



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 255 of 2007

COL. JOSIAH LANDY MRASHUI .....PLAINTIFF

VERSUS

CLEMENT MULEMWA RUGENDO

JOHNSON MWANDAWIRO

GODFREY KIZAKA

JOHN MWAWANA

MWAMBURI MWAKANGALU

DANSON MWAKANGALU .....DEFENDANTS

RULING

By the plaint dated 29<sup>th</sup> October 2007, Col. Josiah Landy Mrashui and Samuel Kalema Mrashui suing as the legal representatives of the Estate of Laban Mrashui deceased sought for judgment against Clement Rugendo and 6 others as follows:

- (a) *An order of injunction to restrain the defendants from burying the body of David Rugendo, deceased, on Plot No. Ronge/Nyika/522.***
- (b) *An order of declaration that the intended burial is unlawful, illegal and an affront of sanctity of ownership of land.***
- (c) *Costs of the suit.***

Pending the hearing of the aforesaid suit the plaintiffs successfully obtained an interim order of injunction. While this suit is still pending, the defendants caused the body of David Rugendo, deceased, to be interred on another piece of land. Mssrs Odongo and Opulu, learned advocates for the plaintiffs and defendants respectively are in agreement that the suit has been overtaken by events in that the body of David Rugendo has been interred in another parcel of land other than Plot No. Ronge/Nyika/522. The learned advocates were of the view that the suit should be marked as settled save for the issue touching on costs.

Learned advocates were invited to make submissions to enable this court determine the issue. Mr. Odongo, learned advocate for the plaintiffs urged this court to give the plaintiffs costs. He based his arguments on Section 27 of the Civil Procedure Act in which the law states that costs shall follow the event. It is Mr. Odongo's argument that the defendants should be condemned to pay costs of the suit because they are the ones who provoked the plaintiffs to file this suit. It is averred that had the defendants heeded the plaintiffs' demand to halt the burial arrangements they would not have taken up these proceedings.

Mr. Opolu, learned advocate for the defendants is of the view that this court should issue an order directing each party to bear its own costs. He urged this court to take into account the fact that the litigants are relatives hence the order for costs may destroy the on going reconciliation and the healing process between them

I have considered the oral submissions made by learned counsels from both sides. There is no doubt that under S.27 (1) of the Civil Procedure Act, the court is given an unfettered discretion to determine who to pay costs otherwise costs should follow the event. I have been urged to make an order directing each party to pay its own costs so that they may reconcile. I do not think that is what the law envisaged. I am satisfied that in the circumstances of this case costs should follow the event. I approve the order marking the suit as settled with costs to the plaintiffs.

Dated and delivered at Mombasa this 8<sup>th</sup> day of June 2009.

**J.K. SERGON**

**J U D G E**