed.
113. The Act is therefore clear on what constitutes a marriage and how one will prove it. In light of the clear provisions of the law I have no hesitation in finding that the Plaintiff did not establish that he was married to the deceased under Kikuyu Customary law
114. The plaintiff submits that the Court should presume a marriage on account of the long cohabitation.
115. Based on Section 2 of the *Marriage Act* I am prepared to find that the Plaintiff and deceased did cohabit. The definition is clear that the two are an unmarried couple and their relationship resembles a marriage. Which in plain English means the Act does recognise Cohabitation and Marriage as distinct ways in which individuals will set up families.
116. A marriage is not a prerequisite to setting up a family, however Marriages will have some elevated status when it comes to the rights, claims and protections that the parties will have.
117. I am buttressed in this opinion by the decision of the Supreme Court in the case of MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) (Petition 9 of 2021) [2023] KESC 2 (KLR) (Family) (27 January 2023) (Judgment) where the Court after finding that the *Marriage Act*, 2014 would not apply in that matter as the cause of action arose prior to the enactment of the *Marriage Act* and laying out the strict parameters within which a presumption of marriage can be made, stated-
- (65) The above notwithstanding, we are of the view, that the doctrine of presumption of marriage is on its deathbed of which reasoning is reinforced by the changes to the matrimonial laws in Kenya. As such, this presumption should only be used sparingly where there is cogent evidence to buttress it.
- (66) In the same breath, we would be remiss if we did not point out that marriage is an institution that has traditional, religious, economic, social and cultural meaning for many Kenyans. However, it is becoming increasingly common for two consenting adults to live together for long durations where these two adults have neither the desire, wish nor intention to be within the confines of matrimony. This court recognizes that there exists relationships where couples cohabit with no intention whatsoever of contracting a marriage. In such contexts, such couples may choose to have an interdependent relationship outside marriage. While some may find this amoral or incredible, it is a reality of the times we live in today.
118. The Supreme Court found that the ‘circumstances in which presumption of marriage can be upheld are limited. In other words, a presumption of marriage is the exception rather than the rule’. In the instant case, the parties set out to formalise their marriage under Kikuyu Customary law in 2015. According to the Plaintiff, the process was put on hold on account of the onset of the illness of the deceased. They did not follow through to finalise that process, the only conclusion that can be made therefore is that they opted to cohabit.
119. Having discounted the existence of a marriage I would find as Nambuye J(as she then was) did in Shem Navade Asuluda v Peter Irungu Kamakia [2009] eKLR, that this ousts the right of the plaintiff as the presumed spouse to bury the deceased and ushers in the defendant as the nearest relative.
120. On the 2nd issue, where the deceased should be interred, in Francis Mbugua Maagu v Gaspar Waweru [1982] eKLR. The court observed that, "... In the case of Mwangi Njoroge Mugwe v James Mwangi Kihara HC Misc CC No. 255 of 1982 (unreported) this court constituted as it is said: "The position



under the Kikuyu Customary Law is this: If the applicant was legally married to the deceased then he is entitled to lay her body to rest, but if the deceased was not married to him, regardless of how long they cohabited the deceased's relatives are entitled to bury her body.

121. In the circumstances having found that the deceased was not married, it is only right that the body be released to the defendant to inter the deceased as the defendant wishes. The Plaintiff will of course be at liberty to attend the burial and participate in any other rites that will honour the memory of the deceased.
122. I am not persuaded that the deceased expressed her wish on where to be buried. The witnesses who alluded to this did not provide specifics on when these utterances were made. Having found that the Plaintiff and Deceased were not married, the question of whether or not the conduct of the plaintiff in relation to the deceased disqualified him from having the right of burying her does not fall for consideration.
123. On the mortuary costs, I direct that the same will be paid by the Plaintiff as earlier directed by the court.
124. Regarding costs of the suit each party will bear its own costs
125. These then are the final orders of the Court-
 - a. The Court finds that there was no marriage between the Plaintiff and the Deceased
 - b. The Defendant as the mother has the right to bury the deceased and is mandated to remove the body for burial at the place and in the manner she wishes.
 - c. The Plaintiff will meet the mortuary fees to date of release of the body for interment.
 - d. The Plaintiff to be allowed to attend the burial of the deceased.
 - e. Each party to bear their own costs

It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY IN NAIROBI ON 18TH DAY OF AUGUST 2023.

P M NYAUNDI

HIGH COURT JUDGE

In the presence of:

Ogado, Advocate ... for Plaintiff

Chepkoech Advocate for Defendant

Court Assistant Sylvia

