



REPUBLIC OF KENYA



KENYA LAW
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**In re Burial of Margaret Wanjiru Kariuki (Miscellaneous Civil Case
E172 of 2023) [2023] KEHC 22746 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22746 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS CIVIL CASE E172 OF 2023
PM MULWA, J
SEPTEMBER 28, 2023**

BETWEEN

**ELIUD MUNG'ARA WAINAINA 1ST APPLICANT
DAVID MUTORA WAINAINA 2ND APPLICANT
DANIEL MBUGUA WAINAINA 3RD APPLICANT
WAINAINA HARDLEY NDICHU 4TH APPLICANT**

AND

ESTHER WANJIRU RESPONDENT

RULING

1. By a Notice of Motion dated September 13, 2023, the Applicants' sought the following orders:
 - i. Spent
 - ii. 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.
 - iii. An order directing the Applicants to proceed with the burial set on September 20, 2023 at their rural home.
 - iv. A mandatory injunction to issue restraining the Respondent, either herself, her agents, family members, relatives and/or any other persons from whomsoever acting under her instructions from blocking access into the rural home for digging up the burial site set on September 19, 2023.
 - v. A temporary injunction does issue restraining the Respondent, either by herself, her agents, family members, relatives and/or any other person whomsoever acting under instructions from interfering with the burial scheduled on September 20, 2023 in any manner whatsoever.



- vi. The officer commanding station of the nearest police station to ensure compliance.
 - vii. That costs of the application be borne by the Respondent.
2. The application is supported by the supporting affidavit sworn jointly by the Applicants on September 14, 2023, reiterating the grounds of the application. That the Applicants are the children of the deceased. The deceased was the 1st wife of John Wainaina Mbugua who passed on in 2021. That the deceased herein Margaret Wanjiru died on September 5, 2023 and the family held meetings and deliberated that she be buried next to her husband in his rural home, which was in accordance to the deceased wishes. That the Respondent has without any justifiable reason refused the deceased to be buried in the rural home. the Applicants have sought the intervention of the area chief and clan elders but the Respondent is adamant that the deceased would not be buried in the rural home.
 3. In opposing the application, the Respondent filed the Replying Affidavit sworn on September 18, 2023, where she contends that she is the wife of the late John Wainaina Mbugua. She declined to be a personal representative of the estate of the late John Wainaina. She avers that the deceased had only one wife and there was no other marriage subsisting. The land in which she lives does not belong to the late John Wainaina. She disputes that the eulogy is not sufficient proof of marriage. She states the family of the deceased has all along been willing to bury the deceased at Langata Cemetery as she was not married and did not own any property.
 4. When the application came up for hearing the court directed that the same be canvassed by way of written submissions. Each party filed their respective submissions.

Applicant's submissions

5. It was submitted for the Applicants that the deceased and the Respondent were married to the late John Wainaina. Counsel argued that courts have set precedents that in determining burial disputes in Kenya customary law is the applicable personal law.
6. Counsel stated that the place of burial of a person is closely linked to three things: the person's wishes, the duty imposed on those closely related to the deceased during his lifetime to bury him and whether the deceased had established a home. In *Jacinta Nduku Masai vs Leonida Mueni Mutua & 4 others* (2018) eKLR the court held that it is common ground that the wishes of the deceased person are a paramount consideration in a burial dispute.
7. Counsel contended that under Kikuyu Customary Law the deceased, being a wife married under the custom, is entitled to be buried in the ancestral land of her husband. He cited the case of *Mwangi Njoroge Mugwe vs James Mwangi Kihara* HC Misc CC No. 255 of 1982 where the court held; "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 co-habited the deceased's relatives are entitled to bury her body."
8. According to submissions by counsel the late husband of the Respondent was in a polygamous marriage and each wife was well aware of the other. That there is evidence from the chief which indicates the deceased and the Respondent had a dispute over their deceased husband's property.
9. In conclusion counsel submitted that all family members are in agreement that the deceased be buried at the rural home next to her husband and urged the court to allow the application as prayed.



Respondent's submissions

10. Counsel for the Respondent submitted that the application is fatally defective in that the Applicants commenced the suit by way of a Notice of Motion application contrary to Order 3 Rule 1(1) of the *Civil Procedure Rules* and therefore Article 159 (2) (d) of the *Constitution* cannot remedy the situation. He relied on Nairobi Misc. Application No. E193 of 2021 - Charity Hilda Wanja & Anor vs Ralh Roothaert where the court held; “based on the foregoing, I find that the omission/ failure by the Applicant to file a suit by way of a plaint on which to anchor her application renders the said application fatally defective and therefore a non-starter. I find the preliminary objection is merited. the Application dated October 15, 2021 is hereby struck out.”
11. Counsel argued that the Applicants have failed to demonstrate that the deceased was married to the late John Wainaina. That the authenticity of the eulogy and photographs is disputed. That the document annexed as MKW3 indicate “the elders said that Margaret should not be buried in the ancestral land.” and as such it is not clear why the Respondent has been sued.
12. Counsel further argued that the Applicants have failed to demonstrate ownership of the piece of land they intend to inter the remains of the deceased. He argued the land in dispute does not belong to the late John Wainaina. That the deceased Margaret lived in Nairobi and has no connection with the Respondent's rural home. And further that prayers 3, 4, 5, and 6 cannot issue as they have been overtaken by events and cannot issue.
13. Counsel urged the court to dismiss the application.

Analysis of issues

14. Customary law has been used by courts in adjudicating matters of burial. The Applicants had, from the evidence, planned for the burial of the deceased which was to take effect on September 20, 2023 in their rural home and next to where the late John Wainaina Mbugua was buried. The Respondent disputes the deceased remains to be interred in the rural home and disputes that Margaret was the wife of the deceased.
15. This court notes that the Notice of Motion herein raises pertinent issues pertaining to marriage and land dispute that need to be addressed through viva voce evidence to enable the court render a reasoned determination.
16. Consequently, due to the sensitivity and urgent nature of the matter:
 - i. The final decision of the court is stayed.
 - ii. Parties directed to parties file their material documents and witness statements in support of their respective arguments. The Applicants to file and serve within 7 days from the date herein. Upon service, the Respondent to file and serve within 7 days.
 - iii. Thereafter, the suit be set down for hearing on priority basis.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 28TH DAY OF SEPTEMBER 2023.

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P.M. MULWA

JUDGE



In the presence of:

Ms. Kilima – for the Applicants

Mr. Kamwaro – for the Respondent

