



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 178 OF 2018

1. JOHN MUKIRI MBAI.....1ST PLAINTIFF

2. MIKE KARIUKI MBAI.....2ND PLAINTIFF

VERSUS

GLADWELL WANJIKU GATUMA.....DEFENDANT

J U D G M E N T

1. John Mukiri Mbai and Mike Kariuki Mbai, the 1st and 2nd Plaintiffs herein, filed an action against Gladwell Wanjiku Gatuma, the Defendant herein vide the Plaint dated 27th July, 2018.

2. In the aforesaid plaint, the Plaintiffs sought for judgment in the following terms: -

a) A declaration that the defendant is not entitled to inter the body of the late Peter Gatuma Mbai without consultation and/or in agreement with the Plaintiffs and the family.

b) That the Plaintiffs are entitled to inter the body of the deceased, peter Gatuma Mbai in accordance with decision of the family under the Kikuyu Customary Law.

c) That the Defendant/Respondents by herself, her servants and/or agents or any other person acting on the Defendant/Respondents instructions be restrained by a permanent injunction from taking, or interring or in any other manner removing out of hospital the body of peter Gatuma Mbai (now deceased) that is presently lying at Nairobi Women Hospital (Adams) Nairobi.

d) Costs of the suit.

3. When served with the summons to enter appearance together with the plaint, the Defendant entered appearance and filed a defense to deny the Plaintiffs' claim. The Defendant also counter-claimed against the Plaintiffs and sought for judgment in the following terms: -

a) General damages.

b) A declaration that the Defendant is entitled to inter the remains of her Deceased husband.

c) A declaration that the Plaintiffs by themselves, servants or agents should not interfere with the burial.

d) A declaration that the Plaintiffs do meet the Mortuary expenses that have accumulated from the 27th of July, 2018 at the Nairobi Women's Hospital to the date of conclusion of this suit.

e) Any other relief that the court may deem fit.

4. The Plaintiffs further filed a reply to defence and a defence to the counter-claim.

5. In view of the urgency of the dispute, the hearing of this matter was fast tracked. The Plaintiffs' case is supported by the evidence of five (5) witnesses while the Defendant tendered the evidence of three (3) witnesses.

6. At the close of evidence, learned counsels appearing in the matter were invited to file and exchange written submissions.

7. The Plaintiffs' case is buttressed by the evidence of John Mukiri Mbai (PW 1), Loise Wanjiku Muria (PW 2), James Muchene Gatuma (PW 3), Dr. Peter Muriuki Ndegwa (PW 4) and Dr. Samuel Njehia Nduati (PW 5).
8. PW 1 told this court that Peter Gatuma Mbai, deceased was his brother. He further stated that the deceased was married to Gladwell Wanjiku Gatuma, the defendant, under the Kikuyu Customary law and rites and that they cohabited together until the time of his death.
9. PW 1 also stated before this court that on 5th July, 2018, the deceased was admitted to MP Shah Hospital for an unknown ailment but was later transferred to a local dispensary at Uthiru called St. Peters ACK. He averred that he could not comprehend why the Defendant refused to take the deceased for proper medical treatment yet he was in a position to meet his medical expenses.
10. PW 1 also stated that he was advised by MP Shah Hospital that the deceased's hand and head showed injuries from the x-rays taken which needed urgent medical attention thus he together with other family members were prompted to take the deceased to Nairobi Women's Hospital (Hurligham) on the same day i.e. 5th July, 2018 where he was admitted for specialized treatment.
11. PW 1 further alleged that on 6th July, 2018 the Defendant mysteriously removed the deceased from the aforesaid hospital and took him to St. Peter's ACK, Uthiru Dispensary, a facility without proper medical facilities. PW 1 said that on 8th July, 2018, he together with other relatives forcefully removed the deceased for the aforesaid dispensary back to Nairobi Women's Hospital (Hurligham) and was later transferred by the Hospital to its Adams Branch.
12. PW 1 also alleged that through the period, the defendant did not want any relative even to go near the deceased and explain to any person who visited the deceased in hospital that the deceased was suffering from alcoholism and related complications. He stated that the deceased passed away on 16th July, 2018 while undergoing treatment at Nairobi Women's Hospital, Adams Branch. PW 1 further averred that Dr. Ndegwa (PW 4), a Government Pathologist told him and other relatives to make a report to the police before he could perform an autopsy on the deceased's body because there were physical marks of assault hence they booked a report at Kabete Police Station on 18th July, 2018.
13. PW 1 further stated that the postmortem was done on 19th July, 2018 in which the pathologist stated that the deceased died as a result of injuries caused by being hit by a blunt object.
14. Dr. Ndegwa (PW 4) testified and produced a copy of the postmortem report he prepared on the deceased's body. PW 4 also stated that the deceased suffered a fracture of the left side proximal humerus and some injuries on the head and formed the opinion that the cause of death was aspiration of blood in the airways due to musculoskeletal injuries inflicted by a blunt object. PW 4 confirmed that when he noticed something unusual on the deceased's body, he asked PW 1 and the other relatives to involve the police.
15. PW 1 also alleged that on 26th July, 2018, the Defendant attempted to remove the body from the mortuary for burial without involving the deceased's relatives and were therefore prompted to file this suit.
16. It is the opinion of PW 1 that the deceased's death occurred under suspicious circumstances and therefore, the Plaintiffs have legitimate interest to ensure that justice is done to unravel the truth.
17. The Plaintiffs further aver that they suspect that the Defendant played a role in it and hence it is necessary to allow the police to conclude the taking of samples from the deceased's body before the deceased can be buried.
18. PW 1 also stated that under the Kikuyu Customary Law, the burial of the deceased is not done exclusively by the spouse but the other family members must be involved in preparation.
19. Loice Muria (PW 2), the deceased's sister, gave near similar evidence like that given by PW 1. She stated that the Defendant told her that the deceased had a broken hand but she was shocked by the revelation because there was no explanation as to when the deceased sustained such an injury. PW 2 claimed that the Defendant did not reveal to the hospital about the broken hand and that even the medical records show that the deceased was only being treated for alcohol withdrawal syndrome. PW 2 alleged that the family became suspicious of the Defendant when it became apparent that there was something she was hiding from them and from the hospital over the deceased's ailment.
20. PW 2 averred that the family did not wish to file this case but they were forced to do so when the Defendant tried to remove the deceased's body from the mortuary for burial on 26th July, 2018 without involving them. She asked this court to make an order to involve the family in the burial arrangements of the deceased.
21. James Muchene Gatuma (PW 3), an uncle to the deceased, testified and gave a similar account to that of PW 1 and PW 2. Both PW 1, PW 2 and PW 3 stated that the family stopped visiting the Defendant's house after the post mortem report revealed that there was foul play in the manner the deceased met his death.
22. The trio concur that it is not possible for the family members to have a joint meeting with the Defendant to plan for the burial before the issue surrounding the deceased's death is resolved.
23. Dr. Samuel Njehia (PW 5) testified before this court and presented the past medical report of the deceased. PW 5 said that he noted that when the deceased was admitted to Nairobi Women's Hospital, he had a swelling on the left upper limb. He said he did not document any fractures. PW 5 said that it was reported that the deceased had fallen down and that his death was not suspicious.
24. The Defendant's defense is supported by the evidence of three witnesses namely, Gladwell Gatuma (DW 1), Augustine Njeru (DW2) and

George Gitau Gatuma (PW 3).

25. Gladwell Wanjiku Gatuma (DW 1) stated that her husband, the deceased left their home on 3rd July, 2018 in the morning and came back late at night while drunk as he has done regularly. She said that the deceased complained that night that he was not feeling well but she did not see the need of rushing him to hospital.

26. DW 1 stated that on 4th July, 2017, she rushed the deceased to St. Peters Rapha Hospital when she noticed that his condition was worsening and was hallucinating. The deceased is said to have been examined and found to be suffering from High Blood Pressure. He was treated and taken back home.

27. It is also her evidence that on 5th July, 2018, she left the deceased resting at home and when she came back, she found him lying on the floor while convulsing. She said she called a nurse from St Peters Rapha Hospital to treat him and further informed the family members of the deceased's conditions. The family members are said to have insisted that the deceased be taken to MP Shah Hospital.

28. DW 1 also stated that she had nothing to hide and that is why she informed the family members. DW 1 further averred that the deceased could not be admitted at MP Shah Hospital because she was unable to raise the required deposit of Ksh.450,000/-, therefore, he was taken back to St. Peters Rapha and was on 8th July, 08 re-admitted to Nairobi Women's Hospital upon DW 1 raising the required deposit of Ksh.100,000/-

29. DW 1 denied the allegation that she restricted the Plaintiffs and the deceased's relatives from accessing him in hospital. She said she was not opposed to the postmortem being done. DW 1 said she was interrogated and found not culpable by the police. She said that when the deceased passed on, she expected the Plaintiffs and other relatives to visit her home for burial arrangements but they refused to do so.

30. DW 1 claimed that Mike Kariuki Mbai told her to clear the hospital bill and promised to show her the burial site.

31. DW 1 denied the allegation that she wanted to secretly bury her husband on 27th July, 2018. She said that she has been willing all along to involve the Plaintiffs in the deceased's funeral arrangements but they are unco-operative.

32. DW 1 alleged that the Plaintiffs were motivated to file this suit by vested interest they have over the properties the deceased used to manage and not the deceased's body nor cause of death. She was emphatic no burial arrangements can be complete without her participation.

33. DW 1 pointed out that since the deceased's body samples have been taken from the deceased's body she should be allowed to bury her husband.

34. Augustine Njeru (DW 2) stated that he found the deceased convulsing when he visited the deceased's home.

35. George Gitau Gatuma (DW 3), the Deceased's cousin, expressly stated in his evidence that he does not relate well with PW 1 over a land dispute which arose in 2005. DW 3 stated that no one denied the deceased's relatives access to the deceased while admitted in hospital and while at home.

36. DW 3 disclosed that he together with DW 1 had planned to have the deceased's body buried on 27th July, 2018. DW 3 told this court to make an order releasing the deceased's body to Gladwell Wanjiku Gatuma for burial.

37. At the close of the evidence, learned counsels appearing in this matter were invited to file and exchange written submissions. Having considered the evidence and the rival submissions, the following issues arose for the determination of this court:

i) Who between the Plaintiffs and the Defendant should bury the deceased's body?

ii) Whether or not it is appropriate to issue and maintain the interim orders.

iii) What are the appropriate orders to issue in this dispute?

38. On the first issue as to who between the Plaintiffs and the Defendant should bury the deceased's body, the parties to this dispute are in agreement that the deceased's burial is under the Kikuyu Customary law and rites.

39. It is not also in dispute that the late Peter Gatuma Mbai and the Defendant were married under the Kikuyu Customary Law.

40. The Plaintiffs have beseeched this court to *inter alia* make a declaration that the Defendant is not entitled to bury the deceased's body without consulting them and or without their concurrence and that of the family.

41. The Plaintiffs have further argued they are entitled, under the Kikuyu Customary Law to inter the body of the deceased in accordance with the decision of the family.

42. The question as to who is entitled to bury the deceased's body under the Kikuyu Customs was answered by this court in the case of **Njoroge Vs Njoroge & Another [2004] 1 KLR 611** in which **Justice Ojwang** (as he then was) held *inter alia* that: -

“Kikuyu Custom, the basis of which the applicant founded her claim to marital status, was precisely what would most decidedly deny her claims to the body of the deceased. It was not contended that under Kikuyu Customary law today, the responsibility for the burial of a man fall in the first place on his eldest son and on the brothers of the deceased.”

43. I have already enumerated the sort of orders the Defendant sought in her counter-claim. She specifically asked this court to declare that she is entitled to inter the remains of the deceased and also asked this court to bar the Plaintiffs from interfering with her burial arrangements of her deceased husband.

44. In the case of **Samuel Mungai Mucheru & 3 Others Vs Anne Nyathira [2014] eKLR**, Musyoka J, held *inter alia*, that: -

“Kikuyu Custom on who should bury and where the deceased should be buried is notorious. It is the responsibility of the clan or the brothers and adult sons of the deceased to bury him....”

45. It is abundantly clear that under the Kikuyu Customs, it is the responsibility of the clan, the brothers of the deceased and the adult sons of the deceased to inter the deceased’s body. It must be made clear at this juncture that the widow is not barred by the Kikuyu customs from participating in the preparation of the burial and in the eventual interment of the deceased’s remains.

46. The Kikuyu Customary Law specifically placed the responsibility to bury on the persons alluded hereinabove.

47. A careful consideration of the evidence presented by the Plaintiffs is to the effect that the deceased’s body should not be buried until the circumstances leading to his death is conclusively investigated.

48. It has come out from the evidence received so far that an autopsy has already been done on the deceased’s body and the postmortem results have been released to the parties.

49. It is apparent from the evidence that some body parts and tissues were taken to the Government Chemist for further tests and analysis.

50. The Plaintiffs had initially sought for the burial to be stopped until the autopsy was done and the body tissues were taken.

51. It is now clear that the injunctive orders sought on the basis of the above stated reasons is no longer tenable.

52. In the end, I am satisfied that the Plaintiffs are favoured by the Kikuyu Customary law as against the Defendant to bury the deceased’s body.

53. In the process of answering the first issue, the second issue was answered and therefore I proceed to consider the third issue which is in respect of the question as to the appropriate orders which should issue.

54. Both the Plaintiffs and the Defendant have prayed for costs of the suit and counter-claim. This is a dispute which involves family members.

55. In the circumstances of this case, a fair order on costs is to issue which I hereby make is to direct that each party should meet its own costs.

56. In the end, I enter judgment in favour of the Plaintiffs and against the Defendant with the result that the following orders are issued: -

a) A declaration that the Defendant is not entitled to inter the body of the late Peter Gatuma Mbai without consulting and or in agreement with the Plaintiffs and the family.

b) That the Plaintiffs are entitled to inter the body of Peter Gatuma Mbai, deceased in accordance with Kikuyu Customary Law.

c) The Defendant’s Counter-claim is dismissed save that the Plaintiffs should settle the mortuary expenses which accrued from 27th July, 2018 up to date.

d) The order for injunction is refused.

e) Each party to meet his or her own costs of the suit.

Dated, signed and delivered in Nairobi this 21st day of September, 2018.

.....

J K SERGON

JUDGE

In the presence of:-

..... *for the Plaintiffs*

..... *for the Defendant*