



REPUBLIC OF KENYA



**Agumba & another v Juma (Environment and Land Appeal
E041 of 2022) [2025] KEELC 3147 (KLR) (3 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3147 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E041 OF 2022**

SO OKONG'O, J

APRIL 3, 2025

BETWEEN

LAWRENCE OYUGI AGUMBA 1ST APPELLANT

JAMES NYAMWEGA ONDU 2ND APPELLANT

AND

MICHAEL ORUKO JUMA RESPONDENT

*(Being an appeal from the judgment and decree of Hon. C.N.C. Oruo SRM
delivered on 9th November 2022 in Winam CMC ELC No. E022 of 2022)*

JUDGMENT

1. The Respondent filed a suit against the Appellants at the Chief Magistrate's Court at Winam on 5th August 2022, namely, Winam CMC ELC No. E022 of 2022 (hereinafter referred to as "the lower court suit") seeking a permanent injunction restraining the Appellants from removing the body of one Millicent Onyango Obudho, deceased (hereinafter referred to as "the deceased") from the morgue and interring the same on the parcel of land known as Title No. Kisumu/Kadero Got Nyabondo/3037 (hereinafter referred to as "the suit property") and the costs of the suit.
2. The Respondent averred that he was the registered owner of the suit property and was residing thereon with his family. The Respondent averred that on 4th August 2022, the Appellants forcibly interred the body of the deceased who was a stranger to the Respondent on the suit property even after they had sought his permission for the said activity, and he had declined to authorise the same.
3. The Appellants filed a joint statement of defence on 1st November 2022 in which they denied the Respondent's claim in its entirety. The Appellants averred that the deceased was not related to them or their acquaintance, and as such, they were not involved in her burial. The Appellants denied that they had approached the Respondent and asked for his permission to inter the remains of the deceased on



the suit property. The Appellants averred that they had no interest in the suit property and the remains of the deceased and did not participate in her burial.

4. The lower court heard the case and delivered a judgment dated 4th November 2022 on 9th November 2022 in favour of the Respondent. The lower court made a finding that the Respondent was the registered owner of the suit property and that interring the remains of the deceased on the suit property by the Appellants or any other person without the Respondent's permission was illegal. The lower court issued an order authorising the Respondent to exhume the body of the deceased from the suit property and awarded the Respondent the costs of the suit.
5. The Appellants were dissatisfied with the said judgment and filed the present appeal. In their Memorandum of Appeal dated 18th November 2022, the Appellants challenged the lower court's judgment on several grounds, which I would summarise into one ground, namely, that the learned magistrate erred in issuing orders that were not sought in the plaint.
6. The Appellants prayed that the appeal be allowed, and the judgment of the lower court be set aside and substituted with an order dismissing the lower court suit. The Appellants also prayed for the costs of the appeal and the lower court suit. The Appellants prayed in the alternative for an order allowing the appeal, setting aside the judgment of the lower court and remitting the suit back to the lower court for a rehearing before a different magistrate.

The submissions

8. The appeal was heard by way of written submissions. The Appellants filed submissions dated 23rd January 2025, while the Respondent filed submissions dated 27th January 2025.

Analysis and Determination

9. I have considered the pleadings filed in the lower court, the evidence that was tendered and the judgment of the court. I have also considered the grounds of appeal put forward by the Appellants and the submissions by the advocates for the parties. The issues arising for determination in this appeal are two, namely, whether the lower court erred in granting orders that were not sought and whether the appeal should be allowed as prayed by the Appellants. This being a first appeal, the court must consider and re-evaluate the evidence on record and draw its own conclusions. The court has, however, to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified before the lower court. See, *Verani t/a Kisumu Beach Resort v. Phoenix of East Africa Assurance Co. Ltd* [2004] 2 KLR 269, *Selle v. Associated Motor Boat Co. Ltd.* [1968] E.A 123, and *Gitobu Imanyara & 2 others v. Attorney General* [2016]eKLR on the duty of the first appellate court.
10. It is also well settled that an appellate court will not ordinarily interfere with the findings of fact by the trial court unless they were not based on evidence at all, or on a misapprehension of the evidence or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, *Peter v. Sunday Post Ltd.* [1958] E.A 424 cited by the Respondent and *Makube v. Nyamuro*[1983] KLR 403.
11. I agree with the Appellants that an order for the exhumation of the body of the deceased, Millicent Onyango Obudho was not sought by the Respondent in his plaint. I also agree that the order could not be granted without the amendment of the plaint. The lower court, therefore, fell into error in granting a relief that was not sought. That said, I am of the view that the Appellants were not prejudiced in any way and did not suffer an injustice that requires correction by this court, by the erroneous order that was given by the lower court for the exhumation of the body of the deceased, Millicent Onyango Obudho, from the Respondent's land. I do not agree with the Appellants' submission that the lower



court violated their constitutional right to a fair hearing. Just like the Respondent, the Appellants were bound by their pleadings. The Appellants' case, as pleaded, was that the deceased, Millicent Onyango Obudho, was a stranger. The Appellants contended that they were not related to her and did not participate in any way in her burial. These averments were not only contained in their defence but also in their affidavit in opposition to the Respondent's interlocutory application for an injunction to restrain the internment of the body of the deceased on the suit property. At the trial, the Appellants told the court that they had no objection to the body of the deceased being exhumed. With that kind of pleading and evidence, I do not know what kind of defence the Appellants would have put forward if the Respondent had amended his plaint to seek the exhumation of the body of the deceased. I also do not see why the Appellants should be bothered with the exhumation of the body of a stranger by the Respondent from his land, in respect of which the Appellants also have no interest.

12. For the foregoing reasons, I see no good reason to disturb the orders for the exhumation of the body of the deceased that were made by the lower court. I believe that following that order, the body of the deceased was exhumed and buried elsewhere. The body of the deceased should be left to rest where it is lying. I am of the view that any order that would disturb that status quo would not be in the best interest of the deceased. In *Re Matheson (deceased)* [1958] 1All ER 202, which was cited with approval in *Hellen Cherono Kimurgor v. Esther Chelagat Kosgei* [2008] eKLR, the court stated that:

“As I have said, the primary function of the court is to keep faith with the dead. When a man nears his end and contemplates Christian burial, he may reasonably hope that his remains will be undisturbed, and the court should ensure that, if reasonably possible, this assumed wish will be respected. In all these cases, the court will have regard to the supposed wishes of the deceased”.

13. In the same case, *Hellen Cherono Kimurgor v. Esther Chelagat Kosgei*(supra), the court stated that:

“From time immemorial it has been the natural desire of most men that after their death, their bodies should not only be decently and reverently interred, but should also remain in the grave undisturbed. This view should and is indeed respected by societal institutions including the courts of law...”

14. The only order that was made by the lower court, which in my view is prejudicial to the Appellants, is the order on costs. The Appellants had contended that the deceased was a stranger to them and that they had nothing to do with her burial on the Respondent's land. The burden of proof was on the Respondent. I am not satisfied that there was sufficient evidence before the lower court on which it could make a finding that the Appellants were the ones who had interred the remains of the deceased on the suit property. Having made an order authorising the Respondent to exhume the body of the deceased which was illegally interred on the suit property, the lower court should not have condemned the Appellants to pay the costs of the suit having not found any fault on their part.

Conclusion

15. In conclusion, I will allow the Appellants' appeal in part. The judgment of the lower court delivered on 9th November 2022 and the decree extracted therefrom on the same date are varied by setting aside the order on costs that was made against the Appellants and substituting it with an order that each party shall bear his own costs. The other orders made in the judgment and the decree shall remain undisturbed. Each party shall bear his costs of the appeal.

DELIVERED AND DATED AT KISUMU ON THIS 3RD DAY OF APRIL 2025



S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Okeyo h/b for Mr. Mwamu for the Respondent

N/A for the Appellants

Ms. Maureen-Court Assistant

