



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. 265 OF 2014

1. VERONICAH KATONI MWANIA

2. REBECCA NDUNDAAPPELLANTS

VERSUS

1. JACOB WAMBUA KING'OO alias MUSAU

2. GIDEON KIILU MULELA RESPONDENTS

(Being an appeal from the Ruling of the Ag. Principal Magistrate's Court at Machakos of Civil Case No. 920 of 2014 dated 12th December 2014)

(Before B. Thurania Jaden J)

J U D G M E N T

1. The Respondents, **Jacob Wambua Musau** and **Gideon Kiilu Mulela** (Respondent 1 and 2 respectively) vide a plaint dated 25/11/2014 instituted a suit in the lower court against the Appellants, **Veronicah Katoni Mwanja** and **Rebecca Ndunda**. The Respondents prayed for judgment against the Appellants as follows:-
 - a. **“A declaration do issue to the effect that the remains of Joseph Musau Mulela be interred in an area designated by his clan according to customary law near his homestead.**
 - b. **The defendants be restrained by way of permanent injunction from burying the remains of the deceased elsewhere apart from his own home at Mikono village in Kola location.**
 - c. **Costs of this suit and interests.”**
2. Contemporaneously with the filing of the plaint, the Respondents filed an application dated 25/10/2014 under a Certificate of Urgency seeking orders that an order do issue restraining the Defendants, their servants, agents, relatives and the administration of **Machakos Level 5 Hospital Mortuary** from releasing the remains of **Joseph Musau Mulela** to the Defendant or his agents pending the hearing and determination of the suit.
3. The background to this suit according to the affidavit in support is that the late **Joseph Musau Mulela** (herein after the deceased) was a brother and father to the 1st and 2nd Respondents. It was averred that the deceased fell ill and succumbed to the illness while undergoing treatment at

Machakos Level 5 Hospital. The Respondents were aggrieved by the Respondents' plans to bury the remains of the deceased away from the home of the deceased contrary to **Kamba Customary Law.**

4. The application was opposed. According to the replying affidavit, the deceased was their brother and the 2nd Respondent is their step brother. It is contended that by the time the deceased passed on, he had not married and had no children. That the 1st Respondent's mother was married to the deceased but that the 1st Respondent was a child of another marriage and was never adopted or acknowledged by the deceased as his child. According to the Appellants, the marriage between the deceased and the mother to the 1st Respondent was terminated under **Kamba Customary Law.** It is further deposed that the wishes of the deceased were to be buried at **Ndalani Yatta** where he had established a home. The Appellants further stated that as sisters to the deceased, they were closer to him in the degree of consanguinity than the Respondents who had disputes with the deceased during his lifetime.
5. After hearing the application, the trial magistrate ruled that the issues whether the 1st Respondent was a son to the deceased or not and the question regarding where the deceased had established his home required a full hearing. On a balance of convenience, the trial magistrate allowed the application and thereby triggered this appeal.
6. The Memorandum of Appeal raised several grounds of appeal. However, the central questions upon which the determination of the appeal depends on are as follows:-

a. Whether the ruling was against the weight of the evidence.

b. Whether the trial magistrate erred in law in allowing the application.

7. During the hearing of the appeal, the Appellants relied on their written submissions which I have duly considered.
8. The Respondents though served did not participate in the appeal.
9. This being a first appeal, the court is duty bound to re-evaluate the evidence on record and come to its own findings. *See for example Selle –vs- Associated Boat Co. Ltd (1968) EA 123.*
10. As stated by the Court of Appeal in **Edwin Otieno Ombaso –vs- Marin Odera Okumu 1996 e KLR**, the law relating to burial matters in Kenya is the personal law of the deceased and the parties subject to the provisions of **section 3 (2) of the Judicature Act Cap 8 Laws of Kenya.**
11. **Section 3 (2) of the Judicature Act** provides as follows:-

“The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”

12. If African Customary Law is not caught up by the qualifications under **section 3 (2) of the Judicature Act**, then customary law must be applied in deciding burial disputes (*See for example Virginia Wamboi Otieno –vs- Ochieng Ougo, [1982 – 1988] 1 KAR 1049*).
13. In the instant case, there is no dispute that the deceased and the parties herein come from the **Kamba community.** The law applicable is therefore **Kamba Customary Law.**
14. According to the affidavit in support, the Respondents were aggrieved by the plans by the Appellants to bury the deceased away from his established home contrary to the traditions of the **Kamba community.** On the other hand, the Appellants in their replying affidavit have contended that the deceased had established his home at **Ndalani – Yatta** and it is where he wished to be buried. It is not disclosed in the said affidavit evidence how the deceased made the said wishes known.
15. It is further averred in the replying affidavit that the deceased had not established a home at **Mikono village Kola** although he was set to inherit **LP No. 1464** which is yet to be distributed to the beneficiaries thereof.

16. From the averments in the affidavit evidence by both parties, it is clear that the place where the deceased had established his home ought to play a central role in determining the place where he should be buried. The parties are not in agreement regarding the place where the deceased had established his home. Is it in **Ndalani-Yatta** or **Mikono village** in **Kola**?
17. An affidavit annexed to the replying affidavit sworn by the deceased prior to his death on 26/6/2013 in support of an application in **SRMCC Kithimani 75 of 2013 – Joseph Musau Mulela –vs- Jacob Wambua King’oo** states as follows:-

“2. THAT I am the beneficial owner of the suit property having jointly inherited it from my late mother together with my brother now deceased. The suit land is known as Plot Number 1464 Kalama/Katanga, situate at Kola Location, Kalama.

- 3. THAT I have been living on the entire property all my life, farming and developing it and have no any other place to call home.**

18. This court need say no more. The deceased’s own affidavit leaves no doubt that he had established his home at plot No. **1464 Kalama/Katanga** situate in **Kola Location, Kalama.**

19. In the aforesaid affidavit, the deceased stated as follows concerning the 1st Respondent **Jacob Wambua King’oo** alias **Musau**:-

“11. the Respondent has without any colour of right invaded my parcel of land issued threats and refused my cultivating or developing the same. I fear for my life too as he has issued me with death threats.

12. THAT he is not my son at all and he is a stranger to me and has no any colour of right or lawful justification to trespass on my land or demand a piece of it from me.”

20. It is evident from the foregoing that there was bad blood between the deceased and the 1st Respondent. They had a land dispute which resulted in the filing of the aforesaid suit by the deceased where he sought *inter alia* orders for police assistance. In the circumstances, the Appellants have a greater claim than the Respondent to enter the body of the deceased.

21. The dispute before this court is not a land dispute. It is also not a succession dispute. Although issues have arisen herein as to whether the 1st Respondent is a son to the deceased, that it is not a matter for this court to determine at this stage. The only issue that was raised by the Respondents in their application is in respect to the place of burial. The said application did not raise any issue relating to the deceased being buried by the Appellants.

22. Did the Respondents make out a case for the grant of injunctive orders? The principles for grant of injunctive orders were set out in the celebrated case of **Giella –vs- Cassman Brown & Co. Ltd [1973] EA 358** as follows:-

“First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

23. The undisputed evidence of both parties is that the deceased should be buried where he had established a home. *Prima facie*, the Respondents have shown a case with a probability of success on that score. Matters of death and burial are highly emotive in nature and cannot be compensated in monetary terms. The balance of convenience tilts in favour of burying the remains of the deceased where he had established a home. It is therefore undesirable for the body to remain in the mortuary for long while litigants fight it out in court.

24. The earlier affidavit evidence by the deceased as analyzed above reflects that he had established his home at plot No. **1464 Kalama/Katanga** situate at **Kola Location**. This gives credence to the Respondents’ case. It is not clear why the Appellants have contradicted the affidavit evidence by the deceased, yet the affidavit by the deceased is part of their own annexures.

25. With the foregoing, I hold that the remains of the deceased ought to be interred at plot No. **1464/Kola/Katanga**. Consequently, the orders made by the lower court are discharged. The Appellants are at liberty to collect the body of the deceased from **Machakos Level 5 Hospital Mortuary** for interment at plot **No. 1464/Kola/Katanga**. The appeal having been partially successful, each party to meet own costs.

.....

B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 13th day of February 2015.

.....

B. THURANIRA JADEN

JUDGE