



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 525 of 2008

DR. CHRISTOPHER MUTHINI MBATHAPLAINTIFF

V E R S U S

DR. FLORENCE MUKII MUKITADEFENDANT

R U L I N G

This is a burial dispute. The parties are the parents of the Deceased, JAMES WAKYUMBU MUTHINI. He was a young man, who sadly passed away on 16th November, 2008. At the time of his unfortunate death, he was a 3rd year student at the University of Nairobi. He was the eldest child of the parties. They have two other children, MICHAEL MULATYA and JUDE MUTISYA.

The parties, as can be seen from the prefixes to their names, are highly educated people. In the year 1986 they married each other. The marriage lasted until the year 2004 when they divorced. It appears that the parting was bitter and acrimonious. In the course of the marriage they were blessed with the three children. The Defendant got custody of the children when they divorced, apparently with the acquiescence of the Plaintiff. The Defendant is the mother of the children; the Plaintiff is the father. The children were then all minors. The Deceased lived with his mother until his demise. The father has since the divorce remarried; it appears that the mother has not.

The substance of the dispute is this. The Defendant wants to bury the remains of the Deceased at Lang'ata Cemetery in Nairobi. It is a public cemetery. She says that when the Deceased died she informed the Plaintiff of her intention to bury his remains at Lang'ata Cemetery, and that he did not then raise any objection. She further says that the Plaintiff has changed his mind just to vex and aggravate her.

The Plaintiff will not countenance burial of his son's remains in a public cemetery. He wants him buried at any of his three pieces of land that he has named. That is why he filed this suit. He seeks two main reliefs; one, a permanent injunction to restrain the Defendant from burying the remains of the Deceased at Lang'ata Cemetery (relief (a) of the plaint), and two, a declaration that the remains of the Deceased be buried at the Plaintiff's ancestral homestead in Athiani Village, Kitise Location in Makueni District, or alternatively at the Plaintiff's Komarock Ranch in Kangundo District, or at the Plaintiff's plot at Kantafu Shopping Centre in Kangundo District (relief (c)).

Together with the plaint the Plaintiff filed an application by chamber summons dated 21st November, 2008. The main prayer in the application is in more or less the same terms as relief (c) of the plaint. The Plaintiff seeks an order to allow him to bury the remains of the Deceased at Athiani Village, Kitise Location in Makueni District, or alternatively at his Komarock Ranch in Kangundo District, or at his plot at Kantafu Shopping Centre in Kangundo District.

It is clear that if the Plaintiff's main prayer in the application is granted at this interlocutory stage, it will have the effect of finally determining the suit. There is no indication that the Defendant has been duly served with summons to enter appearance and copy of the plaint. It cannot be just at all that an order be granted whose effect would be to finally determine the suit in favour of the Plaintiff before the Defendant has been afforded an opportunity to defend the suit. Upon this ground alone I would refuse the application.

But given the nature of burial disputes, attended as they usually are by high emotion and mortuary costs, it is desirable that I determine the application more substantively. Notwithstanding the way the main prayer is framed, it is apparent that what the Plaintiff is seeking is a temporary injunction to restrain the Defendant, pending disposal of the suit, from interring the remains of the Deceased at Lang'ata Cemetery or at any place other than any of the three places indicated by the Plaintiff. Indeed prayer 2 of the application sought an interim injunction in more or less those terms pending disposal of the application *inter partes*. The same was granted *ex parte* pending disposal of the application. I shall therefore proceed upon the basis that the Plaintiff is seeking a temporary injunction as I have framed above.

I have carefully read the supporting and replying affidavits. I have also given due consideration to the written submissions filed on behalf of the parties, including the cases cited. This being essentially an application for temporary injunction the Plaintiff must satisfy the conditions set out in the well-known case of *GIELLA –VS- CASSMAN BROWN & CO LTD* [1973] EA 358. Those conditions are:-

1. The Plaintiff must demonstrate a *prima facie* case with a probability of success.
2. The Plaintiff must also demonstrate that he stands to suffer irreparable loss unless the temporary injunction sought is granted.
3. If the court is unable to determine the application upon the first two principles, it will decide it upon a balance of convenience.

Prima Facie Case

It is now well established that matters of burial are subject to the deceased's and the parties' personal law, and that the personal law of Kenyans is, in the first instance, their customary laws. See the case of *OTIENO –VS- OUGO & ANOTHER (NO 2)* [2008] I KLR (G&F) 948. The Deceased in the instant case and the parties belong to the Kamba community. Though he was an adult, the Deceased had not yet established his own home and he was living with his mother. There is no clear evidence that he had expressed any wish as to where he might want to be buried. He was a young man. It is said that he died from a sudden illness. It is unlikely that in the ordinary course of events he would have contemplated death and expressed such wishes.

The Plaintiff has made out a strong case, both in the plaint and in his affidavits, and also in the submissions filed on his behalf, that under Kamba customary law he is the one, as the father of the Deceased, who is obligated and entitled to deal with the Deceased's burial. He has also made out a strong case that under Kamba customary law the Deceased ought to be buried at his ancestral home, that home being his father's ancestral home.

I am not called upon at this interlocutory stage to make any final determinations as to what the Kamba customary law relating to burial is. Customary laws are matters of fact, and must await trial of the action upon tested evidence. It will suffice for now to state that I am satisfied from the material now before the court that the Plaintiff has made out a *prima facie* case with a probability of success.

Irreparable Loss

Irreparable loss in the present case, in my view, is not only that which cannot be made good by an award of damages but also that which cannot otherwise be made good. In the instant case the Plaintiff obviously

cannot be compensated by an award of damages in the event that he succeeds in his suit. But there will be another remedy available to him which, in my view, would fully compensate him. That remedy is an order for exhumation and re-burial elsewhere. Nothing has been brought to my attention that indicates that exhumation would not be permissible under Kamba customary law. I therefore find, in the particular circumstances of this case, that the Plaintiff does not stand to suffer irreparable loss by refusal of the order sought.

Balance of Convenience

Even upon a balance of convenience I would find for the Defendant. It is not desirable that a body remains in the mortuary unduly long while litigants fight out in the courts as to where it should be buried or who should bury it. There is no property in a dead body, notwithstanding, understandably, all the high emotions that go with these matters in our societies. Ideally, dead bodies ought to be interred or otherwise disposed of as soon as possible after death. And with the availability of orders for exhumation and re-burial elsewhere, there should be no cause for dead bodies to remain in mortuaries for months or years on end pending resolution of burial disputes.

In the instant case, the acrimony and bitterness that seems to have attended the parties' divorce appears to have continued to the present. I will not at this stage examine the personal accusations that they have labelled against each other in these proceedings. But some facts are clear. At divorce the Defendant was awarded custody of the children, including the Deceased, who was then about 16 years old. After the divorce the Deceased lived with his mother until death. The Plaintiff has since remarried and now has another family. There is evidence that the Plaintiff maintained contact with his son and was contributing substantially towards his education. But it is not unreasonable for the Defendant to want to bury the Deceased in neutral ground where she will have free access to his grave. It is not unreasonable for her to apprehend that she may not have free access to his grave should he be buried in the Plaintiff's ancestral or other lands.

It appears to me, *prima facie*, that the Defendant's emotional attachment to the Deceased, both in life and in death, is overwhelming. Even in the eyes of the law such attachment must count for something. I hold that the Defendant, in the circumstances of this case, has a greater and more immediate claim than the Plaintiff to determine where the remains of the Deceased should be interred. Let the Plaintiff await the full adjudication of his claim in the trial of the suit. The balance of convenience demands that the emotional burden upon the Defendant caused by the death of the Deceased should not be exacerbated by denying her the right to bury him where she has determined. Let it not be lost on anyone that she is no longer the wife of the Plaintiff. She has been bringing up the Deceased since the divorce in 2004. There cannot be any just reason at this stage why her parental rights to her first son, dead or alive, should be subservient to those of the Plaintiff.

In the event I find no merit in this application. It is hereby dismissed with costs to the Defendant. The interim injunction granted *ex parte* on 21st November, 2008 is hereby vacated. Those will be the orders of the court.

DATED THIS 18TH DAY OF DECEMBER, 2008

H. P. G. WAWERU

JUDGE

DELIVERED THIS 19TH DAY OF DECEMBER 2008