



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA. NO. 139 OF 2018

JACINTA NDUKU MASAI APPELLANT

-VERSUS-

LEONIDA MUENI MUTUA 1ST RESPONDENT

DANIEL MUSYOKA MUTUA 2ND RESPONDENT

JOHN MAKAU MUTUA 3RD RESPONDENT

PHILIP MULI MUTUA 4TH RESPONDENT

DAVID MUENDO MUTUA 5TH RESPONDENT

JUDGMENT

INTRODUCTION

1. By a plaint dated 14/06/2018, the Respondents lodged Makueni SPMCC 71/2018 seeking the orders be allowed or body of deceased be released to them to inter it at deceased rural home in Kambu.
2. The Respondents were ex-wife (1st Respondent) and children (Respondent 2-5) of the deceased Anthony Mutua Nzioka who had died in a Road Traffic Accident.
3. The Defendant lodged defense and later amended same. It contained a counter claim.
4. She averred that she was the solely lawfully married wife to the deceased thus entitled to bury his remains at his ancestral home in Muisuni at Kangundo.
5. Thus she sought order for the body to be released to her for burial at the aforesaid place *inter alia*.
6. She also prayed in counter claim **THAT:-**
 - a) **An order allowing and/or releasing the body of the deceased to the Defendant for burial at his ancestral home in Muisuni Sub-Location at Kangundo.**
 - b) **An order barring the Plaintiffs whether by themselves, their agents and/or servants from interfering with the burial arrangements and the burial ceremony to be conducted by the Defendant.**
 - c) **An order directing the Plaintiffs to pay the mortuary preservation fees for the period of this suit.**
 - d) **Costs of the suit and counter claim.**
7. The matter was first before Hon. Otieno J. Resident Magistrate where she made orders on 01/08/2018 and 22/08/2018 which aggrieved the Appellants. Thus lodged HCA 57/2018.
8. The matter later moved to Hon. J. Mwaniki Senior Resident Magistrate who heard and determined the matter and the Appellant was aggrieved and thus filed HCCA.139 of 2018.

9. The two appeals have thus been consolidated to be heard together and a single Judgment to be rendered.

10. In the first appeal, the grounds were:-

- 1) **THAT** the learned magistrate erred in law and fact in failing to give a mutually convenient date for hearing when she granted an adjournment on 1st August, 2018.
- 2) **THAT** the learned magistrate erred in fact and in law when she refused to grant the Appellant an adjournment on 16th August, 2018.
- 3) **THAT** the learned magistrate erred in law and fact in failing to consider the convenient dates suggested in a letter dated 31st July, 2018 addressed to the Honourable Court.
- 4) **THAT** the learned magistrate erred in fact and law in fixing the matter for hearing on 21st August, 2018 a date not convenient to the Appellant's advocate.
- 5) **THAT** the learned magistrate erred in fact and law in proceeding to give an alternative date without consulting the parties for a convenient date as required by rules of practice
- 6) **THAT** the learned magistrate erred in law and in fact in directing that the matter proceed as a part heard matter despite there being a request for an adjournment by counsel for the Appellant to another convenient date.
- 7) **THAT** the learned magistrate erred in law and in fact by refusing to grant the Appellant audience before the court while the Appellant was present for the reason that she had an advocate on record.
- 8) **THAT** the learned magistrate erred in law and in fact when she failed to give a chance to the Appellant to choose whether or not to represent herself in the absence of the advocate.
- 9) **THAT** the learned magistrate erred in law and fact in adjourning the matter after hearing the Respondent's case to a date not convenient to the Appellant or her advocate.
- 10) **THAT** the learned magistrate erred in fact and law in failing to take into account the Appellant's right to fair trial.
- 11) **THAT** the learned magistrate erred in fact and law in failing to take into account the Appellant's rights to have her advocate present when the matter came up for hearing.
- 12) **THAT** the learned magistrate erred in law and in fact in determining the Appellant's applications date 13th August 2018 and 20th August 2018 summarily without giving the Appellant advocate a chance to argue them.
- 13) **THAT** the learned magistrate erred in law and in fact when she totally disregarded the rules of natural justice as concerns the Defendant herein more so her right to representation by a counsel of her choice.
- 14) **THAT** the learned magistrate erred in law and in fact when she relied on extraneous matters to arrive at her rulings.

11. On second appeal, the grounds are:-

- 1) **THAT** the learned magistrate erred in law and fact in failing to find that the Appellant was the one closest to the deceased.
- 2) **THAT** the learned magistrate erred in fact and in law when he failed to recognize that the Appellant being a widow to the deceased had every entitlement to bury her deceased husband.
- 3) **THAT** the learned magistrate erred in law and fact in failing to consider the fact that the deceased had already legally divorced the 1st Plaintiff and left the matrimonial home at Kambu.
- 4) **THAT** the learned magistrate erred in fact and law in giving the Respondents custody of the deceased body for burial at Kambu against the deceased's wishes.
- 5) **THAT** the learned magistrate erred in law and fact by failing to take into account the Appellants legal marriage to the deceased in arriving at his decision.
- 6) **THAT** the learned magistrate erred in law and fact when he failed to make a finding about which Respondents had proved their case against the Appellants.
- 7) **THAT** the learned magistrate erred in law and fact when he took into account extraneous matters to reach at his decision.

8) **THAT** the learned magistrate erred in law and fact when he failed to give reasons for his judgment.

9) **THAT** the learned magistrate erred in law and fact the law and precedents when he failed to take into account the existing statutes and case law applicable to the circumstances of the case before him.

10) **THAT** the learned magistrate erred in law and fact when he decided the whole case against the weight of the evidence.

12. Matter came for directions and the parties agreed to canvass appeal via submissions which they filed and exchanged.

APPELLANTS SUBMISSIONS

13. The main issues in Appellants submissions are:-

a) *Duty of the first court on appeal.*

b) *Whether the trial magistrate applied the law correctly in making his judgment?*

c) *Whether the trial magistrate erred in ordering the deceased body be released to the Respondents for burial at Kambu?*

d) *What orders should this court make?*

14. It is trite law that the duty of the court of appeal is to re-evaluate the evidence presented before the trial court before it makes a determination on the appeal.

15. In the case of **Abok James Odera T/A A. J. Odera & Associates –Vs- John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR** the court of appeal held with regard to the duty of the first appellate court that:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”

Whether the Trial Magistrate applied the law correctly in making his judgment.

16. The trial court is accused of:-

i. *Failure to adhere to stare decisis.*

ii. *Failure to make a determination on which of the Respondents had proved their case.*

iii. *Failure to make a determination that the Appellant was the only legal wife and widow.*

iv. *Failure to decide on the legality of her marriage to the deceased.*

v. *Failure to give reasons for judgment.*

vi. *Failure to consider the proximity of the Appellant and the Respondents to the deceased.*

17. The principle of stare decisis requires that, although not bound to do so, the court should follow a decision of a judge of equal jurisdiction unless the decision appears to be clearly wrong.

18. In its vertical application, a court is bound by the decisions of a court superior to it. It is desired for the sake of certainty and consistency that the court does not deviate from decisions of the courts of a higher rank and as such those decisions bind the court.

19. In **JASBIR Singh Rai & 3 Others –Vs- Tarlochan Singh & 4 Others, (2013) eKLR**, the Supreme Court asserted that the rule of precedent promotes predictability, diminishes arbitrariness, and enhances fairness, by treating all cases alike, the doctrine of stare decisis holds that decisions of a higher court, unless distinguished or overruled, bear the quality of law, and bind all lower courts in similar or like case.

20. Further in espousing on the importance of the principle of stare decisis, **Njoki Ndungu, SCJ** in her concurring opinion in **Kidero & 5 Others –Vs- Waititu And Others, Supreme Court Petition No.18 of 2014** (consolidated with petition no. 20 of 2014), made the following opposite remarks.

“The principle of stare decisis in Kenya unlike other jurisdictions is a constitutional requirement aimed at enhancing certainty and predictability in the legal system.”

21. It is trite that a lower court should follow the decisions of a court higher than it within the vertical application. However a court can only shift from the principle of *stare decisis* only in the following instances:-

- a) ***Where there are conflicting previous decisions of the court.***
- b) ***The previous decision is inconsistent with a decision of another court binding on the court.***
- c) ***The previous decision was given per incuriam.***

22. The learned magistrate's disregard of the doctrine of *stare decisis* was not justified nor based on any of the exceptions to the rule.

23. The Trial Magistrate was bound by the previous decisions of the High Court and the Court of Appeal some of which were referred to in the Appellant's submissions.

24. The failure by the trial magistrate to adhere to this noble principle and to give reasons as to the failure was a shift from the constitutional requirement as to enhancing certainty and the predictability in the legal system.

Failure to make a determination on which of the Respondents had proved their case.

25. It is trite law that a person who presents their case for determination before a court of law must present evidence in support of that case lest it fails for want of prosecution or lack of evidence.

26. The learned magistrate in his judgment failed to appreciate that there were Respondents who had not substantiated their case against the Appellant which subsequently rendered the case by those Respondents being the 1st, 2nd and 4th to have failed at the first instance for want of prosecution and/or lack of evidence to support the pleadings as against the Appellant.

27. In **Trust Bank –Vs- Paramount Universal Bank Limited & 2 Others Nairobi HCC. No.1243/01 (2009) eKLR** it was held:-

“It is trite that where a party fails to call evidence in support of its case the party’s pleadings remain mere statements of facts since in so doing the party fails to substantiate its pleadings.”

28. It is quite clear from the evidence presented by the Respondents before the trial court that the 1st, 2nd and 4th Respondents had not supported their case against the Appellant as they had not given any authority to the 3rd and 5th Respondents to appear, plead or act on their behalf but only gave an authority to sign documents.

29. The Honourable Magistrate was by law required to in the first instance make a determination of the case as only between the 3rd and 5th Respondents and the Appellant which he failed in by making a blanket determination of the case as between all the Respondents against the Appellant yet some Respondents had never testified nor presented evidence in support of their claim against the Appellant.

30. This error of the misapplication of the law on the part of the Hon. Magistrate greatly prejudiced the Appellant as it meant that her case was being decided against the case of all the Respondents including those who had not led evidence to support their case and that the court was proceeding to apply evidence which had not been led by the 1st, 2nd and 4th Respondents in support of their case.

Failure to make a determination that the Appellant was the only legal wife and widow.

31. The Marriage Act in section 16 provides *inter alia* that a marriage registered under the Act subsists until it is determined by a divorce decree.

32. The marriage between the 1st Respondent and the deceased had been determined by a divorce decree issued in Divorce Cause No. 2 of 2016 at The Principal Magistrate's Court at Makindu. The 1st Respondent's marriage to the deceased had been determined in 2016 by the divorce decree and as such she could not have regarded as a wife nor a widow to the deceased.

33. The learned magistrate in his judgment at page J3 the last paragraph stated that ***“the 1st Plaintiff and the Defendant are alleged to be the deceased's wives ...”***

34. However he did not proceed to make a determination as to who was the current legal wife and widow and taking into account that the issue of the Appellant's marriage to the deceased was in contention and being challenged by the Respondents, it would have been prudent for the trial magistrate to proceed to make such a determination as it was a basis upon which it would have decided on who had the supervening right to bury the deceased.

35. It was the duty of the trial court to determine on all matters which were of importance and of influential capacity in the matter at hand in making a final determination of the suit against the Respondents and the Appellant.

36. That is an error of law and of fact as the learned magistrate failed to determine on the validity of the marriage of the 1st Respondent and the deceased as well as that of the Appellant and the deceased and hence they submits that he could not have been correctly directed in making a final determination without first making a determination on the issue of the marriage.

Failure to decide on the legality of her marriage to the deceased.

37. The trial magistrate in failing to make a determination that the Appellant was the only legal wife also failed to make a determination that theirs was a legal marriage.
38. This determination would in effect give the trial magistrate a clear mind in deciding on who was to bury the deceased. In all burial dispute matters the issue of marriage and its legality become central.
39. The court must in deciding whether the deceased was married decide upon the legality of the marriage alleged to have existed between the deceased and the surviving spouse so to say.
40. The learned magistrate did not in his judgment render a decision on the legality of the marriage between the Appellant and the deceased.
41. This prejudiced the Appellant as her rights as a surviving spouse which have long been held to supersede those of the relatives of the deceased in such matters were being ignored and not taken into account because the court did not decide on the marriage and its legality.

Failure to give reasons for judgment.

42. It is trite law that every judgment of a court of law in which a suit is defended must include the reasons as to why the judgment is how it is.
43. Order 21 Rule 4 provides;

Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

44. The operative word in this provision is SHALL. It means that the judgment must contain the reasons for the determination made therein failure to which it would be a defective judgment and hence capable of being set aside, the learned magistrate did not give reasons for his judgment nor did he base it on any law nor precedent. This provision gives no room for discretion nor choice. The judicial officer MUST give reasons for their decision.
45. Courts are courts of law and as such they are supposed to follow the law. The law as to drafting and preparing of judgments is very clear and specific as to its containing the reasons for the conclusions and determination reached by the judicial officer.
46. It thus presupposes that in every judgment reasons must be given as to why that decision has been reached by the judicial officer. Where it is found that there were no reasons given as to why the decision made by the judicial officer was reached upon, then that decision must be relooked into.
47. No such reasons have been given in the judgment delivered on 19th September 2018 by Hon. J. Mwaniki. As such the judgment as delivered does not adhere to the legal requirements of Order 21 Rule 4 and as such defective.
48. Another element found in Rule 4 of Order 21 is that a judgment must contain the points for determination. The judgment delivered by the Honourable magistrate on 19th September 2019 did not state the points upon which the learned magistrate was proceeding to determine upon. This is despite there being some issues for determination raised by the Appellant in her lower courts submissions which in all fairness required to be decided upon.
49. The judgment violated this cardinal rule of the civil procedure rules, 2010 warranting an interference by this Honourable Court.

Failure to consider the proximity of the Appellant and the Respondents to the deceased.

50. It is trite that the closest person to a deceased person is the surviving spouse. It is that person who is given the first priority and as such the first one in line of duty in relation to the burial of the deceased person.
51. The children of the deceased and the other relatives though also entitled to bury the deceased, they should help the surviving spouse in burying the deceased while he or she plays a leading role.
52. The learned magistrate in determining that the deceased be buried at his matrimonial home at Kambu took into account extraneous matters as regards the deceased persons conduct and subsequently the fact that he had not divorced himself from the home instead of the proximity of the Appellant and the Respondents to the deceased.
53. The deceased used to stay with the Appellant until the time of his demise. This was not considered by the trial court when making its determination as it was part of the evidence.
54. There was no such evidence by the Respondents nor was it the Respondent's case that the deceased had divorced himself from the home at Kambu.
55. The trial magistrate in proceeding to decide that the deceased had not divorced himself from the home was a decision made from

assumptions drawn from the evidence in court presented in support of the Respondent's case.

56. Precedents which have since become law, are to the effect that the closest person to the deceased person is the surviving spouse and a such he or she should be given the opportunity to arrange for the burial of their deceased spouse because that is the only way a marriage could have a meaningful purpose.

57. It matters not whether the deceased had made wishes or not as the surviving spouse would still carry the day as to the burial of the deceased spouse even if it is found that no wishes were made.

58. The failure by the trial magistrate to consider the Appellant and Respondent's proximity to the deceased at the time of death is a misapplication of the law and disregard of a material fact which is of much importance to the dispute at hand.

59. From the foregoing, the Appellants submit that the learned magistrate did not correctly apply the law in reaching at his determination as it is clear that he disregarded noble principles and provisions of the law severally in his decision.

Whether the trial magistrate erred in ordering the deceased body be released to the Respondents for burial at Kambu?

60. Customary law has been previously used by courts in adjudicating upon matters of burial.

61. The Akamba customary law is to the effect that a deceased man is buried at his ancestral home while a deceased woman at her matrimonial home.

62. The Appellant in her submissions before the lower court relied on several texts which clearly established the Akamba customary law as regards the burial of deceased persons.

63. Further the Appellant urged the court to step in as it is required to but at the same time consider the interests of all the parties involved before making a determination.

64. It is trite that the burial of a deceased person must be at a place where all parties are free to attend. It was clearly demonstrated before the lower court that the Appellant would not be welcome at the home in Kambu by the violent nature of the Respondents against the Appellant. The trial magistrate failed to consider this very fact in ordering the burial of the deceased at the land in Kambu.

65. Courts are always called upon to protect the rights and interests of each litigant more so on matters which are of a greater public importance.

66. The Appellant has rights to bury her deceased husband which are being threatened with violation if the deceased is to be buried at Kambu.

67. The trial magistrate erred in law by failing to consider the best interests of each party in the proceedings and subsequently whether those interests would be well served by ordering the interring of the deceased's body at Kambu.

68. The learned magistrate erred in law and fact when he ordered that the deceased body be released to the Respondents for burial at KAMBU as he did not at first consider the interests of the Appellant who was facing a lot of hostility apparent from the Respondents and as such suggesting that she would not be welcome at Kambu.

69. What this means in effect is that the orders the court gave resulted into locking out the Appellant from participating in the burial ceremony of her deceased husband at Kambu a place where it was clear she would not be welcome.

RESPONDENTS SUBMISSIONS

a) Whether the trial magistrate applied the law correctly in making his decision?

b) Whether the trial magistrate erred in ordering the deceased body to be released to the Respondents for burial at KAMBU.

c) Whether there exists any land in Kangundo for the remains of the deceased to be interred there?

d) Who has between the Respondents and Appellant is closest to the Deceased?

e) What orders should this court take?

f) Whether the trial magistrate applied the law correctly in making his judgment.

70. There is no codified statute and/or an Act of Parliament to guide on burial disputes. Most of disputes relating to burial in Kenya are decided based on case laws and customs of the deceased as was held in **Virginia Edith Wambui Otieno –Vs- Joash Ochieng & Anor (1987) eKLR**. This position is exemplified by Section 3 (2) of the Judicature Act which confers upon the court discretion to apply customary law in considering burial disputes.

71. It was the trial courts finding in paragraph 7 of the trial court's decision that the Akamba customary law was key in deciding the burial dispute of the deceased. It's not true that the trial court never applied the relevant laws in determining the dispute at hand.
72. Whether the Trial Magistrate erred in ordering the deceased body to be released to the Respondents for burial at Kambu.
73. The trial court never erred, it is clear from the Trial Court's judgment and evidence that both the Appellants and the Respondents are very close to the deceased.
74. In fact, the Respondents have stayed with the deceased for over 30 years while the Appellant was legally married to the deceased barely four months before the death of the deceased.
75. The Appellant was only known by the deceased alone and the rest of the family members never knew the Appellant.
76. Evidence in the trial court was led to the effect that, the Respondents never knew the Appellant inclusive of deceased brothers and sisters.
77. The Trial Court rightly correctly ordered the remains of the deceased to be interred at his Kambu home.
78. This is clear from the decision of the trial court and also from the evidence tendered by the Respondents and their witnesses that there does not exist a land in Kangundo where the deceased can be buried in fact no title document was ever produced at the trial court to prove the existence of the Kangungo land.
79. PW3 and PW4 (at the trial court) who are the deceased brother and sister did indicate to the trial court clearly that the deceased and all his brothers do not have any land in Kangundo.
80. A certificate of ownership of Kambu Land was produced in court as Plaintiff's exhibit No.1; indicating clearly that the land in Kambu belonged to the deceased.
81. At the trial court the Appellant and her witnesses did allude to a C.D recording was not produced in court to prove the allegation of such wishes.
82. Additionally, it came out clearly that the Appellants witnesses at the trial court went signing a petition for the deceased to be buried at Kangundo, which the trial court rightly and correctly ruled that such a petition does not amount to wishes, and if anything this was just a mere drama.
83. The issue of whether the Appellant was and is a wife to the deceased was not an issue at the trial court since in her possession was a marriage certificate with the deceased.
84. This issue was not in contention and in fact the trial court recognized the Appellant as wife of the deceased by allowing her together with her associations to participate in the burial of the deceased.
85. The question which was answered by the trial court was whether they had a land to bury the remains of the deceased?
86. The wording of the court order is clear that the Appellant is also recognized as been closer to the deceased by the trial court giving the Appellant and her associations a chance to participate in the burial ceremony of the deceased.
87. The question which begs is, you have lived with your father (deceased) for over 30 years knowing to be married only to your mother, but after the death of your father a lady comes to the fore claiming to be a wife and she claims to bury the remains of your father, she is not known to you and the rest of your family members, will the court allow her to proceed to bury the remains of the deceased? And evidence is clear that she procured her marriage certificate barely four months before the death of the deceased? This is the question which needs to be answered by this appeal.
88. The Appellant does not have a place to bury the deceased, will the court allow her to take the body to her place of choice? What becomes of the deceased four sons who are all over 30 years of age, age mates of the Appellant and who have a home and a land in Kambu where they used to live happily with their father (deceased)?
89. The question which begs is, what prejudice with the Appellant suffer if the burial proceeds as ordered by the lower court? The question is simply none.
90. The Appellant can lay claims in succession proceedings if at all she has some. The Appeal has no merits and bound to fail. There is nothing unlawful by the Respondents burying their father in their Kambu home as ordered by the trial court.

DUTY OF THE 1ST APPELLATE COURT

91. The duty of the first Appellate Court is to subject the whole of the evidence to a fresh exhaustive scrutiny and make any of its own conclusions about it bearing in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of **SELLE & ANOR -VS- ASSOCIATE MOTOR BOAT CO. LTD 1968 EA 123.**

EVIDENCE

92. PW1 John Makau and PW2 David Muendo are deceased's sons. Both said deceased has a parcel of land in Kambu settlement scheme being plot No. 70 where they want him buried and that he had told them he did not have any land at Kangundo and they should not lay any claim on that land as he had sold his part, a part sold by their grandmother and the only remaining part belonged to the deceased's sisters.
93. That deceased never said that upon death, he should not be taken to Kambu. That at a meeting held in Machakos, the deceased only talked about his property and desire upon payment of his teaching dues to sponsor them in their further studies.
94. Both said they were not aware the deceased had divorced their mother Leonida (first Plaintiff) nor that deceased had married the Defendant. PW2 said deceased would regularly go to the Kambu home over the holidays. That when drunk the deceased would show his burial place at Kambu. He said the home at Kangundo is deserted.
95. PW3 Muasya Nzioki and PW4 Elizabeth Kamene who are a brother and sister to the deceased respectively too said the deceased did not have land at their ancestral home in Kangundo but that he had bought land and built at Kambu.
96. They said the remaining portion of land at Kangundo belong to the sisters.
97. PW3 said he and all his brothers left Kangundo after the land was sold leaving only a portion which has conditions among them that it belongs to their sisters.
98. He said upon divorce a man does not leave home, it's the wife who does and that culturally a man with many wives would upon death be buried at his first home. He said if he too dies, he cannot be buried at Kangundo.
99. PW3 said among all the siblings only their brother Thiaka (DW3) who is siding with the Defendant to have the burial at Kangundo.
100. In defense the Defendant said she was deceased's wife with whom they had stated since 2013 and had solemnized their marriage on 04/01/2018 after deceased had divorced his wife Leonida. She said the first wife (1st plaintiff) had left the deceased for personal reasons.
101. That deceased had before his death called a meeting at Machakos attended by DW3 and PW2 at which he said he was officially divorced and that upon death he should not be taken back to his former wife.
102. She said the land in Kangundo where she prefers the burial take place does not belong to the deceased's sisters and that it's registered in the deceased's father's name.
103. She said DW3 was deceased's favorite brother and is the only one siding with her. She said that culturally it's the nuclear family that decides on the issues of burial.
104. Though she said it's not true deceased had a family at Kambu she did indicate the deceased and first plaintiff had a home at Kambu in Makueni county and that the deceased would go to that home severally to collect some documents and go back to her.
105. DW2 Moses Thiaka, the deceased's younger brother said the deceased had stated that upon death he should not be buried at Kambu but at Kangundo and in case he would have bought another land elsewhere, then he should be laid there. He said that was at a meeting he and PW2 attended. He said that was orally stated and recorded. He said the land in Kangundo is registered in their deceased's father's name.
106. That deceased had land and home in Kambu but never felt connected to it. He said upon deceased's death, he went around collecting signatures by family members on the place of burial.
107. DW3 Bernard Muthama said he was a family member. That the land at Kangundo is ancestral registered in the deceased fathers name and that any of the deceased's sibling including the deceased would upon death be buried there if she/he did not have a place to be laid.
108. He said he did sign some petition circulated by DW2 on the place of burial. He said no one who stays on the land at Kangundo and that he knew the deceased's mother had sold some land before her.

ISSUES, ANALYSIS AND DETERMINATION

109. After going through the recorded proceedings, evidence and pleadings plus parties' submissions, I find the issues are:-
- a) *Whether the appeal no. 57/2018 has been overtaken by event as matter has been heard and determined?*
 - b) *If above in negative, were the orders complained of justified in the circumstances?*
 - c) *On main determination, did Respondents prove their case on balance of probabilities?*
 - d) *What is the order as to costs?*

ANALYSIS

110. The court has carefully considered the pleadings herein, evidence on record, exhibits produced and submissions made and authorities cited. The parties herein are related or claim to be related to the deceased.

111. On the first ground, the Hon. Otieno J. Resident Magistrate orders made on 01/08/2018 and 22/08/2018 were to do with adjournment and recusal of the said magistrate however the matter moved to Hon Mwaniki SPM court where the matter was eventually heard and determined. Thus the Appeal No. 57 of 018 became moot and thus superfluous and overtaken by events.

112. On the Appeal No 139 of 2018 merit, the first plaintiff and the defendant alleged to be the deceased's wives while the other plaintiffs as his sons. The plaintiff asserted the place of burial should be at Kambu where deceased owned land on which he had built his home and where they or had stayed. The defendant on the other hand asserted the place of burial should be at Kangundo where the family has an ancestral home.

113. There is un rebutted evidence oral and documentary that, the Appellant was deceased wife and that the first Respondent was divorced by the deceased. Perhaps that is the reason she (1st Respondent) never appeared in court to contest the right and venue of burial and left her children to battle it out with the Appellant the lawful wife of the deceased.

114. The trial court held that all the parties have a right of burial of the deceased person. The issue in contention is the place of burial. However that holding, does not seem to be the prevailing legal position.

115. In the case of **Ruth Wanjiru Njoroge –Vs- Jemimah Njeri Njoroge & Another [2004] eKLR**, Ojwang J (as he then was) held thus:

“In the Social Context prevailing in this country the person who is first in line of duty in relation to the burial of any deceased person is the one who is closest to 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.”

116. In the circumstances of this case such a person would be the wife. The right of Appellant by virtue of marriage with the deceased superseded all other claimant rights.

117. This is also supported by the provisions of the Article 45 (1) and (3) constitution of Kenya. The same stipulates that;

Art 45. Family

(1) The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.

(2) Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.

(3) Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.

118. That, having found for the spouse's right to bury her deceased husband, the next question is the venue of the burial.

119. It is trite that there cannot be property in a dead body and a person cannot dispose of 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 as the same is not contrary to custom nor contrary to the general law or policy. See - **Law JA in Apeli -Vs- Buluku [2008] 1 KLR (G&F) 873.**

120. There was un rebutted Appellant evidence that the deceased had before his death called a meeting at Machakos attended by DW3 and PW2 at which he said he was officially divorced and that upon death he should not be taken back to his former wife.

121. DW2 Moses Thiaka, the deceased's younger brother said the deceased had stated that upon death he should not be buried at Kambu but at Kangundo and in case he would have bought another land elsewhere, then he should be laid there.

122. Clearly, there is nothing in the wishes of the deceased person herein that can be said to be illegal, offensive or unenforceable. Neither were they contrary to custom, or to the general law or to public policy.

123. Nothing would have been easier than for the parties to strike an amicable agreement as to the place of burial of the deceased person herein and accord him a befitting send off. Unfortunately, that is not the case and the court has been called upon to settle the matter.

124. In **John Omondi Olang and Another -Vs- Sueflan Radal (2012) Eklr**, Mabeya J had this to say:

“.....When it comes to the disposal of the body of a married man or woman the spouse should play a leading role. It would be better if the relatives of the deceased can sit down and agree on how to give their loved one a dignified exit. When they fail to agree and approach the Court for solution, the court has no option but to step in.....”

125. The parties appeared at some point to lay some emphasis on the deceased's and the extended family's property as subject of distribution in a succession cause vis-à-vis where the deceased would be laid to rest.

126. Reference was made especially by the plaintiffs to the defendant as being in custody of some title deed (s) and a log book among other family related documents that were held by the deceased as the custodian of the extended family's documents and whether the deceased and his brothers would lay a claim at the ancestral land in Kangundo.

127. Rarely can material assets be a factor for consideration in burial dispute. 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.

128. Those are more relevant to burial dispute than question for disposal of material assets and related claims and things. They, rather than the succession regime should prevail in determining questions of burial.

129. The wishes of the deceased if established to have been expressed during his lifetime would take precedent over other considerations.

130. In an article **LEGAL APPROACHES TO THE BURIAL RIGHTS OF A SURVIVING WIFE BY DR REMIGIUS N NWABUEZE Amicus Curiae Issue 73 Spring 2008** it is opined that;

“Most western legal systems recognize the right of a surviving wife to control the disposition of the remains of her deceased husband. In the USA, the surviving wife is the appropriate person to determine the time, manner and place of burial of her deceased husband. Although she is expected to take the wishes of other members of the family into consideration, her own sepulchral wishes are controlling and paramount in the event of a conflict.

In this way the prioritization of a widow's right to bury her deceased husband reinforces her pre-eminent status as the closest person to the deceased (at least formally). It also gives acute expression to the binding character of marriage and the precedence that it attracts in family relations. But the American widow is not given priority at all cost and in all circumstances. For instance, a widow's priority is subject to the burial wishes of her deceased husband. If the decedent's sepulchral wishes are ascertainable and clear, American courts will enforce them. Accordingly, the widow's priority is lost where the deceased husband gave particular directions regarding the disposition of his remains. Whether these mortuary directions were actually given and what their contents are would always remain questions of fact and the answer would depend on the surrounding circumstances of each case.”

131. The above persuasive opinion reflects the spirit of our constitution and prevailing changes in sophistication of our way of lives and especially those living in urban areas. The wishes of the deceased in the instant matter are congruent with the widow's desire thus the court will have to enforce same to resolve the dispute herein.

132. The court thus make the following orders;

1. The Appeal No 57 of 2018 is dismissed while Appeal No 139 of 2018 is allowed on the following terms;

i. The body of the deceased shall be released to the Appellant to bury him in the Kangundo family ancestral land in deceased's father name.

ii. The Respondents are at liberty to attend the burial.

iii. The parties to share mortuary charges equally.

iv. No orders as to costs.

DATED AND DELIVERED THIS 17TH DAY OF DECEMBER, 2018 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE