



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**

Coram: Hon. D. K. Kemei - J

**CIVIL APPEAL NO. 44 OF 2020**

**MICHAEL WAMBUA MULWA.....1<sup>ST</sup> APPELLANT**

**ANDERSON MUINDE MULWA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**JACKSON MUISYO MULWA.....1<sup>ST</sup> RESPONDENT**

**JOHNSON MBENZA MULWA.....2<sup>ND</sup> RESPONDENT**

(Being an Appeal from the judgement and decree of Hon. K. Kenei (Resident magistrate) at the Machakos Chief Magistrate's Court in CMCC No. 137 of 2020 delivered on 11<sup>th</sup> June, 2020)

**BETWEEN**

**MICHAEL WAMBUA MULWA.....1<sup>ST</sup> PLAINTIFF**

**ANDERSON MUINDE MULWA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**JACKSON MUISYO MULWA.....1<sup>ST</sup> DEFENDANT**

**JOHNSON MBENZA MULWA.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. By an Amended Plaint dated 9<sup>th</sup> April, 2020, the Appellants herein instituted a suit against the Respondents in which they sought the following orders:

- i. An order directing the families of both the Appellants and the Respondents to mutually conduct burial proceedings and the actual interment.**
- ii. The Respondents be ordered to remove and/or exhume the remains of the deceased within 7 days of the court order under the supervision of the Public Heal Officer, Machakos and the OCS, Machakos Police Station.**
- iii. In default, the Public Health Officer Machakos with the assistance of the OCS, Machakos and the Area Chief do undertake the exhumation of the remains of the deceased and interment at his home where the 1<sup>st</sup> wife was buried.**
- iv. An order directing the parties to conduct a postmortem examination of the body of the deceased pending the actual burial.**
- v. An order directing that the deceased is interred on his matrimonial property where his 1<sup>st</sup> wife was buried.**

#### vi. Costs of this suit.

2. According to the Appellants, they are the sons to the deceased's 1<sup>st</sup> wife while the Respondents are also sons of the deceased's 2<sup>nd</sup> wife and therefore they are step-brothers.
3. It was pleaded that the deceased married the Appellants now deceased mother and settled at his ancestral home at Mikuni area before they purchased land known as Mavoko Town Block 3/2936 and constructed a matrimonial home where the appellants and siblings were born and raised. According to the Amended Complaint, prior to the deceased's death he enjoyed a cordial relationship with them and that the Respondents never informed them of the deceased's ailment, admission at Bristol Hospital and subsequent demise.
4. Following the death of the deceased, the 1<sup>st</sup> Appellant alleged that he was never informed of the burial preparations and the interment of the deceased on land reference number Machakos/Mua Hills/204 which is registered in the names of the 2<sup>nd</sup> Respondent herein. The Respondents filed a statement of defence dated 14/4/2020 in which it was pleaded that the deceased had expressed to the 1<sup>st</sup> Respondent his intention to be buried at Kyaani. It was pleaded that the 2<sup>nd</sup> Respondent being the eldest child in the family proceeded to inform the family members of the demise and that the deceased was buried at Kyaani as per his wishes which had been made and or communicated verbally on various instances to various persons when they visited the deceased at his home during the deceased's illness. It was averred that a meeting was subsequently held on 4<sup>th</sup> April, 2020 at about 1.42 pm attended by Bernard Mulwa, Jane Mueni and Nicholas Muthama from the eight children of the 1<sup>st</sup> wife's family, where it was agreed and recorded that the deceased would be buried at his desired place in Mua Hills/204 under a tree with a shade. In fulfilment of the deceased's wish and the said decision, the Respondents made burial plans and set the burial at the deceased's proposed resting place. He further added that during the preparation of the program, the Bernard Mutinda Mulwa 2<sup>nd</sup> son to the 1<sup>st</sup> wife, was appointed as the Chairman of the family though no minutes were availed to confirm the same. He averred that the three of his siblings were present at the meeting and that both the Appellants never attended the meeting nor did the deceased's siblings. According to the Respondents, the Appellants as every other family member were informed that the late John Mulwa Nzioki had been admitted at Bristol Park Hospital, Machakos but the Appellants refused to visit the deceased. It was finally averred that prior to the admission of the deceased in hospital, the Appellants were not in good terms with the deceased and for years, did not visit him in his home in Mua Hills location where he resided until his demise. The Respondents therefore prayed that the Appellant's claim be dismissed with costs.
5. The hearing started in earnest on the 14/5/2020 where the Appellants called 5 witnesses in support of their case. Equally, the respondents called five witnesses.
6. **PW1, Micheal Wambua**, the 1<sup>st</sup> Appellant herein, stated that he was the 1<sup>st</sup> born of the 1<sup>st</sup> wife that and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are his step-brothers. It was his evidence that the deceased was buried in Mua Hills/204 which was wrong as he ought to have been buried in Block 3/2936 where his mother was buried and where the deceased had made a matrimonial home thereon.
7. It was the 1<sup>st</sup> Appellant's evidence that he had earlier sued the deceased and the Respondents in the **ELC Case 73/2018** on learning that the deceased had transferred some properties to his step-brothers and thus sought to protect the interests of the 1<sup>st</sup> family. He stated that he successfully obtained orders restraining the sale or disposal of the properties namely Machakos/Mua Hills/204 and Mavoko Town Block 3/2936. He averred that he later filed an application for contempt of court as Mua Hills/ 204 had been transferred to the 2<sup>nd</sup> respondent while Block 3/2936 was transferred to one Nicholas Mulwa despite the existence of a restrain in transfer of suit properties.
8. In cross-examination, the 1<sup>st</sup> Appellant confirmed that the deceased had 2 wives namely Tabitha Kalekye Mulwa (1<sup>st</sup> wife-deceased) and Beth Mbula Mulwa (2<sup>nd</sup> wife-deceased) who had 8 and 7 children sired by the deceased respectively. He further confirmed that he had good relations with his father prior to his death and that he indeed sued him. He further confirmed that the deceased resided in Block 3/2936 when he was born and that in Kyaani he had a matrimonial home with the 2<sup>nd</sup> wife where he never visited the deceased. He added that he was not aware if the deceased had chosen a family chairman and that he had not consulted Nicholas to have the deceased buried at Block 3/2936. On re-examination, the 1<sup>st</sup> Appellant confirmed that he was not told of the deceased's expression to be buried in Mua Hills/204 otherwise then he would have written the same. He further confirmed that the case in **ELC 73/2018** is still pending.
9. **PW2, David Kiilu Mativo**, a resident at Mua Hills, wished to adopt his witness statement as examination in chief. He testified that he knew the 1<sup>st</sup> and 2<sup>nd</sup> Appellants. He also confirmed that he knew the 1<sup>st</sup> respondent though he may have not met the 2<sup>nd</sup> respondent and that the deceased was his neighbor. He further confirmed that he was aware the deceased had a 1<sup>st</sup> wife and that they had set up a home in Kaseve, and that he was buried at the home of his 2<sup>nd</sup> wife. It was his evidence that as an elder and chairman of Atumia Mathoome Council of Elders Machakos County, which was formed to take care of custom/culture and solve disputes touching on members. He testified that he is a member of the Kenya Council of Elders and that according to the Kamba Customary Law there is a problem in burying the deceased at the 2<sup>nd</sup> wife's homestead as such attracts unforeseen curses to the family.
10. On cross-examination, PW2 testified that he was not involved in the deceased's burial arrangements and that he was very much aware of the Government's directives during this Covid pandemic. He further testified that he was aware that there is no gathering of more than 15 people and that he did not know the number of children the deceased had. He was not aware of the deceased's wishes. On Cross examination by the court he noted that Kamba customs recognizes personal issues made by the deceased and respects them. On re-examination, he testified that customary law prevails unless the wishes made by the deceased are documented and counter signed by a legal officer. He further testified that he was not aware if the deceased had called for a meeting to show where he wished to be buried and that there was no customary law dictating where a polygamous man should reside.
11. **PW3, Muthoka Musinga**, Chairman of Amwei Clan, Kamba Clan and retired chief, testified that he knows the farm, the deceased and his 1<sup>st</sup> wife's homestead which is near his place. He further testified that he heard the deceased was buried at the 2<sup>nd</sup> wife's homestead and that under the Kamba customs when one has two wives and he dies he is supposed to be buried at the 1<sup>st</sup> wife's homestead. He also testified that he was close to the deceased and that the deceased resided at the 2<sup>nd</sup> wife's homestead. He further testified that the deceased was from

Anzu Clan and that the Kamba clans are different. On recall by the court, he testified that under the Kamba Customs a deceased can express his wishes as to where he wishes to be buried. On re-examination, he testified that Kamba Customs should be followed if the deceased's wishes go against it.

**12. PW4, Kingi Nzioki Nguyo**, a younger brother to the deceased testified that the deceased had 2 families and that he was not informed of the demise of his elder brother or when he was buried. He further testified that he did not attend the burial as he did not know of the death of his elder brother and that under custom if one has two wives then he is supposed to be buried at the 1<sup>st</sup> wife's homestead. On cross-examination, he testified that he knows that deceased has adult children who can arrange his burial. He stated that he was the Chairman of Mbaa Nzioki and that there is a difference with Mbaa Mulwa and that he related well with the deceased. He further testified that he had never gone to Kyaani to visit the deceased and that he could not have known his wishes. He stated that he had sued the deceased. On re-examination, he testified that Kamba Customs dictate that the burial of a man is done with an adult family and that arrangements are done by a sibling of the deceased in collaboration with family members. He added that the deceased was his elder brother and that he was not involved in burial plans. He added that he had sued the deceased because he had taken his land.

**13. PW5, Joseph Nguyo Mwiithiki**, a farmer and resident of Muthwani in Lukenya, wished to adopt his witness statement as examination in chief. He testified that under the Kamba custom he refers to the deceased as his father and that he was not involved in the burial arrangements. He further testified that under the Kamba custom if a person dies having 2 wives he is to be buried at the family of the 1<sup>st</sup> wife's homestead. On cross-examination, he testified that he does not know how many children the deceased had and that if a parent orders something and his children go against them then curses follow. He further testified that he was not aware of the burial announcement in the daily newspaper. On re-examination, he testified that under the Kamba custom one who is polygamous is buried at 1<sup>st</sup> wife's homestead and that the deceased could express where he wished to be buried and if he does so then he has to call people and tell them and reduce it into writing.

14. On their part the Respondents called 5 witnesses in support of their case.

**15. DW1, Johnson Mbenza Mulwa**, wished to adopt his witness statement as examination in chief. On cross-examination, he testified that he is the son of the deceased who died on 04/04/2020 at about 2.00 am and that they had a meeting at about 1.42 pm but the minutes did not indicate the venue of the meeting. He added that the deceased had 2 families and from the 1<sup>st</sup> family those who attended the meeting were; Bernard Mulwa, Jane Mueni and Nicholas Muthama. He went on to state that the 1<sup>st</sup> family has 8 children five of whom did not attend the meeting. He stated that the invitation was being done by the eldest brother and his siblings Jackson Kiingi but that Duncan Mutua did not attend the meeting. He confirmed that the deceased had noted that he wished to be buried at Machakos Mua Hills/204.

16. According to DW.I, he was not aware that the deceased's wishes ought to have been written down. He further testified that the parcel Mua Hills/204 is registered in his names and which was done in 2018. He stated that the case involving this parcel of land was determined and that the 1<sup>st</sup> Appellant was not to be involved in the land as the case was concluded.

17. In re-examination DW1 testified that 3 siblings from the 1<sup>st</sup> family were present and that the wife to Kiingi, Monica, was present during the burial meetings. He finally added that the deceased had expressed his wishes to be buried at Mua Hills/204 under shade of a certain tree in the homestead of the 2<sup>nd</sup> wife.

**18. DW2, Bernard Mutinda Mulwa**, adopted his witness statement and on cross examination testified that it's true the minutes does not indicate the place where the meeting took place. He confirmed having convened a meeting as the chairman of the family and did not have the necessary minutes appointing him. He further testified that Michael and Anderson did not attend the meeting, and so did the two deceased's brothers, Jackson Kiingi and Duncan Mutua. He maintained that the deceased had showed him where he wished to be buried on the 14<sup>th</sup> of February 2020.

**19. DW3, Nicholas Muthama Mulwa**, wished to adopt his witness statement as examination in chief and on cross-examination, he testified that he was born in the 1<sup>st</sup> family and that it is true from the 1<sup>st</sup> family only 3 siblings including himself attended the meeting on 4th April 2020, while the other four never attended. He stated that he did not have anything to show that they had been invited to the meeting and that the meeting was convened by Bernard as Chairman of the family. According to him, the deceased did not write a will and that he did not know if his wishes should have been reduced to writing. He added that the deceased was buried in Mua Hills/204 and which land is subject to a suit in which he is a 3<sup>rd</sup> Defendant. He further testified that he is aware of the court order in ELC 73/2018 and that they were fined Kshs. One Million for contempt in that matter. On re-examination, he testified that the initial homestead was at Kyaani before his mother moved to Mavoko Town Block 3/2936. According to him, his siblings were informed of the death of the deceased by Bernard and those who never came did not send representatives and that the Appellants never attended any of the convened meetings.

**20. DW4, Jane Mueni**, wished to adopt her witness statement as examination in chief and on cross examination, she testified that she was born in the 1<sup>st</sup> family. She stated that the meeting held on 4<sup>th</sup> April, 2020 was only attending by 3 siblings from the 1<sup>st</sup> family including herself. According to her, she was not present when her siblings were being informed of the meeting and that the deceased showed them where he wished to be buried in the Mua Hills/204 but did not have the documentation to that effect. On re-examination, she testified that they were born 8 children but that the first born passed on and that it's true that not all her siblings attended the meeting. She further testified that she never inquired if they had been invited to the meeting.

**21. DW5, Patrick Wambua Katilu**, wished to adopt his witness statement as examination in chief. He testified that he is aware that the deceased was buried at Mua Hill/204 and that the Appellants have sued over the area where the deceased was buried. He stated that deceased expressed his wishes to him on where he wished to be buried and that he was his best man when he married his 2<sup>nd</sup> wife. On cross examination, he testified that he was aware the deceased was admitted at Bristol Park Hospital though he failed to indicate the same in his statement but he added that he visited him at the hospital severally. On re-examination, he testified that the deceased had informed him in the presence of his children during a meeting that he wished to be buried next to his 2<sup>nd</sup> wife. He further testified that the deceased had a right

under the Kamba Customs to say where he wished to be buried and that the same must not be in writing.

22. The trial court eventually did not find merit in the appellants' case and dismissed it.

23. Dissatisfied with the said decision, the Appellants appealed to this court on the following grounds:-

**i. THAT the learned trial magistrate erred in law and fact in finding that the Appellants herein had not proved their case on a balance of probabilities.**

**ii. THAT the learned trial magistrate erred in law and in fact by establishing that the deceased had made wishes of his burial place despite overwhelming evidence against it.**

**iii. THAT the learned trial magistrate erred in law and fact by establishing that the deceased could be buried at his ancestral home or any of his properties and affirming that he was rightly buried on land known as Machakos Mua Hills/204.**

**iv. THAT the learned trial magistrate erred in law and in fact by establishing that the deceased was rightly buried on land known as Machakos Mua Hills/204 despite the land being registered in the name of the 2<sup>nd</sup> Respondent herein and also been the subject of active litigation.**

**v. THAT the learned trial magistrate erred in law and fact by failing to establish that the deceased ought it have been buried at his ancestral home.**

24. The Appellants sought for orders that this appeal be and is hereby allowed and that the judgement of Honourable Kenei (RM) delivered on 11<sup>th</sup> June, 2020, delivered at **Machakos law courts in CMCC No. 137 of 2020** and all consequential orders be and is hereby set aside. They also sought orders that the costs of this appeal be and are hereby awarded to the Appellants.

25. Parties canvassed the appeal by way of written submissions. Starting with the appellants, they sought reliance on the decision of the court in **Racheal Wambui Nganga & Another versus Rahab Wairimu Kamau (2020) eKLR** where it was held that:

**“As a first appellate court, this Court has the duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing conclusion from that analysis. This duty is captured by Section 78 of the Civil Procedure Act which espouses the role of a first appellate Court which is to “.....re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions”**

53. The Appellants also relied on **SAN VS GW (2020) eKLR** where the Court of Appeal unanimously held that:

**“In burial disputes, the two questions that will always arise are, who has the right to bury the deceased and the place of burial. Customary law has been held to be applicable law regulating burial disputes in Kenya.....But since customary law exists in almost all ethnic groups in Kenya with a homogeneous value system and the customs vary from one ethnic group to another means that the resolution of burial disputes will depend largely on the peculiar circumstances of each case.”**

54. The Appellants relied on the **Constitution of Kenya** in its preamble- **“we the people..... proud of our culture”**. The Constitution therefore, giving reverence to our cultural beliefs and diversity. Further relying on, **Article 44 (1)** that states that every person has a right to participate in the cultural life of their choices; **Article 45 (b)** that empowers parliament to make laws that support family and **Section 3 (2)** of the **Judicature Act** that identifies African customary law as a source of law.

55. It was submitted based on the above that the learned trial magistrate failed to regard the probative value of the Kamba Customary Law which this case was purely premised on. The Appellant relied on **Section 51(1)** of the **Evidence Act** that stipulated that **“ where the Court has to form an opinion as to the existence of any general custom or right, the opinions as to existence of such customs or right of person who would be likely to know of its existence if it existed are admissible.”**

56. It was submitted that during trial evidence was led in the form of written statements and orally during the hearing before the trial magistrate as to the wishes of the deceased and of pertinence on his wish in relation to his place of his interment upon his death. In addition to the foregoing, the Appellants and four other witness being PW1 to PW5 who are elders and experts in Kamba Customary Laws and traditions presented their evidence. They testified that wishes of the dead must be reduced in writing for the wishes to take precedent. The evidence of the elders was that a polygamous man under the Kamba Customary Law was to be buried with the 1<sup>st</sup> wife and at the homestead of the 1<sup>st</sup> wife or at his ancestral land which was not the case in this matter. According to the Appellants, during trial, during cross-examination the expert witness stated that he was not involved in any of the deceased's burial arrangements. According to the appellants, Respondents called their expert witnesses who did not corroborate any of their statements with any other evidence and It was therefore submitted that the Appellants proved that the wishes were indeed not made known to them on a balance of probability.

57. It was also contended that it is inconceivable for the trial magistrate to find that the evidence adduced by the Appellants as not sufficient, yet it is the appellants' submission that the witnesses who testified under oath as to the wishes by the deceased having made to them despite not having the same written down, offered insufficient evidence and as such the evidence adduced bears a lot of weight and ought to have been considered by the trial court. To the Appellants, the trial magistrate in arriving at the impugned decision failed to offer consideration to the foregoing and on that premise they urged this court to find that the position taken by the trial magistrate in dismissing the suit was not warranted and consequentially reverse the trial court's determination and substitute with this court's determination, that the

Appellant/plaintiffs proved their case on balance of probabilities, and are entitled to prayers that were sought in the Amended Pleat.

58. In this regard the Appellants relied on the case of *Johnstone Kassim Mumbo & 2 Others vs Billy Mbuvi Muumbo & Another* 92018) eKLR (Supra) where the Court held that:

**“The totality of the evidence is that it is one’s word against the other on the diverse statements that the deceased is alleged to have said with regard to his wishes and place of burial. Since this Court cannot conclusively determine what the deceased said to who about his wishes, the Court shall rely on Kamba Customary law.”**

59. Further reliance was placed on the case of *Martha Wanjiru Kimata & Another vs. Dorcas Wanjiru & Another* (2016) eKLR where the Court held that:

**“What law is applicable to burial disputes “it is now settled that where the issue of burial is to be decided by a Court of law, the Court relies on Customary Law to establish the place of burial..... The Law applicable to burial disputes for the time being is therefore customary law, since there is no statute law in place as yet.”**

60. According to the Appellants, whereas the Respondents claimed the deceased had expressed himself to members of the family that he wished to be interred on Machakos Mua Hills/204, the assertions were not supported by written evidence since if indeed the same was true the deceased would not have transferred the parcel of land wholly to Johnson Mbenza Mulwa. According to the Respondents, DW1 stated that the deceased had no written will and that he was not aware if the deceased wishes ought to have been written. He merely casually stated that the deceased showed family members where he preferred to be buried but this evidence falls short as it was not corroborated by all family members and that they did not even indicate the time and date when they allegedly met the deceased. It was therefore submitted that there was no convincing evidence that the deceased had left any will or compelling wish as to where his remains would be interred and therefore his remains ought to have been interred where he had set up his matrimonial home with the 1<sup>st</sup> wife and/or on the land where the ancestral home is situated pursuant to Kamba customs. The Appellants relied on the case of *MNH V. FHM* (2018) eKLR where the Court held that;

**“the question of what constitutes marital property is now settled in law under Section 6(1) of the Matrimonial Property Act No. 49 of 2013 that defines it as the matrimonial home(s); household goods or effects in the matrimonial home(s) or any other immovable or moveable property jointly owned and acquired during the subsistence of marriage.”**

According to the Appellants, the core issue that the trial magistrate failed to comprehend was that the issue at hand was not about the right person to bury the deceased but about the place where the deceased person should have been buried. It was their submission that the trial magistrate misdirected herself about the issues.

61. Lastly, on the talk about Covid-19 pandemic by the trial magistrate the Appellants relied on amongst others the case of *Joan Akoth Ajuang & Another vs. Micheal Owour Osodo the chief Ukwala Location& 3 others; Law Society of Kenya* (2020) eKLR where the Court further stated that;

**“the right to a decent burial, commensurate with the dignity of the individual, is recognized as a facet of the right to life guaranteed by Article 21 of the Constitution. There is, thus, no reason as to why an individual who dies during this period of crisis because of suspected/confirmed covid-19 infection would not be entitled to the facilities he/she would have otherwise been entitle to but for the crisis.”**

62. The Appellants finally submitted that this court has the powers to make just that which is unjust and by this meaning that the deceased herein be exhumed and the remains be buried in his ancestral home where all his children can visit his grave if they so wish. The court to find this appeal has merit and it is in the interest of justice that the body be exhumed and interred at his ancestral home at Mikuini and/or matrimonial home as provided under the Kamba Customary Law.

63. According to the Respondents, it is undeniable that this being a first appeal the court has the power to look at the evidence a fresh and re-evaluate it and to make its own conclusions but should take account of the fact that it has neither seen nor heard the witnesses and should make due allowances in this respect. They however, submitted that the evidence tendered on the deceased’s wishes regarding the place of his interment were convergent and therefore the court could clearly ascertain which of the parties were to be believed. The trial magistrate was therefore right when after evaluating the convergence and consistent evidence by the Respondent held that the deceased’s wishes on the place of his burial could be ascertained.

64. It was contended that the evidence tendered by the Appellants did not prove their case. They relied on section 107 (10) of the Evidence Act that provides that he who alleges must prove and the case of *Robert Ouma Njoga v Benjamin Osano Ondoro* (2016) eKLR where the Court held:

**“... that a general proposition is that the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue... and that the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless provided for by any law.”**

65. It was submitted that it is now settled law by court precedents that the wishes of the deceased’s place of burial must be followed and fully implemented as long as they are not inconsistent nor contrary to general law or policy as was clearly stipulated in that case of *SAN v. GW* (2020) eKLR.

66. It was submitted that the Appellants case that their father should be buried at his 1<sup>st</sup> matrimonial home in accordance with Kamba customs has not been proved. However, the important question that needs to be answered is whether the Appellants position is really what the Kamba Customary law provides. The Respondents relied on the case of **Johnstone Kassim Mumbo & 2 Others v. Mwinzi Muumbo & Another** where the Court held that:

**“Custom is not mandatory where the wishes of the deceased are clear.”**

This was the same position in the case of **Jacinta Nduku Masai v. Leonida Mueni Mutua & 4 others (2018) eKLR** where the Honourable Judge held that: **“the wishes of the deceased if established to have been expressed during his lifetime would take precedence over consideration.”**

67. It was the view of the respondents that the wishes of the deceased had been confirmed by the witnesses as to his preferred place of burial and that the said wishes did not go contrary to Kamba customs or any law or policy. The respondents urged the court to dismiss the appeal with costs.

68. I have considered the record of the lower court and the submissions of the parties in this appeal. The main issue for determination is whether the appellants’ case had been proved on balance of probabilities.

69. This being a first appellate court, its duty is to re-evaluate the evidence afresh and reach an independent conclusion as to whether to uphold the decision of the trial court as was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

**“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”**

70. Therefore, this court is under a duty to delve at some length into factual details and revisit the facts as presented before the trial court, analyse the same, evaluate it and arrive at an independent conclusion but always remembering, and giving allowance for it as the trial court had the advantage of hearing the parties.

71. However, in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** the Court of Appeal held that:

**“A member of an appellate court is not bound to accept the learned Judge’s findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”**

72. In this case, the trial court received evidence from two of the appellant’s witnesses (**pw2 and pw3**) as well as those of the respondents (**Dw5**) that a Kamba man can express his wishes as to his burial place and he can be buried in a property he previously owned prior to transferring the same to his son and the same wishes did not go against the African Kamba customary law. Similarly, the circumstances surrounding the expression of the said wishes were outlined by the witnesses particularly in light of the deceased’s ill-health. Accordingly, since the witnesses did go into the specifics of how and when the wishes of the deceased were made, and before whom, the court found itself able to believe that the deceased had made express wishes of his preferred place of burial. Indeed, it was agreed by a majority of the witnesses that the Kamba customs allow a deceased person to make a choice of his/her place of burial.

73. The court also noted that the said witnesses visited the deceased, their witness statements were the same setting in clear that a meeting was held by the deceased stipulating his burial wishes to them. I am persuaded that the deceased made an oral will as to where he wished to be buried before a majority of his children. The refusal by the appellants to visit the deceased at Kyaani points out that there is no way the Appellants would have known of the deceased’s wishes and in any case the making of his wishes by the deceased was not conditional upon the presence of the appellants since the said wishes only related to the deceased’s place of burial and not sharing of property. It transpired from the evidence that the appellants had filed a suit namely ELC 73 of 2018 over the dispute regarding land parcel number Mua Hills/204 where the deceased had been buried. It would appear to me that the genesis of the suit herein is to do with that particular land and not the burial per se. It is highly likely that the respondents action in burying the deceased on the land in question seemed to have stolen the thunder from the appellants as they had already filed a civil suit regarding the issue of the 2<sup>nd</sup> respondent’s ownership of the land. By burying the deceased on the land the appellants saw it as an attempt to legitimize the respondent’s ownership. The deceased being the owner of both lands was at liberty to decide where he wished to have his remains interred. The appellants have not shown what prejudice they will suffer if the deceased’s remains continue to remain on the particular parcel. The deceased will still remain as their father. It also transpired that the appellants had not been in good talking terms with the deceased and they did not even visit him at his home or hospital while he was ailing and hence the appellants’ new interest in the deceased seems to be not out of genuine sympathy towards him as their father.

74. The learned trial magistrate who heard and saw the demeanour of the witnesses captured the same in her judgement dated 11/6/2020. In **Sheldon Shadora vs. Stanley S. Shadora Civil Appeal No. 210 of 1995**, the Court of Appeal held that:

**“Although in a first appeal the Court is entitled to rehear the dispute, it must be remembered that the trial court had the advantage of hearing and seeing the witnesses testify before him...A Court of Appeal will not normally interfere with the**

**finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did...An appellate court will be slow to interfere with a Judge's findings of fact based on his assessment of the credibility and demeanour of a witness who has given evidence before him."**

75. The trial magistrate duly saw the demeanour of the witnesses and came to the conclusion that the appellants' witnesses were not truthful. It is my finding that the evidence adduced by the appellants did not pass muster since their two witnesses (PW2 and PW3) who are clan elders in their own right admitted on cross examination that the Kamba customs recognizes personal choices made by a deceased person and that deceased's wishes take precedence over Kamba customs. Nothing has been placed before me in this appeal to convince me that the said findings of fact were based on no evidence or misapprehension of evidence or that the learned trial magistrate demonstrably acted on wrong principles in reaching the findings she did. There is therefore no justification to warrant interfering with the learned magistrate's findings on fact.

76. As was held by the Court of Appeal in **Mohammed Mahmoud Jabane vs. Highstone Butty Tongoi Olenja Civil Appeal No. 2 of 1986 [1986] KLR 661; Vol. 1 KAR 982; [1986-1989] EA 183:**

**"Unless it is shown that the learned Judge took into account facts or factors which he should not have taken into account, or that he failed to take into account matters which he should have taken into account, that he misapprehended the effect of the evidence, or that he demonstrably acted on wrong principles in making his findings, the appellate court will not interfere with the findings of facts."**

77. Having found the evidence of the Appellants' unsatisfactory to prove that in this case Kamba Customary law takes precedent over the deceased's wishes, the matter becomes akin to what the court dealt with in the case of **Jacinta Nduku Masai vs. Leonida Mueni Mutua & 4 Others (2018) eKLR** the court held that:

**"The main issues for consideration in a burial dispute is the wishes of the deceased if any had been expressed and the kind of relationship the contestants had with the deceased..."**

78. It is not in doubt that both wives of the deceased predeceased him and that prior to his death he had been residing on parcel number Mua Hills/204 and hence his decision to be buried thereon cannot be said to have been an idea of somebody else other than him. If the deceased had made his wishes known, then the respondents had to fulfil them to the letter. The appellants claim that they were not involved in the funeral arrangements and now want a reburial sounds to be in bad taste in view of the fact that they had not related well with the deceased prior to his death. The appellants still have opportunity to participate in future family memorial programs for their departed parents. Exhuming the remains of the deceased will be in bad taste and will traumatize members of the family of the deceased. They should leave the deceased to rest in peace.

79. Although the Appellants heavily relied on the Law of Succession Act, in **James Apeli & Enoka Olasi vs. Priscilla Buluku Civil Appeal No. 12 of 1979 [1985] KLR 777**, it was held by the Court of Appeal that:

**"There can be no property in a dead body. A person cannot dispose of his body by will. After death the custody and possession of the body belong to the executors until it is buried... If the deceased had left directions as to the disposal of his body though these are not legally binding on his personal representative, effect should be given to his wishes as far as that is possible."**

80. That was the same position in **Jacinta Nduku Masai vs. Leonida Mueni Mutua & 4 Others [2018] eKLR** where it was held that:

**"It is trite law that there cannot be property in a dead body and a person cannot dispose his body by will, but it should be noted that courts have long held that the wishes of the deceased, though not binding must so far as practicable be given effect, so long the same is not contrary to the general law or policy."**

81. In this case it has not been contended that Kamba Customary Law relating to burial is repugnant to justice and morality. It has come out clearly in the evidence of the witnesses that a Kamba man can express his wishes as to his burial place. Even though the appellants maintain that the remains of the deceased ought not to have been interred on the said land that has been registered in names of the 2<sup>nd</sup> respondent, it is instructive that even the other remaining land at Kaseve (Mavoko Town Block3/2936) is already registered to one of the sons Nicholas Muthama Mulwa from the first wife and therefore either way there was no free parcel in name of the deceased for purposes of burial and that if the deceased chose to be buried on the Mua Hills plot then there is no prejudice suffered by the appellants. I find that the appellants have not established their case on balance of probabilities. The finding by the learned trial was therefore sound and I see no reason to disturb it.

82. In the result, I find no merit in the Appellant's appeal. The same is dismissed with no order as to costs.

It is so ordered.

**DATED AND DELIVERED AT MACHAKOS THIS 30<sup>TH</sup> DAY OF JUNE, 2021**

**D. K. KEMEI**

**JUDGE**