



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 188 OF 2010

RACHEL WAIRTIMU KASUKU.....1ST PLAINTIFF
ALEX KASUKU KIMANI2ND PLAINTIFF
GEORGE MAINA KIMANI3RD PLAINTIFF

VERSUS

JOHN SANKALE MAINA1ST DEFENDANT
JOSEPH LEMAIYAN MAINA2ND DEFENDANT

15/4/2010

Coram Mwera J.

Mwinzi for applicant/plaintiff
Gatumuta for Respondent/defendant
JUDGMENT

On 1/4/2010 the 3 plaintiffs herein, the (1st plaintiff) wife of the late Peter Kimani Maina with their two children Alex Kasuku (2nd plaintiff) and George Maina Kimani (3rd plaintiff) filed the suit with a chamber summons in which it prayed that the defendants, the 2brothers of the deceased, be restrained from burying Peter Kimani or in any way interfering with his estate. When the chamber summons came up for hearing, **inter parties**, it was agreed that the suit itself be heard.

It was pleaded in the plaint that the 1st plaintiff was the deceased peter's wife since 1986 and the co-plaintiffs were 2 of their children. When he died on 26.3.10, the 2 defendants moved to procure the burial documents and started to make arrangements to bury the deceased excluding the plaintiffs. The defendants therefore should be permanently restrained from those acts while the plaintiffs are declared solely entitled to take the body of the deceased and arrange for its burial. And that the burial permit procured by the defendants be nullified. The plaintiffs got an interim order of injunction.

On 16.4.10 the defendants filed a statement in defence in which it was admitted that the 1st plaintiff the late Peters wife and the 2 co-plaintiffs, their children. But the 1st plaintiff was required to disprove that since 2003 she and the deceased had been living separately. The defendants denied that they obtained burial documents and proceeded to make arrangements to bury peter. Such documents had been handed to them by the deceased as his brother's because they had been visiting for him when he was ill. The demand that the deceased's body be released solely to the plaintiffs was denied. It was averred that the deceased left a valid oral will as to where to bury him and not on plot LR No. NGONG/NGONG/30208.

When the trial opened the 1st plaint (Rachel, PW1) told the court that since she married the deceased in 1986, they lived on his father's land which he, the father one Maina Partet, subdivided in 1995 or thereabout, giving peter his portion. Peter registered it in his name. he sold portions of it and retained the portion NGONG/NGONG/30208 where he built and lived with his family. Due to domestic disagreements about 2003, Peter left home to go and live and work in Ngong Town, while Rachel rented quarters in a nearby place called Bondeni. The two left their children living and farming the shamba no.30208 which they were doing up to the death of Peter Kimani. It was heard in evidence that the deceased's mother also was farming part of that plot. PW1 told the court that although she and the deceased lived separately, they never divorced. They kept in contact and the deceased regularly went on

the subject plot to tend his trees there and he paid the children's school fees. PW1 produced a certificate of official search of plot no. 30208 in the name of the deceased Peter (exhibit P1). PW1 stated that at some point in 2002 Peter threatened to commit suicide. So she sent George (2nd plaintiff) to summon John Sankale (2nd defendant) to come and counsel his brother. He came and in the presence of the 3 of them, the deceased pointed to a spot near a bush on his plot and expressed a wish that he could be buried there. He never expressed an alternative place. The court heard that one of the deceased's brothers William Robir. Maina died in 1996 unmarried. He was buried on their father's land. That old man Maina Partet died in 2000, leaving a will in which he stated that Joseph Lemaiyan (2nd defendant) would have the land where William was buried if he, Joseph, withdrew the cases he had filed against his father, demanding his share of inheritance, and in default that portion/plot would be Peter's. The cases went on and up to date Lemaiyan had not been registered over the plot he lives on, yet the 2 defendants claimed that the deceased orally willed that he should be buried here and that is what they were in the process of doing.

When Peter fell sick, the defendants did not inform PW1. But when she got to know about it she sent George (3rd plaintiff) to visit him at Kikuyu Mission Hospital. Peter apparently left this hospital went to another called St. Mary's and ended up at M.P. Shah Hospital where he died. When Rachel went there, she found that the defendants had collected the burial permit on claiming that Peter had no wife or children. She swore an affidavit that she was Peter's Widow. On its strength the hospital required the defendants to return the burial permit but they declined to comply. The defendants denied the plaintiffs and even attempted to evict the 2nd and 3rd plaintiff from their home on plot no. 30208. In the act, these 2 were arrested by police as trespassers.

In cross-examination, Rachel maintained that the deceased ought to be buried on his plot no. 30208 which was in his name. It had their matrimonial house occupied by their children since the two fell out in 2003 after a domestic row saw Peter assault Rachel – a matter which ended in a criminal prosecution at Kibera Court. Peter could not be buried on the parcel of land on which Lemaiyan lived. It was still in their father's name – Maina Partet. Nobody was claiming their plot no. 30208 and so it was the proper and right place to bury Peter.

George Maina Kimani (3rd plaintiff, PW2) told the court that he with his siblings lived on their land at Matasia, Ngong. He went to school and his father, the deceased paid fees (exhibit P3). The deceased planted trees on this shamba which he regularly cut and replaced. PW2 also remembered the incident in 2002 when his mother (PW1) sent him to summon his uncle, the 2nd defendant, and in the presence of the three, the deceased pointed to a spot of his burial behind the house near a shrub. The deceased used to visit home. The children living there farmed the land together with their grandmother, the deceased's mother. The deceased had been at home last January and he did not tell the children to vacate the shamba.

When Peter fell sick at Kikuyu Mission Hospital, PW2 was sent by his mother, Rachel, and he visited his father there. Then Peter died at MP Shah Hospital and PW2 learnt that his uncles, the defendants, had collected his burial permit. Then on 25.3.10 police arrested the children living on the deceased's land for trespass, on instigation by the defendants. Aged 22 years, PW2 told the court that he had not been told to participate in his father's burial arrangements. The plaintiffs should be allowed to bury the deceased.

In cross examination PW2 said that when his father, the deceased, left home he went to live in Ngong town. Although at some point the deceased had him (PW2) charged with stealing his property and PW2 served a community service order, the two still were on good terms and the deceased paid his fees. He did not know when Peter was taken to hospital or who paid his bills. Only that his uncles had sidelined the deceased's family from the burial arrangements.

William Songok Maina (PW3), the eldest brother of the deceased and the defendants, knew them all including the late Peter's wife and children- the plaintiffs. When their father Maina Partet subdivided his land in 1995 he gave land to his children including the deceased. The deceased sold part of his land. Lemaiyan (2nd defendant) was not given any because he had filed cases against the old man. The old man left a will stating that if Lemaiyan withdrew the cases, he would get the portion of land he lived on. To date that land is still in the name of Maina Partet.

Despite the domestic rows Peter never divorced Rachel, though they left home to live apart. The children remained on the land and their parents used to visit them. The deceased never told PW3 where he desired to be buried and he had not been invited to participate in Peter's burial arrangements. Nobody had claimed the deceased's land.

The court heard in cross-examination that the person who bought part of the deceased's land, had even built there. When the deceased was hospitalized PW3 was not involved and he did not visit him. The deceased ought to be buried on his land and not where Lemaiyan lives or at Langata as the defendants were claiming. That closed the plaintiff's case.

John Sankale Maina (1st defendants, DW1) told the court that the plaintiffs were the wife and children of the deceased Peter, his brother. To him, Peter went to live away from home following domestic wrangles in 1998. He never returned home. He married another wife and met DW1 daily. DW1 denied that the deceased once summoned him to his home to show him where he wished to be buried. Instead he intimated to the witness that he would either be buried on the land where Lemaiyan had a home, or at Langata. Later the witness added burial in a Catholic church compound. The deceased did not want to come home, claiming that his wife and children used to assault him. Peter fell sick, the defendants took him to the hospitals (above) and paid his medical bills. When George (PW2) visited Peter at Kikuyu Mission Hospital, the latter told him to go away.

As for relatives attending Peter's burial meetings called by the defendants, there was no need of invitation to such meetings. They ought to know. Although Peter had his land and nobody was claiming it, he should nonetheless be buried as per his wishes – either where Lemaiyan lives or at Langata or in the Catholic church cemetery. The 2nd and 3rd plaintiffs were arrested by police when their mother (PW1) sent them to go and take property from the house Peter was living in before his demise. The plaintiffs had not been excluded from the burial arrangements taking place. They had excluded themselves. At one point the deceased had denied owning his land but he did not tell DW1 whose it was.

During cross examination, the witness was referred to a replying affidavit he swore on 9.4.10. It was filed in the present proceedings. He denied that he deponed that Peter and Rachel went to live separately in 2003. He maintained that date to be 1998 as he had testified here. He also denied deponing to the year of "separation" as 2004. DW1 contended that Peter had no house on the plot at Matasaia but then admitted that George (PW2) lived in a small house standing there, and that Peter lived there before going off. He insisted on the burial spots alluded to above adding that Lemaiyan (2nd defendant), however did not have a title to the plot of land he lives on. It was subject to litigation still pending on appeal. DW1 did not know in whose name the deceased's land was and he did not have the title to it. Shown (exhibit P1) the green card for plot no 30208, the witness denied it. The court heard that the defendants obtained the burial permit on the strength of the records the deceased left on M.P. Shah Hospital.

Then it was the turn of Joseph Lemaiyan Maina (2nd defendant, DW2) to testify. He knew the plaintiffs. His late brother, Peter moved to live at Ngong town in 2001 because his wife and children used to assault him. He vowed never to return home. While there, Peter married Betty and DW2 used to meet his brother daily. He too lived in Ngong. On many occasions Peter told Lemaiyan that he wished to be buried where he, Lemaiyan, lived because their brother William was buried there. If not he could be buried at Langata Cemetery. The defendants had not excluded the plaintiffs from Peter's burial arrangements. On 30/3/10 the defendants went to the hospital mortuary to take Peter's body. They found that Rachel had blocked that with an injunction. DW2 was opposed to burying Peter on his land because of his expressed wishes. It was further said in evidence that Peter vowed never to return home but he used to visit their mother at Matasia. She tills his land. The witness lived on his late father's land. It had litigation over it pending on appeal and he did not know the plot's registration number. DW2 claimed that he never told anybody of Peter's burial wishes. He was disclosing them for the first time in court. The Maina Partet's family was called to begin making Peter's burial arrangements. That included Betty, Peter's second wife. It was the Chief who informed Rachel of the burial meetings. Once Peter told Lemaiyan that his title deed was lost. He sold his land to somebody else, Peter, did not tell the witness. The plaintiffs should not bury the deceased because they chased him away from home. He should be buried on Lemaiyan's land, or at Langata or in the Catholic church compound.

The last witness was Josiah Mutigi Partet (DW3), a cousin of the deceased with his brothers (the defendants). This witness knew the family well. He lived with Peter at Ngong. Both did business of selling land on commission and they met very regularly. Peter lived at Upper Matasia until 1998 when he left to live at a place called Bulbul following a domestic disagreement. Then he moved to Ngong and lived there until his death. In 2003 the deceased was arrested and charged at Kibera court. DW3 stood surety for him. When discussing their personal matters, Peter told Josiah that his family assaulted and injured him while at his Matasia home. So he desired that if he died his brother Joseph (2nd defendant) should bury him (Peter) on his (Joseph) land or at Langata. Burial should not be on his land. It was no longer his. Then when Peter fell sick and died, Lemaiyan told the burial committee that the deceased wished to be buried on his (Lemaiyan) land or at Langata or at Ngong. The family meeting for burial which DW3 participated, took place in Peter's mother's house and there it was decided that he should be buried on Lemaiyan's land.

In cross-examination DW3 said that he knew of the land Peter purchased at a place called Kibiku – not its number. Besides expressing wishes about his burial place, Peter also desired that his brothers, the defendants could inherit his estate – not Betty, the second wife. The trial closed.

Both sides submitted. Mr. Mwinzi told the court that on all evidence the suit should succeed. The plaintiffs had not only proved that Peter had his land, claimed by nobody and he had pointed to a spot of his burial. The wife and sons had the first priority in the circumstances to bury the deceased. He should not be buried on the land occupied by Lemaiyan. Lemaiyan had no title to his name. it was still subject of litigation. And as to the priority to bury Peter the case of **Njoroge Vs Njoroge and Another** (2004) 1KLR 611 was cited.

On his part Mr. Gatumuta posited that the defendants should bury the deceased Peter because he had for long lived away from home because his family treated him with violence. For that reason Peter had expressed strong wishes to be buried, not on his land, but on that occupied by the 2nd defendant, or at Langata or in Church cemetery.

In deciding this matter it is appreciated that this is essentially a dispute as to where the late Peter Kimani Maina should be buried – on his land no. NGNG/NGONG/30208 or where Lemaiyan (2nd defendant) lived or at Langata cemetery or in a church compound at Ngong. The plaintiffs – the widow and children of the late Peter, are for burial on his land while the defendants, Peter's brothers, are for the alternatives. Now, not much needs detain us here. The deceased and his wife went to live separate places after a domestic row and a court case in 2003. They did not divorce or legally separate. That is this court's finding. It also finds that the couple's children remained on the deceased's land whose green card (exhibit P1) reads that he was registered, and the court has no reason to doubt, over plot no. 30208 which is still in the name of the deceased. There is no reason advanced forceful enough to convince this court that Peter should be buried elsewhere other than on his land no. 30208. It is his property registered in his name. it is not claimed by anybody and his children have always lived on it. The claims by the defendants that Peter desired to be buried elsewhere were hard to prove, let alone to believe. Evidence had it that it was him who assaulted his wife (Rachel) hence the criminal case at Kibera. It was said that he was convicted there. That gave rise to living apart – not a divorce or legal separation. There is no evidence that it was his family who chased Peter away from home because of assaults on him. The defendant's claims that the deceased's wishes be respected on any account did not amount to much.

Perhaps it was Josiah Partet (DW3) evidence which seems to explain why the defendants want Peter buried on the land Lemaiyan occupies and to which he has no title because he still maintains litigation against his late father's estate including the subject portion:

“Other than expressing wishes about his burial place he desired that the defendants could also inherit his Estate – not the 2nd wife.”

If the court may be allowed to surmise, at the centre of this dispute is the succession for the estate of Peter Kimani Maina – not the place of burial **simpliciter**. But if that be so, it is totally mistaken and misplaced. The question of burial under whatever law, or a place for it, is distinct and separate from that

of succession. The two fall under different legal regimes. Here the defendants may harbor the view that if they bury the deceased as they claim and wish, then inheritance of his estate will automatically follow. No, that is not so. The two do not follow each other as a matter of course. Each is subject of separate proof in law.

In the event it is concluded that the plaintiffs being a widow and children of the deceased with a place to bury him without wrangles, should take his remains, obtain due papers and have him buried on plot NGONG/NGONG/30208 – his shamba. There may be or have arisen strains and stresses following this dispute. But that should not delay or deny Peter Kimani a quick, descent and well arranged burial. So all the immediate and other Partet family members should join hands and do the needful. They would do well to assist with mortuary and other expenses to facilitate the end result – burial of Peter Kimani Maina. In life or in death he is their relative.

And with the foregoing each side will bear its own costs.

Judgment accordingly.

Delivered on 28/4/10

J.W. MWERA
JUDGE