



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**FAMILY DIVISION**  
**CIVIL SUIT No. 9 OF 2017**  
**IN THE MATTER OF THE BURIAL OF N M**  
**M (DECEASED)**

**RULING**

1. The Application before the Court is brought by F H O. The Applicant states that he is the “legal husband” of the Deceased. The Application was filed on 14<sup>th</sup> September 2017 under a Certificate of Urgency. It was certified as urgent before Hon W. Musyoka J when it came before him on that date. In the Application, the Applicant is seeking the following additional orders:

*“3. THAT a temporary injunction do issue restraining the Respondent, either by herself, her agents, family members, relatives and/or any other person whomsoever acting under her instructions from removing and disposing of the body of the deceased N M M from AIC Kijabe Hospital Mortuary or wherever the body would be transferred, interring the remains of the deceased and/or interfering with the said body in any manner whatsoever pending the inter partes hearing and determination of this Application*

*4. THAT a temporary injunction do issue restraining the Respondent, either by herself, her agents, family members, relatives and/or any other person whomsoever acting under her instructions from removing and disposing the body of the deceased N M M from AIC Kijabe Hospital Mortuary or wherever the body would be transferred, interring the remains of the deceased and/or interfering with the said body in any manner whatsoever pending the hearing and determination of the suit filed herein.*

*5. The Officer Commanding Station of the nearest Police Station to ensure compliance. “.*

The Learned Judge made the Orders sought on an interim basis and also ordered that the Matter be heard inter partes on 21<sup>st</sup> September 2017.

2. The Applicant was also ordered to serve the Application and Order on the Parties affected. The Court file shows that AIC Hospital was served on 14<sup>th</sup> September 2014 because there is a date stamp on the copy. The Defendant/Respondent was not served personally. What the process server did was visit a village called Kahumbuini in Murang’a County. He says he met “the son to the deceased”. He does not say how he knows that statement to be correct. Further, he does not inform the Court whether or not the person given the documents was old enough to understand their importance. It is correct that a copy of the Order is endorsed with the names “K K M” as stated.

3. The Application was brought on the following grounds:

1. THAT the applicant is the legal husband of the deceased and married her under Kikuyu Customary Law in 2014. A copy of the "Dowry acknowledgement" is exhibited as **FH01**;
2. There were two children of the union A O who is 13 years old and B A who is 11. The deceased died on 8<sup>th</sup> September 2017;
3. The remains of the deceased are now preserved at AIC Kijabe Hospital Mortuary;
4. THAT the Respondent is the Mother of the deceased and has denied the Applicant access to the deceased's remains or even involve him in the burial arrangements and now intends to remove the body from the mortuary for the purposes of internment at his rural home in Kagumo- ini Village, Candara Constituency, Murang'a County. There is no direct evidence of this intention;
5. The Applicant is entitled to inter the remains of the deceased as he has the closest proximity with the deceased by virtue of being her husband;
6. The Applicant has the means to give the deceased a decent burial and he has made all the necessary arrangements for the burial;
7. The Applicant also relies on the ground that he has a prima facie case with a probability of success;

The Application is supported by the Affidavit of the Applicant who informs the Court that he is a resident of Nairobi County. Surprisingly, he is unable to be more precise. He repeats what is set out in the Grounds however, he says that he "approached the Respondent together with her family over the burial issues but they have remained adamant and have insisted on burying my late wife without involving me". He provides very few details of this approach. Nothing is said of the date or place the alleged conversation was held. He also neglects to state whether or not he was given a reason for that denial or refusal. The matter was not addressed in cross-examination. He wishes to bury the Deceased according to the rites of Luo Customary Laws and Practice. He does not explain how those are different from the Respondent's. He also does not state in the Affidavit where he intends to bury or inter the remains of the Deceased. The Supporting Affidavit states that the Applicant and the Deceased co-habited for 12 years, that suggests that they were together until 2014. A question arises as to what happened after that. Part of the answer is contained in the Witness Statement of Patricia Akoth Okungu who says that at some point in 2015 the Applicant and the Deceased separated. The Deceased and the Children moved to Kahawa West Estate and then Ngong Estate whereas the Applicant remained in Kariobangi Estate. There is no reason given for this arrangement nor its duration. However, it does raise questions of fact. In addition, why was the Deceased at the AIC Hospital in Kijabe. The Applicant has exhibited as **"FH03"** a letter dated 10<sup>th</sup> September 2017 from AIC Kijabe Hospital. It is addressed to Whom it May Concern. It is also incomplete as it has not been signed. It is handwritten and largely illegible.

4. The Application came before this Court for Hearing on 21<sup>st</sup> September 2017. The Applicant was represented and there was Counsel in Court, Mr Kuria claiming to have been instructed by the Respondent. He had not filed a Notice of Acting on that date and nor has he done so since. On 21<sup>st</sup> September he informed the Court that the Respondent was in Hospital and had only been discharged on the preceding Monday. She had not been served personally. She was said to have been disputing the marriage. The Court gave directions for the Respondent to file a response to the Application within 14 days.

5. The Matter came before the Court again on 18<sup>th</sup> October 2017. It had been listed ex parte by Messrs Anyango Ogutu & Co. It was listed for a "Mention for Directions". However at that day the Advocate appearing for the Applicant argued that because the Respondent had not filed any response to the Application he was "requesting the Court to grant prayer 4 of the Application and give a new date for

Hearing of the main suit. The Plaintiff seeks the following prayers:

*"(a) A declaration that the Plaintiff is entitled to inter the remains of the deceased N M M*

*(b) An order directing that the Plaintiff inter the remains of the deceased at his rural home in Kajulu, Kadero, Kisumu County.*

*(c) Costs in this suit*

*(d) Any other relief that this court may deem fit to grant."*

Prayer 4 of the Notice of Motion seeks a temporary injunction. That Order has already been made by Hon W. Musyoka J.

6. On 18th October the Applicant was given an opportunity to file further evidence of proof of marriage. His Advocate submitted that he does not wish to file any further evidence. He was happy to rely on the evidence already before the Court.

7. In the course of hearing this Matter and consideration of the documents that had been filed, the Court came to the decision for the reasons set out above, that this Matter, whether the Application or the Suit is not sufficiently ready for the Court to be able to make substantive orders on entitlement, nor findings on the status of the Applicant and the Deceased on the evidence then before the Court. The Court has also become aware that the Deceased has another child, through the Affidavit of Service. Although both Parties are fully aware of the existence of this child (K), neither mentioned his existence to the Court. He has attained the age of majority and therefore is also entitled to be heard on the issues. The Parties reasons for wishing to conceal his existence are a relevant factor in the circumstances of a Notice of Motion brought ex parte.

8. Therefore on **30th October 2017** the Court Ordered and Directed THAT:

(1) The Application be listed for Hearing with viva voce evidence;

(2) The Child of the Deceased K K M be added as a Respondent to the Application and a Defendant to the Suit;

(3) The Respondents to file and serve any response they wish within 7 days of service. In the event that they do not serve an reply they shall be deemed to not wish to do so.

(4) The Plaintiff be and is hereby granted leave to file a Supplemental Affidavit exhibiting evidence of the subsistence of the marriage after 2015.

(5) In the meantime, the Defendants are whether through their respective servant agents or any family members from removing or attempting to remove the body of the Deceased, N M M from AIC Kijabe Mission Hospital Mortuary or from any other Mortuary where the body may have been transferred to or from interring the said remains or interfering in any manner whatsoever with the said body pending the inter partes hearing of the Application.

(6) The Officer in Charge of Kijabe Police Station is hereby directed to ensure compliance with paragraph 5 above.

9. The Court then heard the Oral Evidence of the Parties. The Plaintiff (PW1) gave his evidence first. He told the Court that he had been in a relationship with the Deceased since 2000. He said they lived together in Kawangware in Nairobi from 2002. He said they later married in 2014 and had two children, A O (dob 19th November 2004) and B O (dob 6th November 2006). The Plaintiff produced the birth certificates for and photographs of the Children with the Deceased. The Plaintiff sought to convince the Court that the relationship between him and the Deceased entailed continuous cohabitation since 2002 to

the time of her death. In fact in cross-examination and through the Defendant's case it transpired that they had been separated for a significant period before she passed away. The Plaintiff then attributed the separation to his Mother-in-law and/or sisters in law and also the intervention of witchcraft. Whatever the cause, the Deceased was not living in the matrimonial home when she passed away. The Deceased passed away at AIC Kijabe Hospital on 8th September 2017. The body was not released to the Plaintiff, nor to the Defendant through her sons who had attempted to have it released to them.

10. The Plaintiff's case is that he was married to the Deceased under Kikuyu Customary Law. He feels that as a consequence he is entitled to inter the remains of the Deceased. He states that he is her closest relative by reason of being her husband. In his Written Submissions it is argued that even if the Court finds that there was no concluded customary marriage, the Plaintiff and the Deceased by reason of long and established co-habitation should be considered to be in a common law marriage. He relies on the authority of ***Martha Wanjiru Kimata & Another [2015] eKLR*** where Hon Mabeya J said "*When it comes to the disposal of the body of a married man or woman the spouse should play a leading role.*". In addition, he relies on the dictum of Hon J.B. Ojwang J in ***Ruth Wanjiru Njoroge v Jemimah Njeri Njoroge & Another [2004] 3KLR*** where the learned judge stated "*As I have already stated earlier on, the person, in social context prevailing in this country, who is in the first line of duty in relation to the burial of any deceased person, is the one who is closest to the 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*". Those authorities are both first instance authorities and neither takes into account the Ruling of the Court of Appeal in ***Joash Ochieng Ougo & Another v Virginia Edith Wambui Otieno [1987] eKLR Civil Appeal No 3 of 1987***. That is a case that deals with the situation where the Deceased and spouse belong to different cultures, as in this case.

11. In his Supporting Affidavit and his oral testimony, he told the Court that his Mother in law had prevented him from having access to the body and she intended to remove it from the mortuary to be buried in her rural home in Kagumo-ini Village, Kandara Constituency, Muranga County. He also said that the Defendant and her family were adamant that they would conduct the funeral and burial and he would not be involved at all. The Plaintiff wishes to bury the Deceased according to Luo Customary Laws and practice. It seems that the Deceased's family also removed the Children from school and have kept them away from their Father. The Plaintiff was very consistent in his evidence when he said that the Defendant and her family were the only impediment between him and the burial he had planned for the Deceased.

12. The Defendant disputes that the Plaintiff was married to the Deceased. She said she did not recognise the marriage because it was not in accordance with the customs of her clan. Those vary between the Replying Affidavit and her oral evidence. The Plaintiff produced documentary evidence of his marriage being a document entitled "Mahari" which set out the bride price he paid to his father in law to be on 18th October 2014. His oral evidence was that he visited the Deceased's parents with gifts on blankets etc when he visited the first time. He then visited a second time when a bride price of KShs.40,000/= was agreed with the Elders and paid. The First Defendant said that one goat was worth KShs500/= at the time. He said that he continued paying bride price which was demanded until the incident when the Deceased is alleged to have left due to witchcraft and/or pressure from her family. The Defendant in her evidence, after some evasion, accepted that the sum of KShs.40,000/= had been paid. however she said whatever her husband said, she did not recognise the Plaintiff as being married to the Deceased because it did not accord with the customs of her clan. She was not able to tell the Court if and when the Plaintiff had been informed of that fact, it is more than likely that he was not. The Plaintiff told the Court that he followed the customs he was told to follow. Under cross-examination on the issue of non-compliance with Kikuyu customary law he said, he did what they said and they did not say go away and follow the correct procedure. The Plaintiff produced one further witness, his sister P A O. She corroborated the fact of the co-habitation. She corroborated that the Plaintiff and his sister traveled to rural home of the Deceased's parents and that the payment of dowry was acknowledged by the Parents of the Deceased. The Plaintiff's first exhibit demonstrates that the brideprice/dowry was paid to the Deceased's father in the presence of her two brothers and representatives of the Plaintiff's family. She also said that the Deceased was recognised as the only wife of the Plaintiff in his own rural home in

Kajulu, Kadero, Kisumu County. Both PW1 and PW2 told the Court that he had travelled to Muranga for the burial of his Father in law and was accepted then as a member of the family. Although the Plaintiff was not very forthcoming about his separation from the Deceased, he told the Court that he continued to support he and they stayed in touch knowing of each other's whereabouts. He told the Court that at the time of her death she was living in Ngong. The Plaintiff claimed that he had paid the Deceased's hospital bills at Kijabe Hospital but he was unable to produce any invoices or receipts.

13. The First Defendant refutes the existence of a marriage at all. Her evidence is contradicted by the documentary evidence presented by the Plaintiff and by the oral evidence of her own grandson who told the Court that the Plaintiff was his step-father. That makes her evidence unreliable. Sadly, both Parties by their focus on only one issue have demonstrated to the Court that they are more concerned with fitting the criteria of **Section 66 of the Law of Succession Act** than giving the Deceased and decent burial. That dispute is premature and unfortunate and particularly distasteful where the needs of 3 young children who are bereaved are being ignored to further each Party's argument. The Court also became aware from the evidence of Joram Muna Muigai the witness for the Second Defendant that the Deceased was in fact relatively wealthy. He has lodged original documents in Court before Hon DR Rading. They form part of the record.

14. The Court has a wide discretion in these matters. In exercise of that discretion the Court must take into account the all the relevant facts of this case including the conduct of the Parties. The issues that arise for determination are:

- (a) Which persons solely or jointly demonstrate the closest proximity and/or attachment to the Deceased at the time of her death?
- (b) What was the Deceased's culture;
- (c) Was the Deceased married;
- (d) Who were the persons who comprised the family of the Deceased?
- (e) Did the Deceased express her wishes concerning her burial during her lifetime?
- (f) What are the options for burial in relation to (i) participants, (ii) places for burial (iii) Did the Deceased demonstrate any attachment to any of the suggested places for burial?

15. The Plaintiff's claim is based squarely on the existence of a marriage between himself and the Deceased. That is disputed by the Defendant. In the course of hearing oral evidence from the Parties and their witnesses, the Court became aware of the fact that the Plaintiff and Deceased although previously been co-habiting and had children together were in fact living apart for a significant period of time before her death. The Plaintiff was not frank about this fact and sought to skirt around the issue in his evidence. That made him an implausible witness on this issue. The First Defendant was equally implausible on the issue of marriage. However, the Court does not need to come to a final decision on this issue before any consideration of entitlement to the Estate. It is sufficient that the Plaintiff and Deceased were in a relationship. The relationship of co-habitation endured from 2002 to 2014. As a consequence they had two Children. Those Children also had a relationship with their Mother. They have not had an opportunity to express their wishes to the Court due to the conduct of the Defendant and her sons. Therefore the Deceased's family comprised her Children and the fathers of those Children including but not limited to the Plaintiff. Her extended family included her Mother and two brothers and possibly others who the Court has not heard from. All those persons have the right and duty to a greater or lesser extent to bury her.

16. What is the culture to which the Deceased belonged. The Deceased and her family came from Murang'a and she belonged to the Kikuyu tribe. Her clan although referred to repeatedly was never named in Court. The Plaintiff belongs to a different tribe with different customs. The Plaintiff wishes to bury the Deceased in accordance with his own tribal customs and not those of the Deceased. The Court

of Appeal in Civil Appeal No 3 of 1987 was clear on that issue. It is the personal customs of the Deceased that prevails. Therefore it is clear that the Plaintiff cannot succeed in that wish. Looking next at the other options. The Defendant wishes to bury the Deceased in her village in Muranga. She was asked repeatedly that burial site was situated and who owned the land. She was not able to tell the Court that she had any rights over the land to carry out the wishes she was expressing. The Second Defendant told the Court that the land in question belonged to the two brothers who had acquired it following the death of their father. In the circumstances, the 1<sup>st</sup> Defendant could not demonstrate to the Court that her preference was possible. In any event the needs of the Children prevail (CoK Article 53(2))

17. The Second Defendant and his witness told the Court that the Deceased had expressed her wishes in relation to her burial. She told them she did not wish to be buried in Murang'a. That is borne out by the fact that she did not return to her ancestral home save for specific events like marriages and deaths. The Court was not presented with any evidence of her attachment to it. The Deceased did own several properties of her own. She lived on one such property in Ngong, according to the Second Defendant. The Second Defendant also does not live in Murang'a. He told the Court he had been pressurised by the First Defendant and her sons to align himself with their position. He said he did not wish to do so because his Mother had expressed her wishes to him clearly and he felt morally bound to carry out those wishes. The Property he identified was her home in Ngong. The evidence of the Deceased's wishes was corroborated by the Second Defendant's witness. He claimed to be in a relationship with the Deceased and the Father of her youngest child. Again, that is not a matter that needs to be resolved at this stage. He told the Court that the Deceased wished to be buried in a place where ALL her Children would have access, and could visit her. Given the First Defendant's hostility to the Plaintiff, it is clear that her home in Murang'a is not such a place.

18. For the reasons set out above, the Court Orders and Directs that:

- (1) The AIC Hospital Kijabe to release the body to the Second Defendant and the Plaintiff;
- (2) The Second Defendant and the Plaintiff shall arrange for the Deceased to have a proper funeral and burial in keeping with her status and in accordance with her own customs and rites.
- (3) Such burial to be carried out at her property in Ngong.
- (4) The Burial shall be attended by the Plaintiff and Both Defendants and the two Children A and B A as well as the baby.
- (5) The First Defendant whether through herself her family, servants or agents shall not interfere with the burial or the order of this Court. Penal Notice attached.
- (5A) The Plaintiff and Second Defendant shall not prevent the First Defendant and her family from attending the funeral. They shall be accorded the appropriate position during the ceremonies and interment
- (6) OCPD Muranga and OCPD Ngong to make arrangements to ensure that the Funeral and Burial ceremonies are conducted peacefully.

19. It is further Ordered pursuant to the Application for Review of the Order 29<sup>th</sup> November 2017 it is Ordered that:

- (1) Upon review the Order of 29<sup>th</sup> November 2017, Paragraph 4 is amended to read the Officer in Charge of Kabati Police Station
- (2) The First Defendant, and her sons, I M M ID No [particulars withheld] and J M M ID No [particulars withheld] to Show Cause on a Date to be fixed, why they should not be committed for contempt of the Court's Order of 29<sup>th</sup> November 2017.

Order accordingly,

**FARAH S.M AMIN**

**JUDGE**

**DATED, Signed and Delivered at Nairobi this 21st day of December 2017**

**Amended pursuant to the slip Rule on 22<sup>nd</sup> December 2017**

In the Presence of:

Court Clerk: Patrick Mwangi

Plaintiff: Mr Ouma Holding Brief for Mr Onyango Oguto

First Defendant: Mr Kuria

Second Defendant: Kevin Kinyanjui Muthoni in person