



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAMIRA

ELC NO. 82 OF 2021

(Formerly at Environment and Land Court at Kisii Case No. 34 of 2020)

OYUNGE BARNABUS RATEMO.....1ST PLAINTIFF

MALACH RATEMO MATHAYO.....2ND PLAINTIFF

KENNEDY MBAKA RATEMO.....3RD DEFENDANT

DANIEL RATEMO (Suing as the administrators of the estate of

MATHAYO RATEMO MAYAKA (Deceased).....4TH PLAINTIFF

=VRS=

CHARLES OTEKI RIOBA.....1ST DEFENDANT

HELLEN BWARI MOKONO.....2ND DEFENDANT

RULING:

Burial rows are not new in this country. This shows the emotion parties attach to their loved departed ones. Their feelings cannot be dismissed. The Application before me is not one of the so many contemporary disputes of who has a right to bury a Deceased person. The issue is whether the Court should allow the body of the late Josiah Mokono Ombaye (Deceased) who died on 3/3/2022 to be interred on the parcel of land known as L.R. NO. 9346/2 or not. The ownership of L.R. NO. 9346/2 has been the subject of litigation in this suit.

According to the Amended Plaint filed herein on 2/6/21, the Plaintiffs seek eviction orders against the Defendants herein in the following terms: -

(a) An order of eviction against the Defendants from the deceased’s land parcel LR. NO. 9346/2.

(b) An order of permanent injunction restraining the Defendants, jointly and severally their respective agents, privies servants and others whosoever claiming through them from entering, trespassing, tilling, construction, wasting, harvesting trees thereon, and/or in any other manner howsoever dealing with the deceased’s land parcel LR. NO. 9346/2.

(c) General damages for trespass.

(d) Costs of this suit and interest.

The suit is yet to be set down for Hearing. Even before the matter was heard, the Husband to the 2nd Defendant died and the Applicants have moved this court to have his widow restrained from burying his body on the suit land in an Application dated

7/3/2022 seeking the following Orders:

1. Spent.

2. **THAT** pending the hearing and determination of this application, an order of injunction do issue restraining the 2nd Defendant/Respondent by herself, her employees, agents and/or servants or whosoever claiming through her from entering, burying the remains of Josiah Mokono (Deceased), developing/constructing thereon, cultivating, tilling and/or committing any acts of trespass or other acts which are prejudicial to the property of the estate of the Deceased in the property L.R. NO. 9346/2.

3. **THAT** pending the hearing and determination of this suit, an order of injunction do issue restraining 2nd Defendant/Respondent by herself, her employees, agents and/or servants or whosoever claiming through her from entering, burying the remains of Josiah Mokono Ombaye (Deceased), developing/constructing thereon, cultivating, tilling and/or committing any acts of trespass or other acts which are prejudicial to the property of the estate of the Deceased in the property L.R. NO. 9346/2.

4. **THAT** the Officer Commanding Station, Matutu Police Station, do supervise enforcement of the Court Orders and provide security.

5. **THAT** the costs of this application be borne by the 2nd Defendant/Respondent.

6. **THAT** necessary directions be made.

The Application is supported on the Grounds: -

(i) **THAT** the applicants are the legal representatives of the late Mathayo Ratemo Mayaka who died on the 20th of May 1980.

(ii) **THAT** the deceased is the absolute registered owner of the land parcel L.R. NO. 9346/2 measuring 165 Acres.

(iii) **THAT** the Defendants had in the year committed trespass onto the deceased property by curving out a portion thereof, fencing it off and taking possession claiming purchase from beneficiaries of the estate long after the demise of the registered owner.

(iv) **THAT** the 2nd Defendant/Respondent lost her husband, Josiah Mokono Ombaye (Deceased) on the 3rd of March 2022 and preparations are in advanced stage to bury him on the property land parcel L.R. NO. 9346/2 belonging to the estate of the deceased.

(v) **THAT** there is need to safeguard the interests of the estate of the deceased by way of restraining orders pending the hearing and determination of the application and the suit.

(vi) **THAT** unless the orders sought are granted, the estate of Mathayo Ratemo Mayaka stands to suffer irreparable loss and damage which will not be adequately compensated.

In her response, the 2nd Respondent who is widow to the deceased has held a firm position that the deceased did not have any other home anywhere else where his body could be buried since he acquired a piece of land on the suit land where he had established a home after disposing of the land he inherited from his father at Ogembo, Kisii county and therefore his body could only be laid to rest on the suit property. She further deposed that her husband and his family have been on the portion he has occupied since 1992: In 1993, long before this suit was filed, one of her sons was buried thereon with the Applicants raising no issue. It is for this reason that she vehemently opposes this Application.

The Court is faced with the situation of either to grant an injunction which would mean discomfort to the 2nd Defendant, or dismiss the Application which would mean that the burial takes place on the suit land which in the Applicants' view, should the Plaintiff eventually succeed, it will mean exhumation of the body, which will also cause inconvenience and parties will once again be back to where they are now.

In fulfilment of the deceased's wish the 2nd Respondent made burial plans and set the burial place at the deceased's proposed resting place, the suit land. It is now settled practice in Kenya that the wishes of the deceased's place of burial must be followed and fully implemented as long as they are not inconsistent nor contrary to general law or policy as was clearly stipulated in the case of **SAN v. GW (2020) eKLR**.

The easiest and natural way to go about this dispute would have been to ask the Respondent to look for an alternative burial site until the dispute herein is concluded. But unfortunately, the Abagusii community has from time immemorial pre-determined where a man or a woman is to be buried and I believe this serves a good purpose in enabling the community to come to terms with the death and loss of their loved ones. Normally, married men would be expected to have homes where they would be buried when they die. A Kisii man determines his burial site by where and how he constructs his house. It is therefore not difficult to know where the Deceased had wished his burial site to be. It is not my intention to disturb the practice which has been well entrenched amongst the Abagusii and if I have to depart from it, I must be given good reasons as to why I should do so. **Because of this I must first explain why the place a Kisii man is laid to rest is very critical and also why the Decision made is of public (read community) importance.**

Regarding Abagusii Customary rites relating to burial of a deceased person, where a person dies without a home, a house known traditionally as "**Ekenyesambo**" is built for him so that he can be buried. An Abagusii man who dies and has a home is buried within his homestead. Where such a person dies without having established a home, an "**Egesamo**" or "**Omucii**" is constructed so that he can be buried next to it.

In an Article titled "**Gusii Funerals: Meaning of Life and Death on an African Community**" Robert A. Levine at page 28 notes as follows notes as follows:

“.....In 1974 a Gusii schoolteacher who lived in town decided to build his house in the rural area on a pleasantly situated spot within the paternal homestead. When his blind grandfather, who was head of the homestead, heard where the house had been built, he called in his grandson and told him that the spot was not a suitable house site because the ground there was solid rock and would not permit the digging of a grave in which he could be properly buried. Another house was thereupon erected on a site with softer earth.....Gusii funerals take place at the home of the deceased. Each action, from dying to posthumous sacrifice has a customary location regarded by Gusii as an essential part of the ritual. The domestic setting has the same kind of relation to a Gusii funeral that the tradition design of a church, mosque or synagogue has to the rituals that take place there: Where the performance takes place is central to its meaning. In this case, however, it is the same house where life has been lived that is the explicit source of meaning at death.....”

The author at page 29 observes that

“.....a Gusii homestead belongs to a man and that the house itself is divided into two rooms: “enyomba” which is the woman’s room and “eero”, her husband’s room.

He further notes in the article that: -

“.....Enyomba as the woman’s room is considered the left side of the house; a woman is supposed to die in her normal sleeping place there, lying on her left side, and be buried outside it just beyond the yard. Eero is considered the right side of the house, and a man is supposed to die there (though he normally sleeps in his wife’s area), lying on his right side, and be buried outside it beyond the cattle pen. (Right is said to be the man’s side because he holds his spear on his right hand.) In burial, the woman should remain lying on her left side and the man on his right side. Thus, the conceptual divisions of the house and adjacent external spaces into right and left sections identified with male and female spouses regulates the places and positions of proper death and burial for those spouses..... Contemporary Gusii take these spatial ideals seriously, even when doing so involves inconvenience, discomfort, and expense. They take pains to assure the proper placement of their own bodies and those of their kin in death and burial.”

Robert A. Levine further observes:

“.....One of the most interesting aspects of these spatial rules is the necessity that each adult have a unique location at burial, one that is not shared with any other adult of the same sex. Hence each man must have a house that was built for him and each woman a house in which she has cooked as his wife; no other available house in the homestead can serve as a substitute point of reference for their graves. The individual identity of the adult is at stake here. No matter how much emphasis there is on the corporate identity of the homestead and the generational continuity of the lineage in other parts of the funeral, each person who has reached maturity is entitled to a unique house-burial site as a minimal marker of individuality..... informants emphasized the need to smooth down the earth after burial so that its location would be invisible to the witches, who are believed to exhume corpses and eat them. Thus the house is at the time of death and thereafter the only visible marker of the deceased as an individual. For the Gusii, whose bodies are literally incorporated at death into their homesteads and who see their descendants as their primary evidence of having lived, the house is an indispensable symbol of personal identity as an adult individual at the time of interment.....”

Having no other home and having used enormous resources to develop the 3 Acres bought out of the suit premises the Deceased spoke loudly on where he wished to be buried. The issue now is whether or not this court should stop the 2nd Respondent, widow to the deceased, from burying the body of the late Josiah Mokono Ombaye(Deceased) on any portion of the parcel of land known as L.R. NO. 9346/2.

I must warn the parties herein that by allowing or disallowing the burial of the deceased on the suit land it should not be seen as an attempt to legitimize the ownership of the suit property by any of the parties. For the avoidance of doubt, I am not called upon to determine land rights respecting the Plaintiff’s family members. Such a time would arise. By determining the burial place of the deceased, I have not determined any ownership rights respecting the parcel of land known as L.R. NO. 9346/2 presently in dispute. That would have to await appropriate proceedings at full trial. I hope the Application dated 7/3/2022 was not brought with the aim of trying to settle the ownership dispute of the parcel of land known as L.R. NO. 9346/2 or distribution of the same through a burial dispute.

Although the 2 issues herein are not exclusively detached from each other, the parameters are different in determining ownership of land and determining a burial dispute. In this case, I will determine whether the deceased will be buried on the suit land which necessarily does not confer any ownership rights over the subject parcel of land.

It is not in dispute that the Estate of the late Mathayo Ratemo Mayaya has been legally distributed and each of the beneficiaries given his portion. The certificate of confirmation of Grant in respect to the Estate of the late Mathayo Ratemo Mayaya was issued on 9th July 2020. From the said certificate of confirmation of Grant Daniel Ratemo was to hold 20 Acres out of Land Parcel Number 9346/2 in trust for his siblings. It is his brother who sold 3 Acres to the 2nd Defendant out of the 20 his siblings and himself are entitled to. The Administrators should therefore not frustrate the sale by not completing the administration of the Estate. The moment the certificate of confirmation of Grant of the Estate was issued, the Estate was no more since all the entitlements were made known. On this proposition I am guided by Section 45 (1) of the Law of Section Act, CAP 160 Laws of Kenya which provides that:

Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person. (Emphasis mine).

What does the **grant of representation** confer? The initial Grant confers limited rights and duties. And the certificate of confirmation of Grant does distribute the Estate thus conferring rights of ownership to the beneficiaries and where there is no Trust, as is the case here, the Estate is wound up. The only thing remaining is for the beneficiaries to get their specific Title Deeds.

Under Section 83 (g) of the Act one of the duties of the Personal representatives shall be:

to complete the administration of the estate in respect of all matters other than continuing trusts, within six months from the date of confirmation of the grant, or such longer period as the court may allow, and to produce to the court a full and accurate account of the completed administration.

What are the Administrators still doing with the certificate of confirmation almost 2 years after the confirmation of the Grant and distribution of the Estate? There was sufficient time for the Applicants together with their co-administrators to complete the process on the ground. They can therefore not convince me that they are here to protect the Estate of the Deceased. On the contrary, they have failed in their duties under Section 83 (g) to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration.

If indeed the Estate of the late Mathayo Ratemo Mayaya still exists, the Applicants should then have moved the Succession Court in Kisii High Court Succession Cause Number 5 of 2019 and not the Environment and Land Court. That would have been the best forum to raise the issue of intermeddling with the Estate.

The 1st Defendant having sold part of his land to the 2nd Defendant and there being no dispute amongst the members of the house that the 1st Defendant hails from, and also bearing in mind that no one has alluded that the 1st Defendant has sold more than he is entitled to, the Applicants cannot be heard to object to the burial of the 2nd Defendant's husband on the portion he has occupied since 1992 and where in 1993, long before this suit was filed, one of the 2nd Respondent's sons was buried on the suit land with the Applicants herein raising no issue.

The situation would have been different only if the beneficiaries' entitlements were not known. The Applicants' argument that although the entitlements are known, it is not clear where the 2nd Defendant's entitlement on the ground is does not hold. **As demonstrated above, the burial of the 2nd Defendant's husband on a portion bought by her from the person allocated the same after distribution does not infringe on the Applicants' right to their property nor their position as Administrators.**

Consequently, I will respond to the Applicants' Notice of Motion dated 7/3/2022 by making the following orders:

1. The prayer for an injunction restraining the 2nd Defendant/ Respondent, either by herself, her employees, agents and/or servants or whomsoever claiming through her from entering, burying the body of her husband, Josiah Mokono Ombaye(Deceased), developing and/or constructing thereon, cultivating, tilling and/or committing any acts of Trespass or other acts which are prejudicial to the property of the Estate of the Deceased in the property L.R. NO. 9346/2 is declined.
2. The prayer that the Officer Commanding Matutu Police Station be ordered to supervise the enforcement of the court order herein and provide security is allowed with a meaning different from the one contemplated by the Applicants - to ensure that the burial of the late Josiah Mokono Ombaye who died on 3/3/2022 is conducted by the Deceased's (Josiah Mokono Ombaye) without any interference from any quarters.
3. The Applicants shall pay all the mortuary bills incurred for the period beginning from 7/3/2022 to 24/3/2022 (inclusive).

Finally, I must warn the parties herein that we have found ourselves where we are today because of not expediting this Dispute. The expeditious hearing and determination of this suit cannot therefore be overemphasized and it is against that background that the court must fast track the hearing of the suit. Otherwise with time we may have to converge on the same point.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 24TH DAY OF MARCH, 2022.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Sibota

Plaintiff: Mr. Mutai

Defendant: Mr. Nyambati for 1st Defendant/Respondent

Mr. Moracha for 2nd Defendant/Respondent