



REPUBLIC OF KENYA



**Milanga v Attorney General (Miscellaneous Civil Case E030 of 2022)
[2022] KEHC 16654 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16654 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
MISCELLANEOUS CIVIL CASE E030 OF 2022
KW KIARIE, J
DECEMBER 20, 2022**

BETWEEN

MAUREEN AKUMU MILANGA APPLICANT

AND

THE HON. ATTORNEY GENERAL RESPONDENT

RULING

1. The applicant moved the court by way of notice of chamber summons dated June 6, 2022. The application is brought under article 165 (3) (a) of the Constitution of Kenya. The applicant is seeking the following orders:
 - a. That this application be certified urgent and heard on priority basis.[spent]
 - b. That this honorable court be pleased to order that the body of Christine Ooko Milanga (deceased) buried on the property Central Kasipul/Kamuma/4608 be exhumed and reinterred through cremation.
2. The application is premised on the following grounds:
 - a. The late Christine Ooko Milanga was buried on a piece of land known as Central Kasipul/Kamuma/4608 which property now falls on a commercial zone and on which the family of the deceased intends to commence commercial development.
 - b. The applicant has been appointed as administratrix in charge of the estate of the deceased.
 - c. No viable development can take place in the land in the light of the grave lying on the property. In fact no construction approvals or occupation certificate can be given unless the body is relocated.



- d. The family of the deceased now wishes to exhume the body and cremate it which process the local authority has endorsed.
 - e. Unless the order sought is granted the property will serve no economic value as it shall become a dead capital.
 - f. The applicant shall bear the cost of exhumation and in cremation.
 - g. The deceased died of a heart problem on June 4, 2013 which decease none communicable and does not pose any health risk to the public, the surrounding community, health experts and the embalmers.
 - h. The applicant is seeking urgent intervention of the court to sanctions the process so development can commence without delay.
 - i. It is in the interest of justice that this matter is prioritized.
 - j. The respondent will suffer no prejudice if the application is allowed.
3. The application was opposed by the respondent on the following grounds:
- a. That the application is misconceived as the relevant authorities in the county government has not been enjoined that there is sufficient evidence exhumation not be hazardous to the community.
 - b. That the said application is premature and an abuse of the court process since the applicant has no authority and capacity under law to develop, use dispose, divide undertake on the said parcel without a confirmed grant as provided for under section 55(2) of the [Law of Succession Act](#) and section 80(2) of the [Law of Succession Act](#).
 - c. That a grant of letters of administration does not confer any power to the applicant to unused the property for the purported commercial development before the grant is confirmed.
 - d. That no sufficient evidence has been adduced that the parcel lies on an economic zone.
 - e. That without any evidence from the ministry of health in county government that the exhumation is safe, the court should not grant the orders.
4. Article 165 (3) (a) of the [Constitution](#) of Kenya provides:
- 3) Subject to clause (5), the High Court shall have—
 - (a) a) unlimited original jurisdiction in criminal and civil matters;
5. The applicant is therefore invoking this jurisdiction as the basis of the orders sought.
6. On the other hand, the respondent has argued that the [Public Health Act](#) has not been complied with. Section 146 of the Act provides:
- (1) Subject to the provisions of section 147, it shall not be lawful to exhume any body or the remains of any body which may have been interred in any authorized cemetery or in any other cemetery, burial ground or other place without a permit granted in manner hereinafter provided.
 - (2) Such permit shall be granted only to the legal personal representative or next of kin of the person buried, or to his or their duly authorized agent.



- (3) Such permit may be granted by the minister in respect of any body or the remains of any body interred in any cemetery or burial ground or any other place. (4) The permitting authority may prescribe such precautions as he may deem fit as the condition of the grant of such permit, and any person who exhumes any body or the remains of any body contrary to this Act, or who neglects to observe the precautions prescribed as the condition of the permit, shall be guilty of an offence and liable to a fine not exceeding one thousand five hundred shillings: provided that nothing herein contained shall be deemed to affect the right of a magistrate to order the exhumation of a body or the remains of any body for the purpose of holding an inquiry into the cause of death of any person.
7. It is evidently clear that the court is not the first port of call when exhumation is being applied for. The Act gives the mandate to the minister for the time being responsible for matters relating to health. The applicant cannot therefore invoke the jurisdiction of this court after ignoring the authorized office. The rationale is very simple; the minister has the personnel who may be able to ascertain that the proposed exhumation will not compromise the health of the public. However meritorious the reasons for the application may be, the applicant ought to apply for the permit to the relevant office.
8. The position would not have changed even if the applicant exhibited a copy of the confirmation of the grant owing to the failure to comply with the Public Health Act. This however does not mean that the applicant ought not to comply with section 55 of the Law of Succession Act. It provides:
1. No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71.
 2. The restriction on distribution under subsection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death whether the income arises in respect of a period wholly or partly before or after the date of death.
9. I therefore find that the application lacks merit and the same is dismissed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 20TH DAY OF DECEMBER, 2022

KIARIE WAWERU KIARIE

JUDGE

