



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELCA NO. 12 OF 2021**

**ROSE WATERE NDUMBI..... APPELLANT**

**-VERSUS-**

**JAMES KIHUNGI KAHIGA .....1<sup>ST</sup> RESPONDENT**

**MAGDALENE WANJA NGECHU....2<sup>ND</sup> RESPONDENT**

**RULING**

1. By the Notice of Motion dated 15<sup>th</sup> April 2021, Rose Watere Ndumbi (*the Appellant*), prays for an order of stay of execution of the Ruling delivered on 14<sup>th</sup> April, 2021 in Nyeri MCL & E case No. 81 of 2019 pending the determination of the Appeal herein. In addition, the Appellant urges the Court to issue directions as would serve to preserve the subject matter of the Appeal.

2. The application which is supported by an affidavit sworn by the Appellant is premised on the grounds:

- (a) That the ruling analysed in depth the evidence of marriage whereas this was merely an interlocutory application;
- (b) That no viva voce evidence had yet been adduced on the issue of marriage;
- (c) That the orders granted essentially dispose of the main suit;
- (d) That in an interlocutory application, it is an error or misdirection to make an in-depth analysis and to pre-empt the substantive suit; and
- (c) That it is in the interest of justice that this application be granted.

3. The application is opposed. In a Replying Affidavit sworn on 16<sup>th</sup> July, 2021 on his own behalf and on behalf of the 2<sup>nd</sup> Respondent, James Kihungi Kahiga (*the 1<sup>st</sup> Respondent*) avers that the Appeal does not have any chances of success as the Appellant did not provide any evidence that she had celebrated any marriage ceremony with the deceased.

4. The Respondent further assert that this Court has no jurisdiction to deal with the Appeal since the main suit relates to a burial dispute and the same ought to have been heard by the High Court. The Respondents further aver that they do not intend to bury the remains of Charles Muriithi Kariga on the said L.R Kabaru/Ngonde/Block 6/(Ngatia)/44 and that the burial ceremony has been put off indefinitely.

5. In addition to their Affidavit in reply, the Respondents have filed herein a Notice of Preliminary Objection dated 25<sup>th</sup> June, 2021 stating as follows:

- 1. That the Appeal as filed is defective ab initio as it violates the provisions of Section 13(1), (2) and 4 of the Environment and Land Court Act, 2011 as the Appellant does not claim any proprietary interest in L.R No. Kabaru/Ngonde/Block 6/(Ngatia)/44 in the Memorandum of Appeal dated 15<sup>th</sup> April, 2021 nor in the Complaint dated 14<sup>th</sup> November, 2019;
- 2. The Appeal as filed is defective ab initio in so far as the Appellant challenges the interment of Charles Muriithi Kariga (Deceased) on L.R No. Kabaru/Ngonde/Block 6/(Ngatia)/44 without involving her by virtue of being a wife to the said Deceased;
- 3. The Probate and Family Division of the High Court has the jurisdiction to hear and determine the Appeal herein; and

4. Such other, or further and/or incidental grounds as may emerge or be canvassed at the hearing of the Application.

6. I have carefully perused and considered both the application and the Preliminary Objection. I have similarly perused and considered the rival submissions as filed herein by the Learned Advocates acting for the parties.

7. By their Preliminary Objection dated 25<sup>th</sup> June 2021, the Respondents have challenged the jurisdiction of this Court to hear and determine both the Motion herein dated 15<sup>th</sup> April, 2021 as well as the Appeal itself. It is their case that the Appeal violates the provisions of **Section 13(1), (2) and (4) of the Environment and Land Court Act, 2011** and that the Appeal ought to have been filed before the Probate and Family Division of the High Court.

8. On her part, the Appellant asserts that the facts raised in the preliminary Objection are not correct as the said **Section 13 of Environment and Land Court Act** clothes this Court with Jurisdiction over land and the environment. It is the Appellant's case that in as much as the issue of interment of the body of the deceased involves being buried on the parcel of land known as Kabaru/Ngonde Block 6/(Ngatha)/44, the same touches on land and thus the Court is seized of jurisdiction to determine the same.

9. **Section 13 of the Act** provides the jurisdiction of this Court as follows:

**1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.**

**2. In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes –**

**(a) Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**

**(b) Relating to compulsory acquisition of land;**

**(c) Relating to land administration and management;**

**(d) Relating to public, private and community land contracts, choses in action or other instruments granting any enforceable interest in land;**

**(e) Any other dispute relating to environment and land.**

10. In his Replying Affidavit to the Notice of Motion sworn on 16<sup>th</sup> July, 2021 as filed herein on 19<sup>th</sup> July 2021, the 1<sup>st</sup> Respondent has annexed copies of the pleadings filed by the Appellant herein in the subordinate Court. A perusal thereof reveals that the Appellant instituted the suit in the lower Court on 18<sup>th</sup> November, 2019 praying for Judgment against the two Defendants and sought for a permanent injunction to issue restraining them, their relatives, agents or servants from interring or disposing in any way the remains of one Charles Muriithi Kahiga in Land Parcel No. Kabaru/Ngonde/Block 6/(Ngatha)/44.

11. In her prayers in the alternative, the Appellant sought to be allowed to participate in the burial arrangements and be accorded full recognition as the wife of the said Charles Muriithi Kahiga after which the burial could proceed on a date to be agreed.

12. Filed together with the Plaint was an application dated 14<sup>th</sup> November, 2019 in which the Appellant sought orders of injunction to restrain the two Respondents from proceeding with the burial on the said parcel of land pending the hearing and determination of the suit. Having heard the application and by her Ruling delivered on 14<sup>th</sup> April 2020, the Honourable F. Muguongo, SRM dismissed the application having found that it lacked merit. Aggrieved by the said determination, the Appellant moved to this Court vide a Memorandum of Appeal dated 15<sup>th</sup> April, 2021.

13. Having perused the pleadings and the Ruling by the Learned Magistrate, I had no doubt in my mind that the dispute before the lower Court was in the nature of a burial dispute. It was apparent that the Appellant herein sought to challenge the interment of the remains of the said Charles Muriithi Kahiga on the aforesaid parcel of land not on account that she was exercising any rights or interest over the land but on the basis that she was Charles' wife and that the Respondents were planning to go on with the burial without her participation and without recognizing her as a wife married by the deceased under Kikuyu customary law.

14. That being the case, it was clear to me that the nature of the dispute herein was not among those contemplated under **Section 13 of the Environment and Land Court Act**. There being no dispute over the ownership of the parcel of land on which the deceased is to be buried, it was evident that this was a pure burial dispute and that this Court lacks the Jurisdiction to deal with the same.

15. The upshot is that the Preliminary Objection succeeds and both the Appeal and the Motion dated 15<sup>th</sup> April, 2021 are hereby struck out.

16. Each Party shall bear their own costs.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 24<sup>TH</sup> DAY OF MARCH, 2022**

In the presence of:

Mr. James Kahiga – 1<sup>st</sup> Respondent present in person

No appearance for the Appellant

Court assistant - Kendi

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**J. O. OLOLA**

**JUDGE**