



**Namachanja & another v Wekesa (Environment and Land Appeal
E040 of 2024) [2025] KEELC 3382 (KLR) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3382 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E040 OF 2024**

EC CHERONO, J

APRIL 24, 2025

BETWEEN

FLORENCE NAMACHANJA 1ST APPELLANT

EVANS WANYAMA MUSIME 2ND APPELLANT

AND

PRISCAH NALIAKA WEKESA RESPONDENT

JUDGMENT

1. The 1st and 2nd Appellants herein were the defendant's while Priscah Naliaka Wekesa-the Respondent was the plaintiff in the former suit before the trial court. The said Appellants now contest judgment of the trial court in Bungoma CM- ELC Case no. E069 of 2024 delivered on 16/08/2024 by Hon. T.K.Ng'etich where the trial court allowed the Respondents claim and dismissed the Appellant's counter-claim.
2. The Respondent through her Amended plaint claimed that she has cohabited with one Rodgers Sikuku Musime-dcd since the year 1995 after the deceased was deserted by the 1st Appellant who was his 1st wife. That their said union was blessed with 4 issues. That the said Rodgers Sikuku Musime died on 09/07/2024 and his body was taken to Bungoma Hospital Referral Mortuary and later transferred to Kiminini Cottages for preservation. That during his lifetime, the deceased had purchased land parcel no. E. Bukusu/N.Kanduyi/3353. That sometime in the year 2023, the 2nd Appellant visited the deceased and took his identification documents in the pretext that he was going to register him for NHIF. That they later found out that the Appellants had connived to transfer land parcel no. E. Bukusu/N.Kanduyi/3353 to his name and was subsequently issued with a title deed as land parcel no. E. Bukusu/N.Kanduyi/5671.
3. That the Appellants intents to bury the deceased in Tongaren despite having separated from him for a period of over 30 years. That the deceased had established a home in land parcel no. E. Bukusu/



N.Kanduyi/3353 during his lifetime. The Respondent sought for judgment against the Appellants jointly and severally for;

- a. The deceased body be retained at Kiminini Cottages for preservation until the case is heard and determined.
 - b. That the defendants be barred from interring the remains of the late Rodgers Sikuku Musime at Tongaren.
 - c. That the plaintiff be allowed to bury the deceased Rodgers Sikuku Musime on his land in Makutano i.e on land parcel no. E. Bukusu/N.Kanduyi/3353 previously land parcel no. E. Bukusu/N.Kanduyi/3353.
 - d. Costs of this suit
 - e. Any other relief that this honourable court may deem fit to grant.
4. The Appellants filed a statement of defence and counter-claim dated 06/08/2024 in which they denied the contents of the plaint and claimed that the 1st Appellant is the lawful spouse of the deceased as per an affidavit sworn on 16/01/1989 and denied the allegation that they ever colluded as alleged by the Respondent and asserted that no complaint has ever been lodged against them on the said issue. It was stated that the deceased does not own land in Togaren save for a portion of ancestral land which is his entitlement and that he is to be buried there in line with the customs and tradition of the Bukusu Community. They denied that the deceased had established any other home and added that he left no will and testament on disposal of his body upon his demise and therefore he ought to be buried in his ancestral home in accordance with Bukusu customs.
5. In their counter-claim, the Appellants averred that the Respondent lacks locus standi to institute the suit as she did not produce any material to justify her claim that she is the wife of the deceased. That the plaint did not disclose any cause of action against them and that in the absence of any proof of marriage, the deceased's estate is to be administered according to the customs and traditions of his community. That according to the law, only bona fide family ought to be allowed to bury the deceased and the plaintiff who has not demonstrated any marriage between herself and the deceased cannot be given priority in determining the issue of resting the deceased's body.
6. That the 1st Appellant is the lawful wife of the deceased as evidenced in the affidavit sworn on 16/01/1989 and the inclusion of the deceased in the 1st Defendants NHIF's cover as a spouse. That having demonstrated that the 1st Appellant is the deceased's spouse, she is entitled to the lead role on his burial arrangements together with the 2nd Appellant who is his son. They sought for judgment against the Respondent for;
- a. A permanent injunction be and is hereby issued as against the plaintiff herein, barring the said plaintiff from in any way whatsoever interfering with the interment plans for the remains of the deceased herein Rodgers Sikuku Musime.
 - b. An order be and is hereby issued that the management of Kiminini Cottages shall release the remains of the deceased herein Rodgers Siuku Musime to the 1st and 2nd defendants to interment at the deceased's ancestral home situated at Tongaren.
 - c. The plaintiff's case be and is hereby dismissed.
 - d. The 1st and 2nd defendants counter-claim be and is hereby allowed; and
 - e. Cost of this suit shall be borne by the plaintiff herein.



7. The suit before the trial court proceeded by way of viva voce evidence where the Respondent called six (6) witnesses while the Appellants called three (3) witnesses.

The appeal.

8. The appeal before this court sets out nine (9) grounds as follows:
 - a. That the learned trial magistrate failed to discover it was purely a land matter instead of burial dispute and entirely was subject for dismissal.
 - b. That the learned trial magistrate grossly erred in law in evaluation of the evidence before him.
 - c. That the learned magistrate erred in law and in fact as the judgment was against the weight of evidence adduced by the defendant's in the lower court which facts were justifiable, substantive and overwhelming as provided for in law.
 - d. That the learned magistrate erred in law and in fact by totally ignoring and not taking into consideration the submissions of the defendant's in the suit and fully uploading plaintiffs' submissions which fell short of the evidence adduced by the plaintiff.
 - e. That the learned magistrate grossly erred in law as he failed to discover the plaintiff did not produce any evidence of validity about her marriage. Exhibited actual bias against the appellants.
 - f. The learned trial magistrate exhibited actual bias to award body for burial to a stranger against the wish of the 2nd defendant being the 1st wife as there was no divorce certificate available to the court thereof.
 - g. The learned trial magistrate erred in law and in fact by failing to test all the facts and evidence pleaded and adduced on balance of probabilities especially on issue of land registered in life person.
 - h. That the learned magistrate erred in law and in fact by failing to discover the plaintiff lacked locus standi to institute suit in court and his judgment bears contradictions which is bad in law.
 - i. That the final orders have occasioned injustices to the appellants herein
9. The appellants sought for the following prayers;
 - a. Appeal be allowed.
 - b. The judgment of the magistrate in Bungoma No. ELC/ E069 of 2024 delivered on 16/08/2024 be set aside and suit struck out.
 - c. In the alternative this honourable court grant relevant orders as it deems fit.
10. When this appeal came up for directions, the parties agreed to canvass the same by way of written submissions.
11. The Appellants filed their submissions dated 10/02/2025 and raised five key issues. Regarding the first issue, they argued that the trial court lacked jurisdiction to hear the dispute, contending that the matters in question fall within the exclusive original jurisdiction of this Honourable court. Reliance was placed in the case of *Morris Odawa vs. Samuel Ochieng Auma* (2019) eKLR and the provisions of Article 162(b) of the [Constitution](#) and Section 13 of the [Environment and Land Court Act](#) 2011. They argued that the 2nd Appellant is the registered owner of Land Parcel No. E.Bukusu/



N.Kanduyi/5671 and his right as such is protected under Section 24 and 26 of the [Land Registration Act](#) No. 3 of 2012. They cited the case of Mbira vs. Gichuhi EA 13. It was also submitted that the Respondent lacked capacity to institute the suit since she was not an administrator of the estate of the deceased. They relied on the case of Rajesh Pranjivan Chudasama vs. Sailesh Pranjivan Chudasama (2014) eKLR.

12. The Respondent on her part filed her submissions dated 24/02/2025 where she submitted that this appeal was filed in the wrong forum as the issues in dispute concern a burial dispute and do not touch on land use or ownership. It was also submitted that the 2nd Appellant's title for land parcel no. E.Bukusu/N.Kanduyi/5671 which is a sub-division of E.Bukusu/N.Kanduyi/3353 and the transfer in issue were acquired and done through fraud and according to Section 26(1) of the [Land Registration Act](#), that title is liable to be impeached on grounds of fraud and misrepresentation. Finally, the Appellant argued that this appeal was filed in the wrong forum.

Analysis and determination.

13. I have considered the record of appeal, the grounds set out in the memorandum of appeal herein and the rival submissions and find that the issue that commends for determination in this appeal is whether this court has jurisdiction to determine this appeal and sufficient grounds have been established for this Honourable Court to interfere with the exercise of discretion by the trial court and set aside its judgment and decree. First, I must remind myself of this court's duty as the first appeal court. See *Kenya Ports Authority v Kunston (Kenya) Ltd*, (2009) 2 EA 212.
14. This court's jurisdiction has been challenged by the Respondent and therefore a question begs whether a dispute such as this one should be within the purview of the ELC jurisdiction. Jurisdiction, as has often been stated, is everything and without it, the court must down its tools and cannot make any further step. See *Owners of the Motor Vessels "Lillian S" v Caltex Oil (Kenya) Ltd* (1989) eKLR.
15. Section 13 of the Environment and [Land Act](#) clothes this Court with 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 the ELC Act or any other law applicable in Kenya relating to environment and land. Article 162 (2) (b) of the [Constitution](#) demarcates the jurisdiction of the ELC Court and states that it shall have power to hear and determine disputes as follows;
 - 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 and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land.
16. I have carefully looked at the prayers sought in the pleadings as summarized in preceding paragraphs and I have no doubt in my mind that the dispute before the lower Court was in the nature of a burial dispute. The issues raised are ideally on the release and interment of the deceased's body and the major question the court is called upon to interrogate is to whom the deceased's body ought to be released to. That being the case, it is 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](#).



17. Having said that, this court has no jurisdiction to determine burial disputes and as such, has no option but to down its tools. This appeal is therefore struck out. However, in the interest of justice and given the circumstances of this case, I shall direct that this file be placed before the Deputy Registrar, Bungoma High Court forthwith for purposes of placing it before any Judge for appropriate directions. I shall not make any orders as to costs.
18. Orders accordingly.

DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 24TH DAY OF APRIL, 2025.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Muyala for the Appellants.
2. Mr. Wanjala for the Respondent.
3. Bett C/A

