



1. *Civil Appeal*

2. *Subject of Subordinate Court Case*

*BURIAL DISPUTE*

2.1 *Deceased filed land suit in the year 1979.*

2.2 *Husband died in 1954, leaving her a young widow with two daughters.*

2.3 *Father in law died in 1957.  
had 3 wives.*

2.4 *Father in law left instructions that land be subdivided amongst the houses:-*

*House No. 1            –            16 acres*

*House No. 2            -            15.75 acres*

*House No. 3            -            14 acres*

2.5 *Deceased came from House No. 2 as a daughter in law.*

2.6 *She had a further 6 children out of wedlock.*

2.7 *As she was a widow the fear that she might sell  
land registered in name of Peter Kihara Gathoga  
(the 1<sup>st</sup> born son in the 1<sup>st</sup> house.)*

2.8 *Peter Kihara Gathoga sub-divides the land on  
19<sup>th</sup> January 1979 being Githunguri/Githoga/13  
consisting of 12.16 hectares.*

2.9 *Deceased filed suit High Court of Kenya case  
No. 3859/79.*

2.10 *Trial commenced before Shield J*

*19<sup>th</sup> May 1993*

*20<sup>th</sup> May 1993*

*26<sup>th</sup> May 1993*

- i) Hon. Judge's contract not renewed.*
- ii) A total of 4 witnesses heard.*

2.11 *Trial commences before Kubo J*

*12<sup>th</sup> November 2008*

*5<sup>th</sup> May 2009*

- i) A total of 2 witnesses*

*heard*

*and defence closed.*

*not renewed.*

*Hon. Judge's contract*

2.12 *Hon. Chief Justice (Gicheru CJ) nominates*

*Nambuye J to write judgment.*

- 2.13 *Judgment delivered on 24<sup>th</sup> September 2010.*
- 2.14 *During trial original (HCC 3859/79) defendant passes away.*
- 2.15 *Respondent original defendant HCC 3859/79 changed advocates.*
- 2.16 *5<sup>th</sup> November 2010, O.P. Ngoge not on record request for stay of execution*
- 2.17 *Exparte orders granted Mwera J.*
- 2.18 *12<sup>th</sup> November 2010 advocate for original defendant in HCC 3859/79 announces that O.P. will take over proceedings.*
- 2.19 *Hon. Judge orders all parties to appear for mention 19<sup>th</sup> November 2010 to map the way forward. Status quo to hold. “Although Mr Ngoge got some orders on 5<sup>th</sup> November 2010 he is yet to properly come on record.”*
- 2.20 *19<sup>th</sup> November 2010 duty judge Dulu J mention before Mwera J 3<sup>rd</sup> December 2010.*

*Ngoge*

*on*

- 2.21 3<sup>rd</sup> December 2010, Dulu J orders hearing date in registry.  
*Note: no interim orders 19<sup>th</sup> November 2010 to 14<sup>th</sup> February 2011.*
- 2.22 14<sup>th</sup> February 2011 duty Judge Mwera J orders application served.
- 2.23 18<sup>th</sup> February 2011 duty judge Mwera J interparte application adjourned to 1<sup>st</sup> March 2011.
- 2.24 1<sup>st</sup> March 2011 duty Judge Mwera J – O.P. Ngoge does not wish Hon. Judge to handle matter.
- 2.25 Hon. Judge – obliges and declines to handle file.
- 2.26 No further action taken on file after 26<sup>th</sup> May 2011.  
Muchelule J gives orders two applications be heard together.  
(14<sup>th</sup> April 2011 and 4<sup>th</sup> July 2011)
- 2.27 Judgment of Nambuye J dated 24<sup>th</sup> September 2010.  
That deceased (then the widow from 1954) be  
land parcel Githunguri/Githiga/1121 consisting of 10.7 acres.

given

transferred to

2.28 *Execution of orders by deputy registrar and deceased. On 21<sup>st</sup> December 2010 land deceased.*

2.29 *Deceased original plaintiff passes away. Radio announcements made 16<sup>th</sup> August 2011 for service on 19<sup>th</sup> August 2011.*

Subject of appeal case HCA 430/11

2.30 *Original plaintiff 1 & 2 Samwel Ndiba alias Senior Samwel Ndiba alias Junior file suit in the law courts, Githunguri PMCC 70/11*

2.31 *Hon. Magistrate grants ex-parte orders (19<sup>th</sup> August 2011) to restrain burial of deceased original plaintiff in HCC 3859/79*

2.32 *Interparte hearing on 25<sup>th</sup> August 2011*

from

2.33 *Original plaintiff 1&2 appellant change advocates*

Advocates

*G K Gatere & Co Advocates to Kingara & Co*

2.34 *Hon. Magistrate held application for injunction Having no merits be dismissed. Burial to proceed.*

2.35 *7 days stay of execution granted.*

3. *Appeal filed on 6<sup>th</sup> September 2011*

3.1 *File before Duty judge Mwera J*

3.2 *Certificate of urgency application 6<sup>th</sup> September 2011 granted for stay of execution restraining respondent from burying widow on suit land.*

3.3 *Application for stay of execution 6<sup>th</sup> September 2012 confirmed by court (Angawa J) pending hearing of appeal.*

3.4 *Further order, appeal be heard before Nambuye J.*

3.5 *Nambuye J elevated to court of appeal bench.*

3.6 *Parties return to Civil Appeal, Civil Division on 6<sup>th</sup> March 2012.*

3.7 *Hearing of appeals and direction – 21<sup>st</sup> March 2011.*

4. *Appeal hearing*

i) *Submissions by appellant original plaintiff*

- 4.1 *Appeal against ruling of Hon. Magistrate dismissing application for injunction restraining respondent from burying deceased widow.*
- 4.2 *Respondent not at liberty to bury deceased.*
- 4.3 *Once judgment HCC 3859/99 delivered 24<sup>th</sup> September 2010 application made for stay of execution and granted by Mwera J on 5<sup>th</sup> October 2010 that read:*
- i) Matter certified urgent*
  - ii) Allowed O.P. Ngogo to come on record*
  - iii) Order No. 2 (stay)*
- 4.4 *Stay of execution till determination of appeal.*
- 4.5 *Submissions by respondent that orders had lapsed after 5<sup>th</sup> October 2010 not true.*
- 4.6 *Hon. Trial Magistrate on 2<sup>nd</sup> September 2011 made findings order had lapsed.*
- 4.7 *By dismissing application, Hon. Magistrate has gone against Mwera J's orders.*
- 4.8 *Prayed for appeal to be allowed.*

ii) *Submissions by Respondent*

- 4.9 *Appeal would not be rendered nugatory if burial takes place.*
- 4.10 *Advocate went to court and obtained ex parte orders.*
- 4.11 *Orders lapsed.*
- 4.12 *Hon. Magistrate gave reasoned judgment*
- 4.13 *Deceased widow had been a squatter on her own land for 31 years before her demise.*

5. *Held:*

- 5.1 *The Hon. Trial Magistrate was correct in its findings.*
- 5.2 *The Hon. Deputy Registrar Ougo as she then was, was correct in signing forms in execution of court judgment of 24<sup>th</sup> September 2010.*
- 5.3 *There was no orders of court at time transfer to land was made.*
- 5.4 *Appeal dismissed. Orders of Hon. Magistrate upheld.*
- 5.5 *Deceased be buried.*

13. *Case law:*

14. *Advocates* :

i) *S. Kingara instructed by S. Kingara & Co Advocates for the Appellants/original plaintiffs*

ii) *M.K. Chebii instructed by M/s M.K. Chebii & Co Advocates for the Respondent/original defendants*

**SAMWEL NDIBA alias SENIOR ..... 1<sup>ST</sup> APPELLANT**

**SAMWEL NDIBA alias JUNIOR ..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**JOHN GACHOKA KIHARA..... 1<sup>ST</sup> RESPONDENT**

**JOSEPHAT GATHOGA KIRAHHA ..... 2<sup>ND</sup> RESPONDENT**

**DAVID MBURU KIHARA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the Ruling of the Hon. Mr B M Nzakyo – Resident Magistrate – Githunguri dated the 2<sup>nd</sup> September 2011 in Githunguri PMCC 70 of 2011)*

## **J U D G M E N T**

### **I. INTRODUCTION**

1. Esther Wangari Kihara, now deceased was widowed at a young age in 1954. Her husband left her with two daughters. One is now married whilst the other is single. Her father in law passed away in 1957. He himself had three wives and had divided his land between the three houses:-

House No. 1	...	16 acres
House No. 2	...	15.75 acres
House No. 3	...	14 acres

2. It is alleged that her father in law gave instructions that the land for House No. 1 and House No. 2 be registered in the name of one Peter Kihara Gathonga (the 1<sup>st</sup> born son in the 1<sup>st</sup> house.) The reasons being that the widow might sell the land.

3. On 19<sup>th</sup> January 1979 Peter Kihara Gathonga sub divided the land of the House No. 1 and 2 totalling

to 32.75 acres or 12.16 ha into parcel of

5 acres and one 10 acres to the original title then known as Githunguri/Githiga/13.

4. The late Esther Wangari Kihara filed suit at Nairobi being HCC 3859/79. Her trial commenced before Shields J on

19<sup>th</sup> May 1993

20<sup>th</sup> May 1993

26<sup>th</sup> May 1993

5. Upon hearing 4 witnesses the Hon. Judge's contract not being renewed was not able to proceed with the matter.

6. Whereas between 1993 and 2008 the matter was adjourned by several judges of which part of the problem being that the deceased original defendant passed away, it was not until the year 2008 that the matter came before Kubo J. He proceeded with the trial on

12<sup>th</sup> November 2008, 5<sup>th</sup> May 2009 and heard two more witnesses. The defence was closed and the only thing pending was the judgment to be delivered. The Hon. Judge's contract was not renewed.

7. The Hon. the Chief Justice (Gicheru CJ) nominated Nambuye J (as she then was) to write the judgment.

8. The judgment was delivered on the 24<sup>th</sup> September 2010.

9. The defendants in HCCC 3859/79 changed advocates.

10. The original advocate who was on record was G Kamonde. Another advocate O.P. Ngoge appeared before Mwera J and obtained orders of stay of execution *exparte*. O.P. Ngoge was not yet on record. The

Hon. Judge not aware of this directed that the matter be mentioned on 12<sup>th</sup> November 2010.

11. On 12<sup>th</sup> November 2010 G Kamonde announced to the Hon. Judge that O.P. Ngoge would be taking over the proceedings.

12. The Hon. Judge orders that all the parties appear before him as duty judge for mention on 19<sup>th</sup> November 2010 "to map the way forward. Status quo to hold." The Judge commented in writing.

***"Status quo to hold although Mr Ngoge got some orders on 5<sup>th</sup> November 2010, he is yet to properly come on record."***

13. On 19<sup>th</sup> November 2010, Mwera J was not available. The duty Judge Dulu J mentioned the matter and ordered that parties appear before Mwera J on 3<sup>rd</sup> December 2010. On the 3<sup>rd</sup> December 2010 the file went before Dulu J as duty judge who gave further orders that parties to take dates in the registry. There were no interim orders granted by Dulu J.

14. On 14<sup>th</sup> February 2011, the file came before Mwera J seeking orders on an application by O.P. Ngoge. It is unclear which application this was. The advocate was ordered to serve the application and come for hearing on 18<sup>th</sup> February 2011.

15. The Hon. Judge ordered on 18<sup>th</sup> February 2011 that there be an *interparte* application and adjourned the matter to 1<sup>st</sup> March 2011.

16. On 1<sup>st</sup> March 2011 O.P. Ngoge announced to the duty judge, Mwera J that he does not wish the Hon. Judge to handle the matter. The

Hon. Judge obliged and declined to handle the file.

17. No interim orders had been issued since 19<sup>th</sup> November 2010 to 1<sup>st</sup> March 2011.

18. Whereas on 26<sup>th</sup> May 2011 Muchelule J made orders that two applications dated 14<sup>th</sup> April 2011 and 4<sup>th</sup> July 2011 be heard together, no further action had been taken on the file since 26<sup>th</sup> May 2011.

19. The judgment in HCCC file 3859/79 of Nambuye J dated the

24<sup>th</sup> September 2010, ordered that Esther Wangari Kihara (now deceased) (but then a widow since 1954) be given land parcel Githunguri/Gathiga/1121 consisting of 10.7 acres. She was entitled to 15.75 acres but 5 acres had been given to a person from the same house (who is now the administrator of her estate.)

20. Upon the execution of the orders of the judgement, the Hon. Deputy Registrar together with the deceased widow transferred the suit land into the deceased name on the 21<sup>st</sup> December 2010.

21. Unfortunately, the deceased original plaintiff in HCCC 3859/79 land case, passed away. The two appellants from the original defendant's house in case HCC 3859/79 being Samwel Ndiba alias Senior and Samwel Ndiba alias Junior upon learning of the demise of the late Esther Wangari Kihara on the "Inooro" radio announcement on

16<sup>th</sup> August 2011 filed suit in the Githunguri courts. Both were represented by M/s G K Gatere & Co Advocates.

22. By an application dated 18<sup>th</sup> August 2011, the Hon. Trial magistrate in PMCC 70/2011 at Githunguri courts granted ex parte orders restraining three respondents

- i) John Gachoka Kihara
- ii) Josephat Gathoga Kihara
- iii) David Mburu Kihara

from burying the deceased widow original plaintiff in HCC 3859/79.

23. An interparte date was given for 25<sup>th</sup> August 2011. The original plaintiff 1 & 2 and appellant herein, namely Samwel Ndiba alias Senior, Samwel Ndiba alias Junior changed advocates. They engaged the services of M/s Kingara & Co Advocates.

24. On the 2<sup>nd</sup> September 2011, the Hon. Magistrate, upon hearing the arguments on this matter by both sides dismissed the application for injunction as having no merits. He nonetheless granted 7 days, stay of execution. The advocate was able to file appeal on 6<sup>th</sup> September 2011 and applied before the duty judge – Mwera J for stay of execution restraining the burial of the widow on the suit land.

25. This was granted for 21 days. The file was placed before me for hearing interparte. On the 29<sup>th</sup> July 2011, Hon. Mwera J clarified his orders of stay of execution. That it was not given until the hearing of the appeal but until the hearing of the application dated 4<sup>th</sup> October 2010.

26. Upon hearing the parties, this court confirmed the orders of Mwera J. That there be a stay of execution until the finalization of the present appeal. That the appeal be heard by Nambuye J who was aware of the matter, through her earlier judgment.

27. Unfortunately, the Hon. Judge was not available to hear the appeal as she was elevated to the Court

of Appeal. The file came back to this court on 6<sup>th</sup> March 2012.

28. The appeal was 'fast tracked' due to the urgency that the deceased widow has been lying in the mortuary for up to six months.

29. The appeal including the directions was heard on 21<sup>st</sup> March 2011.

## II SUBMISSIONS

### i) By the Appellant's/Original Plaintiff 1 & 2

30. The appeal before the court is against the Hon. Magistrate dismissing the application for injunction that would have restrained the 3 respondents from burying the deceased widow.

31. Once the judgment in HCC 8589/79 was delivered on

24<sup>th</sup> September 2010, an application had been made for stay of execution and granted by Mwera J on 5<sup>th</sup> October 2010 that read:

**“i) Matter certified as urgent**

**ii) Allowed O.P. Ngoge to come on record**

**iii) Order No. 2 (stay)”**

32. The stay of execution was till the determination of the appeal. whereas the respondent had stated the orders of stay had lapsed after 5<sup>th</sup> October 2010, this fact was incorrect.

33. the Hon. Trial Magistrate also made finding on 2<sup>nd</sup> September 2011 that the orders of stay had indeed lapsed.

34. By dismissing the application of 18<sup>th</sup> August 2011, the Hon. Trial Magistrate had gone against orders made by Mwera J, the duty judge.

35. In this appeal, the appellant prayed that it be allowed. The orders of the Hon. Magistrate be set aside and substituted with orders that an injunction restraining the respondent do issue.

### ii By The Respondent/Original Defendant

36. It was the respondent's submissions that the appeal would not be rendered nugatory if the burial would take place.

37. The advocate for the appellant's had gone to court and obtained ex parte orders. The Hon. Magistrate on hearing both parties gave a reasoned judgment/ruling.

38. This matter should come to rest. The deceased widow had been a squatter on her own land for 31 years before her demise.

39. The respondents prayed the appeal be dismissed.

40. Whereas this appeal is related extensively with HCC 3859/79, now finalized, I have avoided to go into the merits and demerits of that land matter on grounds that it is a subject yet to be heard in the Court of Appeal. the successful party in that case was awarded land parcel

LR Githunguri/Gthiga/112 comprising of 10.7 acres.

41. The issue that arises in this appeal is that of “stay of execution” of the judgment of the court in HCC 3859/79.

42. It was the appellants’ argument that in HCC 3859/79, being dissatisfied with the orders of Hon. Nambuye J, they wished to file appeal and stay of execution of transferring the suit land into the deceased widow/original plaintiff’s name.

43. They obtained these orders on the 5<sup>th</sup> October 2010. That whilst the orders were persisting, the deceased in collusion with the deputy registrar transferred the land to the deceased’s name when she was alive. This was in disobedience of Mwera J’s orders. It was further alleged that the Hon. Magistrate disallowed orders of injunction which indirectly amounted to the disobedience and or orders issued contrary to the High Court through Mwera J.

44. I had outlined each step taken in both files being HCC 3859/79 and PMCC 70/2011 together with this appeal CA 430/2011.

45. When O.P. Ngoge appeared before Mwera J, he had not officially come on record. He obtained ex parte orders. It is therefore not correct that the orders of Mwera J included the words, “**allowed O.P. Ngoge to come on record.**” If this was the situation, then Mwera J would not have on 12<sup>th</sup> November 2010 stated that on 5<sup>th</sup> October 2010 that

**“Although O.P. Ngoge (not on record) got some orders on 5<sup>th</sup> November 2010, he is yet to properly come on record.”**

46. The Hon. Judge was concerned that orders were issued without the advocate properly being on record.

47. As of 19<sup>th</sup> November 2010 when this file was before duty judge,

Dulu J, no extension of interim orders were made. No orders of status quo was recorded on the file. It therefore meant that both Dulu J and Mwera J never issued any further orders as far as “stay of execution” was requested.

48. It is with this understanding that this court can reliably state that her honour Ougo, deputy registrar (as she then was) acted within her powers and as ordered by the court in its judgment of HCC 3859/79 and transferred the property together with the deceased to her name. There were no orders of the court that would have been contravened.

49. The issue in this appeal was the title was fraudulently transferred to the deceased, when she was alive fraudulently. That she was aware of the intended appeal.

50. After perusing all the three files (HCC 3859/79, CMCC 70/11 & CA 430/11), there was no order of stay of execution in force. The order that had been obtained was so done by an advocate not on record.

Even if per chance he had been on record as of 19<sup>th</sup> November 2010, the orders had never been extended by this court. I would then dismiss this line of argument.

51. Should the orders of injunction be reinstated to stop the burial of the deceased?

52. It had been commented by Nambuye J that the deceased had been a squatter from 1979 on her own land when the original defendant

(HCC 3859/79) had subdivided the land on 19<sup>th</sup> January 1979, depriving her of 15.75 acres that was rightfully hers.

53. Here is a young woman widowed in 1954. She is deprived her land on grounds that she is still young and might sell it. She becomes old and the said land is subdivided depriving her of the access to land. She dies and for six months or more, her body lies in the mortuary on grounds that she is not permitted to be buried on the land pending an intended appeal to the Court of Appeal.

54. The right to own property, the right to be buried on land that she has lived all her life, is an inherent right. This is more so further, when she holds title deed for land that she is said she is not to be buried on.

55. I find that the Hon. Trial Magistrate in a very well reasoned ruling came to the correct conclusion. That there would be no injunction issued against the respondents. The deceased being holder of the title, the law provides that no injunction can issue against the one who holds title to land. The respondents herein, I believe, were sued as the funeral committee.

56. I hereby dismiss this appeal. The orders of the Hon. Magistrate dismissing the application of 18<sup>th</sup> August 2011 are upheld.

57. The respondents be at liberty to bury the deceased. The officer commanding the police station Githunguri and OCPD are to provide security and to ensure peace is maintained.

58. This appeal having been dismissed there would be costs to the respondents in this appeal. There will be costs to the respondents, original defendants in the magistrate's court case.

DATED THIS 28<sup>TH</sup> DAY OF MARCH 2012 AT NAIROBI

M.A. ANG'AWA

JUDGE

*Advocates* :

iii) *S. Kingara instructed by S. Kingara & Co Advocates for the Appellants/*

*original plaintiffs*

iv) *M.K. Chebii instructed by M/s M.K. Chebii & Co Advocates for the Respondent/original defendants*