



**Ingati & another v Amulyoto & another (Environment and Land Appeal
E5 of 2021) [2022] KEELC 3839 (KLR) (21 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3839 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E5 OF 2021**

DO OHUNGO, J

JUNE 21, 2022

BETWEEN

REBECCA MUHONJA INGATI 1ST APPELLANT

ISAAC SHIKHO INGATI 2ND APPELLANT

AND

ALFRED AMULYOTO 1ST RESPONDENT

PRISCILLA BUSOLO AVUNA 2ND RESPONDENT

*(Being an appeal from the judgment and decree of the Chief Magistrate's Court at
Kakamega (B Ochieng, Chief Magistrate) delivered on February 4, 2021 in Kakamega
MCELC no 80 of 2019 Alfred Amulyoto v Rebecca Muhonja Ingati and others)*

JUDGMENT

1. This appeal traces its roots to a plaint which the first respondent filed in the subordinate court on June 3, 2019 against the appellants as defendants. The second respondent later applied to be joined to the suit as an interested party. Her application was allowed on August 16, 2019 since it was not opposed by any of the parties. The first respondent averred in the plaint that he was the registered proprietor of the parcel of land known as Isukha/Kambiri/1272 and that the first appellant and second appellant who were the widow and son, respectively, of Patrick Muteshi Ingati who had passed away on June 1, 2019, had started preparations to inter his remains on Isukha/Kambiri/1272. He therefore prayed for judgment against the appellants for an order that the appellants be restrained by a permanent injunction from burying the body of the late Patrick Muteshi Ingati on land parcel no Isukha/Kambiri/1272. He also sought costs of the suit and any other order that the subordinate court deemed fit and just to grant.
2. Upon hearing the matter, the subordinate court (B Ochieng, Chief Magistrate) delivered judgment on February 4, 2021 in favour of the respondents as follows:



1. The defendants, their agents, legal representatives and/or employees or anybody acting on their behalf be and are hereby restrained by a permanent injunction from burying the body of the late Patrick Muteshi Ingati on land parcel no Isukha/Kambiri/1272 or 983.
 2. The defendants are at liberty to bury the body of the late Patrick Muteshi Ingati on land parcel no Isukha/Kambiri/984.
 3. The defendants to meet costs of preserving the deceased body at the mortuary
 4. Costs to the plaintiff and interested party. Right of appeal 28 days.
3. Aggrieved by the said outcome, the appellants filed this appeal on March 2, 2021. They listed the following grounds on the face of the memorandum of appeal:
1. That the learned trial magistrate grievously (sic) erred in law and fact by granting injunctive reliefs to the interested party who never sought the reliefs and whose interest did not lay any legal threshold requirement for granting of such reliefs.
 2. That the learned trial magistrate grievously (sic) erred in law and in fact by failing to note that the consent order recorded in court on June 19, 2019 determined the suit.
 3. The learned trial magistrate grievously (sic) erred both in law and in fact in failing to apply correctly the provisions of sections 24, 25, 26 and 28 of the Land Registration Act hence wrongly caused miscarriage of justice by injunctioning the appellants from interring the remains of the deceased in the deceased's parcel of land reg no Isukha/Kambiri/983.
 4. The learned trial magistrate erred in law and in fact in failing to take directions in respect of the interested party's position in the proceedings and christened the interested party as the plaintiff and granted orders which were not supposed to be granted.
 5. The learned trial magistrate erred both in law and in fact in failing to note that the interested party's claim lied (sic) to the high court and wrongly went ahead to arbitrate a succession claim that is pending in the high court at the lower court level hence wrongly applied the principles of granting an injunction.
 6. The learned trial magistrate erred both in law and in fact in failing to note that it was the plaintiff and interested party that ought to have satisfied a condition of paying the preservation/mortuary charges since it is orders in their favour that caused the body to be preserved in the mortuary.
 7. That the learned trial magistrate erred in law and fact by ordering the body of the deceased to be interred in L P Isukha/Kambiri/984 which does not belong to the deceased and whose owner is unknown, yet it was not the subject parcel of land under litigation, hence gave directions which were uncalled for in the circumstances, thus leading to miscarriage of justice.
4. They therefore prayed that the appeal be allowed, the respondents' case be dismissed with costs and that the respondents be ordered to meet the mortuary costs in respect of preservation of the body of Patrick Ingati Muteshi from June 1, 2019 to the time when the body will be removed from the mortuary.
 5. The appeal was canvassed through written submissions. The appellants filed submissions in which they contended that the learned magistrate ought not have granted an injunction to the second respondent since she admitted that she did not have any letters of administration in respect of her late husband's estate, since she did not seek any injunction and she did not satisfy the principles of granting an injunction. They further argued that the deceased is the registered owner of Isukha/Kambiri/983 and



that there was no contrary evidence to suggest that the interested party was the registered owner of the said parcel. That injunctioning burial on the deceased's land where he is the registered owner was a miscarriage of justice and that the order that the deceased's body be buried in Isukha/Kambiri/984 was wrong as the deceased is not the registered owner of that land.

6. The appellants further faulted the trial magistrate for going against a consent that was recorded by the first respondent and the appellants on June 19, 2019 to the effect that the deceased be buried in Isukha/Kambiri/983, which is registered in the deceased's names and where the deceased's homestead is situated. That the consent resolved the issue of the place of burial of the deceased only for the trial court to turn around and direct that the appellants are at liberty to bury the remains in Isukha/Kambiri/984, a property which is unknown to the parties.
7. The appellants went on to argue that the learned magistrate wrongly applied the provisions of sections 24, 25, 26 and 28 of the *Land Registration Act* to the extent that the deceased was the registered proprietor of Isukha/Kambiri /983 and that ownership of the said plot was not an issue. That it was therefore wrong for the learned magistrate to hold that the deceased was holding the said plot in trust for the second respondent's late husband. That upon allowing the second respondent to join the suit as an interested party, the learned magistrate failed to give directions on whether the interested party was to be treated as a plaintiff or defendant. That instead, the subordinate court went ahead to treat the interested party as a full party in the proceedings and granted injunctive reliefs which were never sought by the interested party in her pleadings.
8. It was also contended by the appellants that the issue of revocation of the title in respect of Isukha/Kambiri/983 was pending before the High Court and that the subordinate court ought not to have entertained the interested party since she had moved the High Court in succession proceedings. Further, that the trial court ought to have gone by a rule that in burial disputes, a party who obtains an order stopping burial is the one who caters for the mortuary/preservation fees. In conclusion, the appellants argued that the trial magistrate erred in granting orders that the deceased be buried in Isukha/Kambiri/984 when the said plot was not a subject of the litigation. They therefore urged this court to allow the appeal with costs and to direct that the deceased be buried in Isukha/Kambiri/983.
9. In response, the first respondent submitted that the effect of joining the second respondent as an interested party does not mean that she became a "defendant" or a "plaintiff" and that her status was directly related to the purpose of her joining the proceedings which was to voice her interest in Isukha/Kambiri/983. That she did not need to file further pleadings to get orders favourable to her since her interest was to vary the consent of June 19, 2019 which had ordered that the deceased be buried in Isukha/Kambiri/983. That the second respondent succeeded in her mission by demonstrating that she has an equitable right over land parcel number Isukha/Kambiri/983. Further, that while it is true that nobody prayed for an order that the deceased be buried on land parcel number Isukha/Kambiri/984, it was apparent during the proceedings that the said parcel was owned by the deceased and further that the order that the appellants were at liberty to bury the deceased on the said parcel was a suggestion as opposed to a directive. Regarding the issue of mortuary fees, he argued that it was not addressed before the subordinate court and that it cannot therefore be a ground of appeal. He argued in conclusion that the appellants caused the dispute and escalated the trial by being untruthful, seeking to bury the deceased on Isukha/Kambiri/1272 and misrepresenting themselves that their home is in Isukha/Kambiri/983. He therefore urged the court to dismiss the appeal with costs.
10. On her part, the second respondent argued that this court does not have jurisdiction to entertain the appeal since the matter before the subordinate court was purely a burial dispute and had nothing to do with the environment, the use and or occupation of, and title to land. She further argued that the trial court was right in not upholding the consent of June 19, 2019 since her entry into the matter revealed



that Isukha/Kambiri/983 and 984 had unresolved disputes in High Court Succession Cause no 87 of 1996. She further argued that the learned magistrate did not misapply the provisions of sections 24, 25, 26 and 28 of the [Land Registration Act](#) since the district surveyor and the land registrar's report stated that she had a home on Isukha/Kambiri/983 while the deceased and his two sons had homes on Isukha/Kambiri/984. That consequently, the registration of the deceased as proprietor of Isukha/Kambiri/983 was subject to her claim of trust as well as the those of members of her family.

11. Regarding her role in the suit and whether the subordinate court ought to have granted her orders, the second respondent argued that the courts have a wide discretion to grant such orders as are just and appropriate. That the appellants consented to her joining the suit and further that having failed to raise the issue of directions regarding her status in the proceedings, the appellants cannot now raise the issue on appeal. She cited article 159 of the [Constitution](#) and argued that justice is to be administered without undue regard to procedural technicalities. Regarding the issue of who was to pay mortuary fees, the second respondent argued that the appellants are the ones that insisted on burying the deceased on Isukha/Kambiri/983 and that having failed in that argument and in the case before the subordinate court generally, the subordinate court was justified in ordering the appellants to pay mortuary fees. In conclusion, she urged the court to dismiss the appeal with costs.
12. This being a first appeal, my mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore make due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence. See [Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates](#) [2013] eKLR.
13. I have carefully considered the grounds of appeal and the parties' submissions. The issues that arise for determination are whether this court has jurisdiction, the role of the second respondent in the proceedings before the subordinate court, whether the second respondent could be granted orders by the subordinate court and whether the appeal has merit.
14. Jurisdiction, as has often been stated, is everything. Without it, the proceedings come to a certain end and the court cannot make any further step. See Owners of the [Motor Vessel "Lillian S" v Caltex Oil \(Kenya\) Ltd](#) [1989] eKLR. In [Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others](#) [2012] eKLR, the Supreme Court emphasised the importance of jurisdiction as follows:

A court's jurisdiction flows from either the [Constitution](#) or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the [constitution](#) or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. ...
15. Pursuant to article 162(2)(b) of the [Constitution](#) and Section 13 of the [Environment and Land Court Act](#), 2011, this court has original and appellate jurisdiction to hear and determine all disputes relating to the environment and the use and occupation of, and title to, land. Both from the heading of the memorandum of appeal herein as well as the case number of the suit in the subordinate which is MCELC no 80 of 2019, it is apparent that the suit was filed before the subordinate court pursuant to the said court's environment and land jurisdiction under section 9 (a) of the [Magistrates' Courts Act](#), 2015 as read with section 26 of the [Environment and Land Court Act](#), 2011. This being an appeal against a judgment and decree passed by the subordinate court in exercise of its aforesaid jurisdiction, it lies properly and exclusively with this court, in terms of section 26 (4) of the [Environment and Land Court Act](#), 2011. I also note that the dispute before the subordinate court revolved around the question



of whether or not the deceased's remains could be buried on land parcel number Isukha/Kambiri/1272 or Isukha/Kambiri/983. The dispute concerned both proprietorship rights as well as use of the parcels. I am satisfied that this court has appellate jurisdiction in the matter.

16. What was the role of the second respondent in the proceedings before the subordinate court? The record shows that on June 25, 2019, the second respondent filed Notice of Motion dated June 25, 2019 through which she sought to be joined in the suit as an interested party "for purposes of protecting her interests in Kakamega/Kambiri/983". It seems that she was referring to Isukha/Kambiri/983. Her reasons for seeking to join as can be gleaned from both the grounds of the application and the supporting affidavit were that the deceased and her late husband were blood brothers and that during the lifetime of the two brothers, their father allocated Isukha/Kambiri/984 to the deceased and Isukha/Kambiri/983 to the second respondent's late husband. That the second respondent was in occupation of Isukha/Kambiri/983 while the deceased occupied Isukha/Kambiri/984. That without her knowledge, the deceased filed Kakamega High Court Succession Cause No. 87 of 1996 and concealed the fact that there was a clear distinction between the two plots and that she was entitled to the exclusive possession and ownership of Isukha/Kambiri/983. That although a grant was issued in favour of the deceased in respect of Isukha/Kambiri/983, she challenged the grant and the court ordered the Land Registrar in the company of the District Surveyor to go and demarcate the boundary between the two plots. That the deceased's home is not situated on Isukha/Kambiri/983 and that the appellants intend to bury the deceased's remains on Isukha/Kambiri/983 instead of on Isukha/Kambiri/984. That there was need for her to be brought into the matter so as to articulate her rights over Isukha/Kambiri/983. Although the appellants had initially opposed the application, their counsel told the court on August 16, 2019 that they were no longer opposed to it and that it could be allowed as prayed. Based on that, the court made an order on August 16, 2019 allowing the application. Simultaneously, by consent of all parties, the court scheduled the suit for hearing on September 4, and 5, 2019.
17. In view of the foregoing, it is apparent that the second respondent's role in the suit was simply as an interested party. She was neither a plaintiff nor a defendant. Going by the reasons for her seeking to join, it is discernible that she had a claim to Isukha/Kambiri/983 and was keen to stop burial of the deceased on it. While it would have been ideal that directions be taken as to which side of the dispute the second respondent would advance her said claims and any possible amendment to the plaint or defence, no directions were suggested by any of the parties. Instead, the parties including the appellants embraced the second respondent as an interested party and moved with speed to set a hearing date for the suit.
18. In view of the above circumstances, the appellants cannot now turn around and blame the subordinate court for not giving directions. They were fully aware that the second respondent was mounting a frontal attack both against them and their intention to bury the deceased on Isukha/Kambiri/983. It must be remembered that directions, just like any other order that a court of law makes, is the end product of an application, a response by the other parties and ultimately an order of the court in the form of directions. Parties must not lazily sit back and wait for the court to formulate and give directions.
19. The second respondent having been made an interested party in the suit and bearing in mind her reasons for seeking to join, which she elaborately articulated in her application, it was inevitable that at the conclusion of the hearing, the question of whether or not to stop burial of the deceased in Isukha/Kambiri/983 would have to be addressed. Her stated mission in the matter from the onset was to stop burial of the deceased on Isukha/Kambiri/983. While it would have been more elegant for her to participate as a plaintiff with a plaint seeking those prayers or as a defendant with a counterclaim seeking those prayers, the absence of a plaint or counterclaim could not be a bar to the court granting her



prayer, a prayer which all the parties were aware of from the moment she sought to join and which all the parties fully addressed in the course of hearing and submissions. It must be remembered that under article 159 (2) (d) of the *Constitution*, section 3 of the *Environment and Land Court Act* and section 1A of the *Civil Procedure Act*, the overall mission of the court is to do substantive justice without undue regard to procedural technicalities. I find that the subordinate court was perfectly within its powers and jurisdiction in granting to the second respondent an order stopping burial of the deceased on Isukha/Kambiri/983.

20. Prior to the second respondent joining the matter, the dispute was whether the deceased could be buried on Isukha/Kambiri/1272. That dispute was resolved through the consent of June 19, 2019. Following that consent, the appellants in fact made it clear that they had no intention of burying the deceased on Isukha/Kambiri/1272. The consent however did not conclude the case as the appellants would have us believe. It stoked a new dispute: whether the deceased could be buried on Isukha/Kambiri/983. This new dispute was not about ownership of Isukha/Kambiri/983 but simply whether the second respondent had any discernible interest in the said property to warrant stopping burial on the property.
21. While analysing the second respondent's claims regarding Isukha/Kambiri/983, the learned magistrate stated as follows:

I have carefully considered the matters raised by the defendants and interested party with regards to parcel 983 The Land Registrar, Kakamega (DW5) confirmed that pursuant to an order made vide KAK HCSC No.87 of 1996 directing them and the district surveyor, Kakamega to demarcate the boundary between parcels 983, 984 and suit land they established that the said parcels of land are distinct and separate on the ground and that the interested party was indeed in occupation of parcels 983 and the deceased parcel 984. They proceeded to fix beacons marking the boundaries of the two parcels of land as per sketch tendered in evidence (dexhibit 3(c) and prepared reports (dexhibit 3(a) & (b) confirming position of the parcels on the ground.

Taking into consideration the foregoing it is clear that the deceased registration as the proprietor of parcel 983 was as a result of a grant from HCSC no 87 of 1996 wherein both the deceased and the interested party's husband were beneficiaries.

The interested party has demonstrated that she raised an objection in the succession cause which is ongoing ...

22. There is no dispute that the succession cause referred to by the parties is pending and that the second respondent is involved in it with a view to having the grant pursuant to which the deceased became the registered proprietor of Isukha/Kambiri/983 revoked. I have further perused the report that was produced in court by the Land Registrar and it is indeed stated therein that the second respondent was in occupation of Isukha/Kambiri/983 while the deceased was in occupation of Isukha/Kambiri/984. I further note that the appellants produced a certificate of official search in respect of Isukha/Kambiri/983 as at June 11, 2019 which showed that although the deceased was registered as proprietor of the said parcel on January 22, 1998, a caution was promptly registered on March 10, 1998 in favour of the second respondent who was claiming a beneficiary interest. In those circumstances, the second respondent had demonstrated sufficient interest in Isukha/Kambiri/983 to warrant stopping burial of the deceased in the said property. Being a registered proprietor is not everything. There are rights and interests of other parties which the law acknowledges, as the learned magistrate rightly held. In the context of the dispute that was before the subordinate court, it sufficed to note the second respondent's possible rights and interests in Isukha/Kambiri/983 but without determining them, since



their determination is an issue in another court. The learned magistrate did not purport to determine the rights and interests.

23. The appellants have also expressed total dissatisfaction with the order of the subordinate court that they were at liberty to bury the body of the deceased on land parcel no Isukha/Kambiri/984. A reading of the said order reveals that it was expressed in very permissive terms and was in fact a suggestion. The appellants are under no compulsion whatsoever in so far as the said order is concerned. If the idea of burying the deceased on Isukha/Kambiri/984 does not appeal to them, they can bury him elsewhere other than Isukha/Kambiri/1272 and Isukha/Kambiri/983.
24. Regarding mortuary fees, I note that the appellants lost in the litigation before the subordinate court. They opted to keep the body of the deceased in the mortuary in the course of the litigation. As far as I can see, the orders issued so far only stopped burial of the deceased on particular plots. There was no order completely stopping burial regardless of the plot. Since the rule is that costs follow the event, I see no reason why the appellants who have lost the litigation so far and who have opted to keep the body of the deceased in the mortuary all this time, should not bear mortuary fees.
25. In view of the foregoing discourse, I find no merit in this appeal. I dismiss it with costs to the respondents.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 21ST DAY OF JUNE 2022.

D O OHUNGO

JUDGE

Delivered in open court in the presence of:

The appellants present

No appearance for the 1st respondent

The 2nd respondent present

Court assistant: E Juma

