REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 330 OF 2004

RUTH WANJIRU NJOROGE .....
PLAINTIFF/APPLICANT

VERSUS

JEMIMAH NJERI NJOROGE& ANOTHER .....
RESPONDENTS/DEFENDANTS

RULING

1. The Application The Prayes and The Depositions

The plaintiff's application by Chamber Summons was dated 6th April, 2004 and filed on the same day. It was brought under order XXXIX rules 1, 2 and 3 of the Civil Procedure Rules and section 3A of the Civil Procedures Act (cap 21). This application was made against the background of a plaint drawn and filed on the same day, and it seeks interim relief pending the hearing and determination of the main suit.

The prayers in the Chamber Summons may be summarized as follows:

(a) that a temporary injunction be issued restraining the respondents, their servants and/or agents or any third parties claiming through them, from preventing the applicant from accessing the body of her husband, ex- Councilor Samuel Njoroge Muiruri and/or removing the body from Lee Funeral Home, interring it and/or in any way interfering and dealing with the deceased's body without her consent, knowledge and participation pending the determination of this suit;

(b) that the Officer Commanding the Nairobi Area Police Station be ordered to supervise the enforcement of the Court order herein, until the determination of this suit;

(c) that the costs of this application be provided for.

Grounds to support the application are set out on the face of the Chamber Summons as follows:

(i) that the applicant is the second wife of the deceased since 1978; and the deceased died on 30th March, 2004 after a sudden heart attack in her presence at the Kenyatta National Hospital where she and her son were issued with a notification of his death;

(ii) that at the time he fell ill, the deceased had been staying at his home with the applicant, at Kitengala Town; and the applicant first took him to Athi River Medical Centre, and thereafter to Kenyatta National Hospital where he was pronounced dead at the casualty department;

(iii) that the applicant did take the body of her husband to the City Mortuary for a post-mortem examination and then informed members of the immediate family of her intention to transfer the body to the private wing of Kenyatta National Hospital for preservation; but the respondents later removed the body and preserved it instead at the Lee Funeral Home, without the applicant's consent or knowledge, and they gave instructions that the applicant be denied access to the body;

(iv) that the respondents, their servants or agents have planned to remove the body of the deceased for burial at Muguga in a parcel of land that does not belong to him, without the participation or involvement and consent of the applicant;

(v) that the respondents' acts will cause irredeemable loss and mental agony to the applicant if she is excluded from the burial of her husband and in a place where he expressed his last wishes not to be buried.

The application is supported by several affidavits. I will here summarize the main points in these affidavits.

(a) Supporting affidavit of the applicant, Ruth Wanjiru Njoroge dated 5th April, 2004

(i) that she is the applicant, and the second wife of the deceased since 1978 and they have one child of the marriage, Jeff Njuguna Njoroge born in 1982, two other children born in 1994 and 1996 respectively having died in infancy. (She attaches as annex RWN 1 carrying copies of the Identity Cards of Samuel Njoroge Muiruri (the deceased), of Kiambu district, Kikuyu division, Kikuyu location, Sigona sub-location; Jeff Njuguna Njoroge, of Kiambu district, Kikuyu division, Muguga location, Muguga sub-location: and of herself, Ruth Wanjiru Njoroge, of Kiambu district, Kikuyu division, Kikuyu location, Kikuyu sublocation);

(ii) that the deceased died after she had frantically struggled to save his life, right from her matrimonial home with him at Kitengela, to Athi River Medical Services, and finally to the Kenyatta National Hospital in Nairobi;

(iii) that the respondents have planned to remove the body of the deceased and to have it interred at Muguga, on land not belonging to him, without the deponent's participation, involvement, consent or knowledge, and this will cause her and her son irreparable loss and emotional distress, as she will be denied their inalienable right to bury her husband and to pay to the deceased her last respects at the Kitengela farm, registered in his name and which he cherished, in accordance with his last wishes;

(iv) that the first respondent is the estranged and separated wife of the deceased, while the second respondent is his younger brother and the motive of these two is to intermeddle with the estate of the deceased and to oust the deponent from the matrimonial home and her matrimonial right to bury the deceased in accordance with his last wishes.

(b) Further supporting affidavit of Gerald Kimani Muirui dated 4th April 2004

(i) that the deponent is the step-brother of the deceased;

(ii) that to the deponent's knowledge, the deceased did not stay together with the first wife (first respondent) for the last 14 years;

(iii) that the deceased confided in the deponent that he had separated from the first respondent after she attempted to poison him, and that the first respondent had, jointly with her sons, physically assaulted him several times;

(v) that the deceased over the last several years of his life, had confided to him and to close friends of the deceased at Kitengela, his last wishes in the event of his death, and that he had said he wished to be buried at a certain specified rocky spot at his Kitengela parcel of land;

(vi) that the deceased swore several times that he hated Muguga on account of the first respondent's cruelty and hostility towards him, and he would loath being buried there;

(vii) that the applicant was the wife of the deceased and they lived together happily at their Kitengela Farm, with their son Njuguna Njoroge and their adopted daughter Joyce Wanjiku Njoroge.

(c) Replying affidavit of the first respondent, Jemimah Njeri Njoroge dated 7th April, 2004.

(i) that the applicant is not the second wife of the deceased from 1978, and neither is Jeff Njuguna the son of the deceased;

(ii) that it is not the applicant who had informed the first respondent of the death of the deceased;

(iii) that the applicant had the right to move the body of the deceased to the Lee Funeral Home and she did not require the applicant's consent;

(iv) that appropriate arrangements had been made to bury the deceased at Muguga, a parcel of land that belongs to the deceased jointly with his two brothers, Joseph Gakuru Muiruri and William Muiruri (copy of the Title Document "Jmn 1" attached);

(v) that the intended burial site at Muguga, known as Sigona/33 and measuring 16 acres, is ancestral land belonging to the family and was left behind by the late father of the deceased, Joseph Muiruri Njoroge and he is himself buried there;

(vi) that she, the first respondent, was never estranged or separated from the deceased, and that she had cordial relationship with the deceased over the period of 33 years of their marriage (copy of marriage certificate, dated 31st July, 1971, attached);

(vii) that over the period of marriage the couple had begotten six children, respectively in 1971, 1974, 1977, 1979, 1983 and 1985 and this is proof that the husband-and-wife relationship was normal;

(viii) that the deponent and the deceased, as wife and husband, had acquired lands other than the ancestral land, at Namanga, Narok, Isinya and Muguga, but the Matrimonial home had been established at the Muguga farm, known as Sigona/33, and they had not built a home at any of the other lands;

(ix) that the deceased never did at any time introduce the applicant to the deponent as a wife, and the deponent is not aware of any customary marriage between the deceased and the applicant;

(x) that the deceased had during all his life, lived at the matrimonial home and had even served in that area as a councillor for 10 years, 1982- 1992;

(xi) that the deponent and the deceased had established a high school at the matrimonial home, and were already extending the school system to their land at Kajiado, where they were constructing the Neighbours Fellowship High School;

(xii) that the deponent and the deceased had not constructed any house at Kajiado/Noonkopir/161 which is a commercial plot within Kitengela town, and it could not have been the wish of the deceased to be buried there, and he never expressed such a wish to the deponent or to members of her family;

(xiii) that the deponent has learnt that the applicant is married to a man by the name Gicheru who hails from Kikuyu, and so she could not also have been a wife to the deceased.

(xiv) that Jeff Njuguna Njoroge and Joyce Wanjiku Njoroge are not the children of the deceased, and even their names are not consistent with the Kikuyu custom of giving names.

(d) Replying affidavit of the second respondent, Joseph Gikaru Muiruri dated 7th April, 2004

(i) that the alleged customary marriage between the applicant and the deceased is unknown to the deponent or to his family;

(ii) that the deceased never introduced the applicant as his wife, or have any customary rites ever been performed to signify a customary marriage between the deceased and the applicant;

(iii) that the deceased was the elder brother of the deponent, and they had a close relationship, but the wish to be buried anywhere but the ancestral land, Sigona/33, was never expressed to the deponent;

(iv) that the said ancestral land is registered in the joint names of the three brothers, including the deceased, and it is on this land that the three brothers have their homes;

(v) that the deceased and the first respondent married in church, in 1971 and they have always lived together, and the deponent had not witnessed any fights between them over the years;

(vi) that the deceased was in the process of constructing a second school at Kitengela, Neighbours Fellowship High School;

(vii) that the deponent's step-brother, Gerald Kimani, who has sworn an affidavit in support of the applicant, has had a long-standing misunderstanding with the first respondent, and this would explain his affidavit which is not truthful;

(viii) that the deceased had no other children by the names Jeff Njuguna and Joyce Wanjiku.

(e) Replying affidavit of Eunice Wangari dated 7th April, 2004

(i) that the deponent is aged 92 and is the mother of the deceased, who was her third child in a family of seven;

(ii) that she has throughout her life, lived at the family land, Sigona/33 which is now registered in the names of her three sons- including the deceased;

(iii) that the deponent is not aware of any customary marriage that took placed between the deceased and the applicant, and she has never been involved in any such rite;

(iv) that the deceased never introduced the applicant as her daughter-inlaw, and even the applicant's children are strangers to the deponent;

(v) that the deponent and her sons, including the deceased, have always resided at the family land, Sigona/33, and she has never known of any fights between the deceased and the first respondent;

(vi) that there is a family burial site at Sigona/33 where her late husband and her late daughter Helina Waithera are buried and there would be no reason to bury the deceased in any other place.

(f) Reply to replying affidavits of the applicant, Ruth Wanjiru Njoroge dated 13th April, 2004

(i) that the applicant is a lawfully married wife of the deceased, and this is known to the local people at Kitengela and to the extended family of the deceased at Muguga;

(ii) that the title to the family land Sigona/33 is fraudulently registered in the names of the three sons of the first respondent;

(iii) that Sigona/33 is a disputed parcel of land;

(iv) that the first respondent had assaulted and ejected the deceased from Muguga High School, being assisted by her sons, and so the deceased started another home at Kitengela;

(v) that the applicant was not introduced to the first respondent because of the estrangement which prevailed between the first respondent and the deceased;

(vi) that the construction of Neighbours Fellowship High School was necessitated by the ejectment of the deceased from Muguga High School by the first respondent;

(vii) that family photographs are available to prove that the children of the applicant were also the children of the deceased;

(viii) that the deponent believes she will be cursed by the spirit of the deceased if she allows burial to take place at Sigona/33;

(ix) that the last wishes of the deceased are that he be buried at Kitengela.

(g) Further replies to replying affidavits

(i) Peter Njoroge Muiruri, a step-brother of the deceased swore an affidavit on 13th April, 2004. He depones as follows;

• that he has known the applicant as a second wife of the deceased for at least 20 years;

• that the title deed for the family land, Sigona/33 is a fake title deed;

• that the deceased and the first respondent were totally estranged and lived separately;

• that the deceased vowed never to return to Muguga, and he wished to be buried at Kajiado/Noonkopir/161 in Kitengela;

• that the deceased had told the deponent that if anyone dared to bury him at Muguga, a curse would fall upon such a person.

(ii) Thiongo Kagicha, describing himself as the coordinator of the Kitengela Funeral Committee, swore an affidavit on 13th April, 2004 as follows:

• that he has been a close friend of the deceased and the applicant with whom the deceased lived as his wife;

• that the deceased and the applicant settled at Kitengela in December, 2000, on 9 acres of land – Kajiado/Noonkopir/161, and he had told the deponent that he had moved from one part of the country to another – Isenya to Muthiga to Kikuyu Town to Molo, before settling at Kitengela;

• that the deceased had expressed bitterness with the respondents, because they had conspired to eject him from his own Muguga High School;

• that the deceased vowed to start his life afresh, and he started constructing a new school Neighbours Fellowship High School;

_ that the deceased confided in the deponent that he was on no account to be buried at Sigona/33 if he died, and anyone going against his wishes would be cursed;

_ that the deceased expressed his wish to be buried at Kitengela, the place where he had found peace;

_ that members of the Kitengela burial committee comprised family members and kinsmen of the deceased who were well aware of his last wishes to be buried at Kitengela.

(iii) Daniel Haiyaye Muroki, who described himself as a close friend of the deceased swore a further

reply to replying affidavit in these terms;

Affidavit in these terms;

• That sometime between 1981 and 1983, the deceased, three elders and the deponent went to the applicant's home at Burnt Forest, and they gave the bride wealth attached to the marriage process under Kikuyu Customary law;

• That in December, 2003 the deponent visited the deceased at Kitengela, and saw him identify a site where his grave was to be constructed, in the event of his death;

• That the deceased had a goat slaughtered as part of the grave-site identification ceremony and that he was not to be taken to Muguga dead or alive, and whoever dared to take his body to Muguga would be cursed.

(h) Further affidavit of the first respondent, Jemimah Njeri Njoroge, dated 28th April, 2004

The deponent refers to the applicant's affidavit of 13th April, 2004, to which was annexed an affidavit claiming to be sworn by the deceased and the applicant as man and wife, on 30th July, 1981. She then depones;-

• that she believes to be true the information from her advocates on record, that as at 30th July, 1981 there was no advocate by the name Charles Karitu Gatumuta on the Roll of Advocates and who was a commissioner of oaths who could have commissioned the affidavits of 30th July, 1981 as alleged;

_ that the purported affidavits of 30th July, 1981 are forgery.

(i) Affidavit of Charles Karitu Gatumuta dated 28th April, 2004 The deponent avers as follows:

• That he is an advocate practicing under the name and style Gatumuta & Co Advocates;

• That he has been shown an affidavit sworn by Ruth Wanjiru Njoroge alias Ruth Wanjiru Gicheru and Samuel Mururi Njoroge purporting to have been sworn on 30th July, 1981;

• That he was admitted to the Roll of Advocates on 19th December, 1991;

• That he was admitted as commissioner of oaths sometime in 1995;

• That the deponent could not, therefore, have witnessed, the said affidavit being sworn in 1981, and therefore he believes the document has been forged.

(j) Further reply to replying affidavit of the applicant, Ruth Wanjiru Njoroge dated 30th April, 2004

The applicant is responding to the averments made regarding the affidavits of 30th July, 1981. She avers as follows:

• That she recalls that around 30th July 1997, she and the deceased visited the Chambers of C K Gatumuta & Co Advocates for the purpose of swearing an affidavit of marriage to facilitate change of details on her identity card, and two copies of the affidavit of marriage were drafted and the two of them duly signed;

• That the deponent believing the deceased must have altered the year to read 1981.

2. The Submissions of Counsel

(a) The applicant's case;

The Chamber Summons first came before the duty judge, the Honourable Mr Justice Kihara Kariuki, who granted the second prayer on a shortterm basis and on certain conditions. The order, made on 7th April, 2004 read as follows:

"That a temporary injunction be and is hereby issued restraining the respondents, by their servants and/or agents or any third parties claiming through them from preventing the applicant from accessing the body of her husband, ex-Councillor Samuel Njoroge Muiruri (deceased) and/or removing the body from Lee funeral Home, interfering with it and/or in any way interfering and dealing with the deceased's body without her consent, knowledge and participation."

The temporary injunction was to lapse on 15th April, 2004 when hearing would take place *inter-partes*.

During the first day of hearing, on 3rd May, 2004 counsel for the applicant, Mr Gitau Mwaura made a presentation of the several affidavits in support of his client's case. He stated that the deceased had been staying with the applicant as wife at Kitengela, when he was taken ill, and that it was the applicant who saw to his immediate needs, cared for him and rushed him to the hospital. It was averred that following the death, it is the respondents who moved the body from the City Mortuary to the Lee Funeral Home, and it was alleged that the respondents then placed a restriction on the applicant's access to it.

All the supporting affidavits, further supporting affidavits and replies to replying affidavits speak in unison; they single-mindedly support the applicant's case to restrain the respondents from claiming the body of the deceased and burying it at what has been described as the family land, the family burial place, at Muguga, Sigona/33. The applicant is seeking such restraint until the suit commenced by plaint, dated 6th April, 2004 is fully heard and determined. Quite clearly , the applicant's expectation is that a full hearing of the case on the merits, with all the evidence taken and submission made, would turn in her favour so that she realizes her claim to the body of the deceased, for burial at a place other than Sigona/33. It would have to be assumed that this mode of solution to the dispute would keep the question in abeyance for some time, given the workings of the Court calendar; and hence the burial question would remain undecided for an indefinite period of time. It must be assumed that this eventuality is a matter of concern to the respondents; but more to the point, they believe they have a basis for coming via the medium of the applicant's interlocutory application, to have the applicants's claims set aside, with the result that, at this threshold stage, the Court may enable them to take the body of the deceased and to inter it at the family home at Muguga, that is, land parcel No Sigona/33.

The content of the depositions has been set out in detail. On questions of law, Mr Gitau Mwara submitted that the position of polygamous wives has been secured since 1981, with the entry into force of the Law of Succession Act (cap 160). Counsel submitted that since this Act did not discriminate between wives on the basis of the system of law under which they married their husband, it followed that the applicant had as much right as the first respondent to be granted the body of the deceased, for burial. Counsel cited in this regard the Court of Appeal decision in *Irene Njeri Macharia –vs- Margaret Wairimu Njomo & Patrick Muriithi Harrison,* Civil Appeal No 139 of 1994. Counsel cited the following passages;

"But in 1981….Parliament intervened and added paragraph (5) to section 3 of the Law of Succession Act Paragraph 5…added by Act No 10 of 1981 provided as follows:-

Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purpose of this Act and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act."

And later in the judgment, their Lordships remarked as follows:

"Parliament, in its wisdom, and whatever it might have intended to do, provided that: 'Notwithstanding the provisions of section 37 of the Marriage Act….'

Josephine was, nevertheless, a wife for the purposes of the Laws of Succession Act, and in particular

sections 29 and 40 of the Act."

On the authority of the *Irene Njeri Macharia* case, counsel submitted that the applicant in the instant case was in every respect a wife, and her rights in the family context, and in particular with regard to her claim of the rights of burial for the deceased, should be given fulfillment.

Counsel argued that an earlier litigation between the respondent and the deceased, in *Jemimah N N Muirirui –vs- Samuel N Muiruri*, civil suit No 3019 of 1997 (OS) should be a basis for the Court to decide the matter in favour of the applicant, rather than the respondent. Counsel contended that the 1997 case was founded on the position that the parties were divorced, and that the properties of the deceased (who was the respondent then) should be shared by virtue of section 17 of the Married Women's Property Act of England, 1882, which is a statute of general application. Now counsel for the respondent has argued, and I believe correctly, that the application of the Married Women's Property Act, 1882 can only be in relation to an existing marriage; and hence the inference being drawn by counsel for the applicant that the episode evidences a condition of divorce, does not seem right. It is true that in that suit of 1997, the respondent had sought several declarations as follows:

• That the defendant hold the matrimonial property movable and immovable and registered in his sole names in trust for the plaintiff and the defendant in equal shares;

• That the said matrimonial property be subdivided and shared equally between the plaintiff and the defendant, or in such manner as the Court may deem just.

It should be noted that the plaintiff's suit in that instance failed. Apart from the litigiation documents in that case which the applicant has annexed to her affidavit of 13th April, 2004 she has also annexed a copy of acrimonious correspondence which passed about the same time, December, 1997 between the respondent and the deceased, when the deceased denounced the respondent as his wife and threatened to seek judicial orders of separation against her.

From such correspondence it can only be inferred that there was at the time no legal status of divorce between the respondent and the deceased, though there is clear evidence that there had been a strain in the relationship between the two.

Counsel for the applicant has endeavoured studiously to prove that there was in existence a valid customary marriage between the deceased and the applicant. Affidavits have been sworn among others, by the applicant herself, by Gerald Kimani Muiruri, by Peter Njoroge Muiruri and by Daniel Haiyaye Muroki, the collective message being that more than 20 years ago, the applicant had joined the deceased in matrimony under customary law. The exact date of the marriage, however, is not quite certain, the year 1978 being claimed on the face of the Chamber Summons, and also in the applicant's affidavit; and a period of time running from 1981 to 1983 is claimed by Daniel Haiyaye Muroki. In his deposition, Muroki says that sometime between 1981 and 1983, the deceased, three elders and the deponent had participated in the bridewealth ceremony for the applicant, at Burnt Forest, and that this was the basis of the marriage which was celebrated in accordance with Kikuyu Customary law.

The validity of the claims based on Kikuyu customary marriage are directly challenged by the depositions of the first respondent, in her further affidavit of 28th April, 2004. She disputes an affidavit annexed to the applicants affidavit of 13th April, 2004. The said annexure purports to have been made by the deceased together with the applicant as man and wife, on 30th July, 1981. The respondent impugns the said annexure because it purports to be an affidavit commissioned in 1981 by an advocate, Charles Karitu Gatumuta; but the said advocate has sworn an affidavit now attached to the said affidavit of the first respondent, averring that he was admitted to the Roll of Advocates only as recently as 19th December, 1991, and as a Commissioner for Oaths only in 1995. It is quite clear, therefore, that the affidavit dated 1981 is an invalid one, and in this regard I have not found the further reply to replying affidavit of the applicant, dated 30th April , 2004 and dealing with the questionable aspect of the 1981 affidavit, at all convincing.

Valid or not, however, the said affidavit of 1981 did apparently serve some practical purpose in a public office; it led to the rectification of the applicant's name under the Registration of Persons Act (cap 107), and she was issued with an identity card no 1681362 under the name Ruth Wanjiru Njoroge. This identity card was dated 20th February, 1998. Her district of birth was shown as Uasin Gishu. The place of issue was shown as Kikuyu; the district was shown as Kiambu; Kikuyu location; Kikuyu sub-location.

There is no doubt that the applicant saw marital status under customary law as a vital question in her case. She has attached to her affidavit several photographs, showing her in a family context in which both the deceased, the first respondent and other relatives of the deceased were present. In one photograph (taken in 1986) she has a caption showing as persons appearing: the deceased; Jeff Njuguna (described as his son); Ruth Wanjiru Njoroge (described as wife); and Joyce Wanjiku Njoroge (described as adopted daughter). In another photographs (taken in 1995) there appear Eunice Wangari (mother of the deceased), and Ruth Wanjiru Njoroge (described as wife of the deceased). In yet another photograph, of 1997, described as Njoroge family member, there appear; Jemimah Njeri Njoroge (first respondent); Nelly Nduta Gikaru; Jane Wanjiru, the wife of Gerald Kimani; and Ruth Wanjiru Njoroge (the applicant).

On the question whether the African Christian Marriage and Divorce Act (cap 151), under which the first respondent had married the deceased, was a bar in law to the applicant contracting a marriage with the same deceased under Kikuyu customs, Mr Gitau submitted that the said enactment could only have been a bar if the deceased had wished to celebrate a second marriage in church. Counsel argued that this legal limitation had no application to situations of second or further customary marriages, and more so where the death of the husband was in issue: the reason being that the abiding reality in such a situation is the existence of various marriages, and the claims involved in those unions.

On the supposition that a valid customary marriage existed between the applicant and the deceased, it was submitted that her case for burial rights, as presented in the main suit, was a *prima facie* one. It was submitted that unless the prayers in this application were granted, then the applicant would suffer irreparable loss, and that the balance of convenience stood in her favour, and consequently the applicant's prayer for equitable interlocutory reliefs should be granted.

(b) The Respondents' Case

Ms Judy Thongori for the respondents opposed the application. She submitted that the first respondent's marriage to the deceased, which had taken place in church and under the authority of the African Christian Marriage and Divorce Act (cap 151), was subject to section 37 of the Marriage Act (cap 150), a provision which defined a marriage as a monogamous union, and that anyone married by this procedure had no capacity to marry again under customary law. Counsel cited the case, *Irene Njeri Macharia –vs – Margaret Wairimu Njomo & Patrick Muriithi Harrison,* Civil Appeal No 139 of 1994, at page 8:

"In the appeal before us, we have said we do not know whether the first respondent and the deceased ever went through any ceremony of marriage; we are also not certain if the concept of a presumed marriage could be applied to their circumstances. In the absence of such evidence, we are unable to say whether she could qualify as a 'wife' under the provision of section 3(5) of the Law of Succession Act. It must not be forgotten that in the *Mutua* case, Josephine went to very great lengths to prove that *Mutua* had married her under Kamba Customary law. The learned judge in the *Mutua* case was apparently of the very clear view that even if that evidence were to be treated as true, it did not matter because under section 37 of the Marriage Act, Mutua lacked the capacity to contract another marriage during the subsistence of the statutory marriage."

Further, on the authority of the *Irene Njeri Macharia case*, counsel submitted that section 3(5) of the Law of Succession Act (cap 160), which gave all wives of a deceased person recognition, was only for the purposes of the Succession Act and did not apply in any other respect.

Counsel further submitted, once again on the authority of the *Njeri Macharia case*, that even under customary law, the applicant should have proved the existence of marriage, but that the applicant had failed to prove that any ceremony of marriage had indeed been held, thus bringing the deceased and the

applicant into any marital union.

Counsel for the respondents challenged the claims of the applicant, that the deceased had expressed a will regarding his place of burial and how he should be buried, in the event of his death. Relying on the case, *James Apeli and Enoka Olasi –vs- Prisca Buluka***,** Civil Appeal No 12 of 1979, counsel submitted, that this is clearly the correct position in the Kenya law today, that there is no property in a dead body, and person cannot dispose of his dead body by will.

So how was the corpse to be disposed of? Who was to do it? Who would be responsible for the dead body? In English law, as cited in the *James Apeli case* (from *Williams and Mortimer on Executors, Administrators and Probate* (London: *Stevens & Sons,* 1970), the position is that

"After death the custody and possession of the body belong to the executors until it is buried and, when it is buried in ground which has been consecrated according to the rights of the Established Church, it remains under the protection of the Ecclesiastical Court of the diocese, and cannot be removed from the grave or vault of the mausoleum in which it has been placed, except under a faculty granted by the Ecclesiastical Court."

There certainly will be a difference between such a position and the law and practice that must carry the day in Kenya. If we start from the position that the executor, in a proper case, might have responsibility for a dead body, we must recognize that, thereafter, we will not have in place the Established Church or the Ecclesiastical Courts; and in the absence of a local statute on burials, which ought, ideally to be enacted, we must fall back on customary law.

When customary law applies, does it apply in its totality, or selectively, and for parts of it only? From existing authority, that customary law will in most cases apply is not in doubt. But it does not necessarily apply in its totality, as, where any elements of it are found to be repugnant to justice and morality, then they can be excluded {*Virgina Edith Wamboi Otieno – VS- Joash Ochieng Ougo and Omolo Siranga***,** Civil Appeal No 31 of 1987 (1982 – 1988) I KAR 1049}

Now the repugnancy question was not much canvassed, and I must thus take it to be of no special importance in this case. Ms Thongori for the respondents relied on Kikuyu Customary law to dispute the applicant's claim to the body of the deceased. She relied on *Carmelina Ngami Mburu –vs- Mary Nduta, Hellen Omoka and Medical officer of Health*, Nairobi, Nai HCCC No 3209 of 1981. The relevant passage is set out in *Eugen Cotran's Casebook* on Kenya Customary Laws, at P 238:

"This Court has to be guided by African Customary law in matters of this nature as provided by section 3(2) of the Judicature Act (cap 8), and other decisions of the Court. In the past, customarily, the responsibility for burial fell on the eldest son or in his absence, on the brothers of the deceased. The tendency these days is to have consultations. In those days even where dead bodies were being thrown to hyenas, as this Court has been informed, women took no part. I have also been told that even in the present days women do not take part except carrying flowers. That being so, there is no cause of the widows having a tug of war over the body of the deceased."

I would prefer ultimately to found the outcome of this case, even if it is in favour of custom, on slightly different grounds. With great respect, the testimonies upon which the learned judge relied in stating the position above set out as the law, could not today be accorded so much weight. This is in particular because, such a stark differentiation of gender roles no longer approximates to reality in all cases, quite apart from the valid objection on grounds of gender equity which may jolly well be raised.

Counsel has resorted to the above-quoted passage from the *Mburu* case to demonstrate that responsibility for burial, under Kikuyu Customary law, falls upon the elders and cannot be the subject of a claim such as that now being made by the applicant, on the basis that she was the second wife of the deceased.

Ms Thongori cited the holding in the *Wamboi Otieno* case (1982-1988) 1 KAR 1049, to support the respondents' claim based on customary law.

The holding in that case is set out (p 1050) as follows:

1. At present there is no way in which an African citizen of Kenya can divest himself of association with the tribe of his father if the customs of the tribe are patrineal.

2. By virtue of s 3 of the Judicature Act, the common law of England is, in the absence of statute, the law of the Superior Courts in Kenya, but the Courts in exercising their jurisdiction, shall be guided by customary law when this is not repugnant to justice and morality.

3. Generally speaking the personal law of Kenya is customary law in the first instance.

4. The deceased's wife has to be confided in the context of all wives who became subject to the customary law.

5. Under such law by which she is bound, she has no right to bury her husband.

6. A wife who is not the personal representative of her deceased husband has no duty to bury him.

Counsel submitted that the burial of the deceased in the present case would in the first instance be governed by customary law. On this principle, counsel submitted, the responsibility for burial lay in the first instance with the brothers and the son of the deceased.

Following her submission on preliminary points of law, Ms Thongori then considered the pleadings made by the deponents in their various affidavits. Eunice Wangari, the 92-year-old mother of the deceased, denied the averment made by the applicant that she, the deponent, was senile. She deponed that she was not aware of the Kikuyu customary law marriage alleged to have taken place between her son, the deceased,and the applicant. She further deponed that there was a family burial place, Muguga/Sigiona/33, and that there was no good reason to bury the deceased anywhere else. Joseph Muiruri in his affidavit of 7th April, 2004 deponed that he knew nothing about the alleged customary marriage, and that while he had always been close to his brother, the deceased, the deceased had never expressed to him the wish to be buried anywhere other than Sigona/33.

The first respondent swore a further supplementary affidavit, dated 15th April, 2004, with an annexure relating to an official search in the Lands Office. The purpose of the search was to establish the status of the parcel of land known as Kajiado/Noonkopir/161, situated at Kitengela, where the applicant intended to bury the deceased. The search showed that, on 12th April, 2002 the said land parcel, which had previously been registered in the name of the deceased, was transferred into the name of the Jomujo Educational Foundation, and on the same day, this title was closed for sub-division into 74 commercial plots. Counsel submitted that the original title, Kajiado/Noonkopir/161, has not been in existence since 12th April, 2002. The effect of this submission which has not at all been traversed by the applicant, falls on two planes: (i) that the applicant is not acting in good faith when she claims the body of the deceased for the purpose of burying it at Kajiado/Noonkopir/161, because that land parcel does not exist; (ii) the applicant is making a prayer, and with regard to burial at Kajiado/Noonkopir/161, that lacks veracity. Counsel has further submitted that even as at 12th April, 2002 the said land parcel was not the property of the deceased, in whose name it had indeed been registered on 6th December, 1995; rather the parcel of land, Reg No Kajiado/Noonkopir/161 was now the property of Jomujo Educational foundation.

In the substantive part of her submission, Ms Thongori questioned the very object of the applicant's prayer for a temporary injunction. The relevant prayer is to restrain the respondents from interfering with the applicant and impeding her participation in funeral matters, pending the final decision of the Court in the main suit. Counsel asks: what kind of participation is being sought? She submits that African funerals in general, and Kikuyu funerals in particular, are open events; indeed she requests that the Court should take judicial notice of this fact. Ms Thongori argues that this particular prayer is equivocal and unclear, and therefore will not answer to the requirement that, in an application for injunction, the applicant must show a *prima facie* case with a probability of success. Counsel cited the well known case of *Giella –vs- Cassman Brown & Co Ltd* [1973] EA 358, to support the proposition that a temporary injunction will not

be granted unless the applicant is destined otherwise to suffer irreparable injury; and also as the basis of the principle that where doubts exist in the mind of the Court, then the applicable test is the balance of convenience.

Ms Thongori submitted that the applicant showed no *prima facie* case and indeed made hardly any submission in that regard. Whether or not, a *prima facie* case has been made, counsel urged, must be tested against the prayers in the applicant's plaint, especially that a permanent injunction be issued to restrain the respondents, and that the body of the deceased be interred at the land parcel, Kajiado/Noonkopir/161 according to his last wishes. Against this test, no *prima facie* case had been shown, and the respondents's demonstration of this point took the following lines.

The applicant lacks *locus standi* to bring the proceedings. There was a valid marriage certificate which confirmed that the deceased was party to a formal marriage and was thus incapable of contracting any other marriage. There had been no divorce between the first respondent and the deceased, and therefore the deceased had no capacity to marry again in his lifetime. Counsel submitted that, so solemn was the monogamous union as a rights-creative phenomenon in the family situation, that by section 37 of the Marriage Act (cap 150), the offence of bigamy has been created to accord such a union the protection of the State and its regime of public law. It followed that, even though the applicant may says he was married under customary law, the deceased had no capaciaty to contract a marriage with her.

Ms Thongori disputed the contention by counsel for the applicant, that section 3(5) of the Law of Succession Act (cap 160) (which recognized all wives of a deceased, for purposes of succession) had repealed section 37 of the Marriage Act (cap 150) which protects the institution of monogamy). Counsel submitted that the application of section 3(5) aforesaid must be limited to the succession process only and would have no effect on the family relationships that fall under the umbrella of marriage, and its governing laws.

This reasoning led counsel to the question: who is who, for the purpose of *locus* in burial questions? She submitted, and with considerable persuasiveness, that the marriage and divorce law has a close bearing on the burial question than the succession legislation. She cited section 2(1) of the Law of Succession Act (cap 160), which reads as follows:

"Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of the estates of those persons.

Counsel submitted that the above-cited provision applies only to the estates of deceased persons, that is, the free property to be disposed of, but not the body itself.

This submission has in my view, much merit, and from that standpoint it is possible to see the respective degrees of relevance of marriage on the one hand, and succession on the other, to the subject of burial. Up for burial is the body of a person who was an integral part of a family and a society, with close relatives and friends – the people who ought to be regarded, in the context of social life in Kenyan society today, as the first ones in the line of duty to arrange for last respects for the departed one. This cluster of interested persons is held at the inner core by the cord of matrimony and by issue of the central family set-up. It is clear, then, that the factor of marriage will create a closer chain of relationship around the deceased than the factor of succession – which is first and foremost about material and related things which essentially belonged to one individual, and the main agenda of which, at this point, is only distribution. I am in agreement with counsel for the respondents, that questions about marital status, by virtue of the matrimonial law, are more relevant in relation to burial, than questions of disposal of material assets and related claims and things, that is, questions of succession.

The parties clearly have considered, and I am in agreement with them, that the merits of the case and in particular of this application, are likely to be determined on the basis of questions pertaining to marital status. This would be the reason, quite obviously, why the applicant has endeavoured so much to advance

the premise that the marriage relationship between the first respondent and the deceased had for all practical purposes worn rather-thin; and this even as she, the applicant, maintains that there existed a strong and healthy marriage relationship between herself and the deceased, built upon ceremonies recognized under customary law.

Thus while the applicant invokes the Originating Summons suit between the first respondent and the deceased, of December, 1997 to show that the first respondent was estranged from the deceased, the first respondent has put up a spirited contest to such a proposition. Ms Thongori submitted that the said suit of 1997 had no relationship to any purpose of terminating the marriage. The suit was only for the purpose of achieving a division of property under the Married Women's Property Act of 1882, something which in its very concept and intent, only takes place during marriage. Counsel underlined the fact that the first respondent's marriage to the deceased had taken place under the African Christian marriage and Divorce Act (cap 151), section 4 of which applied the Marriage Act (cap 150), section 37; and that section 37 stipulated that the celebration of a monogamous marriage had the object and effect of ruling out any further marriage to a different woman by the male partner in the union.

Although the applicant has maintained that she was the second wife of the deceased, this has been firmly contested by the first respondent and her sons and close relatives living with her at Muguga. The various depositions made to support the first respondent's case state that the applicant never had the status of a wife in relation to the deceased. And it is significant that even in the unsuccessful matrimonial property suit of 1997, the first respondent in this matter had not recognized any other wife of the deceased. Indeed, part of the grievance which led to the suit of 1997, was that some of the matrimonial property had inured to the benefit of alleged concubines and their children. Counsel submitted that the claimed customary marriage between the applicant and the deceased was not true, because the affidavit made in support of the claim was a false affidavit. Counsel submitted that a claim so based could not found an equitable relief such as that which was being sought by the applicant. It is quite clear that the affidavit sworn by the applicant to support the claim of a customary marriage, was an invalid one; and counsel for the first respondent submitted that:

"Those who came with forged documents do not deserve equitable remedies. They seek to subvert the course of justice by fraud. The Courts must protect their dignity; and the applicant must move the court with clean hands".

(C) Customary Law

Counsel for the respondents has argued on the basis of relevant authorities, that even if it were to be determined that there was a customary marriage between the applicant and the deceased, this would not confer upon the applicant the capacity to bury the deceased, as that would be contrary to Kikuyu customary law. The relevant law is that stated in *Wamboi Otieno–vs- Joash Ochieng Ougo* (1987), and in *Carmelina Ngami Mburu –vs- Mary Nduta and others* (1981); and by these authorities, responsibility for burial fell on the eldest son, or the brothers of the deceased. Ms Thongori submitted that the person bestowed with the rights of burial for the deceased, under Kikuyu Customary law, was his son with the first respondent, Alex Muiruri, born in 1971; and if Alex Muiruri had not been there, then the brothers of the deceased, rather than the applicant, would have taken the responsibility for the burial. In the circumstances, the applicant had no basis in law for bringing suit against the second respondent, who is a brother to the deceased.

Counsel submitted that the applicant had no *prima facie* case with a probability of success. She had no status in customary law to take responsibility for the burial of the deceased. She had no land where to bury the deceased, as the burial site she intends at Kajiado/Noonkopir/ 161 is not in the name of the deceased, and is not available. The oral will the applicant alleges to have been made by the deceased, regarding his burial site, counsel submitted, does not comply with the requirements for oral wills as laid down in section 9 of the Law of Succession Act (cap 160) and it has not been properly witnessed and executed.

(d) Other issues in the respondent's case

Counsel submitted that the respondents had a purpose much more consistent with Kikuyu customary law, of burying the deceased at Muguga/ Sigona/33, which is the ancestral land where his own father is buried and which is occupied by his mother and brothers, and where the matrimonial home is located.

Counsel disputed the averments contained in depositions made in support of the applicant's case that the deceased had invoked a curse to afflict anyone who dared inter his body at Muguga. Counsel submitted that Muguga/Sigona/33 was not just the matrimonial home, but was also the site of a large school constructed by the deceased, a site where he had intentions of erecting a university. Counsel submitted that, had the deceased so very strenuously objected to a Muguga burial, then he would have written a will to say so – but he never did.

Counsel for the respondents submitted that the applicant would not suffer any irreparable loss if her prayers in the instant application were not granted. The applicant would make no material loss, as there is no property in a corpse. Counsel submitted that the balance of convenience lay with the respondents, who had made all the necessary burial arrangements at the family land.

Ms Thongori finally submitted that the application should fail, as it did not meet the test of *Giella –vs- Cassman Brown*, on the issuance of equitable relief. The applicant had also prayed for orders to involve the police in protecting her interests in the subject of this application. But counsel on this point, submitted that this is a purely civil matter which would not call for the role of the police.

(e) Applicant's Reply

Mr Gitau for the applicant stated that his client's case was based on statutory law, as well as the law of equity pertaining to injunctions. He submitted that the role of customary law was limited, and it should guide the Court only if it was not repugnant to justice and morality. He impugned the *Mburu* case for its apparent unprogressive perception of the role of women in burial matters, and it was his view that on this subject, customary law was repugnant to justice. But he still held that the *Mburu* case was in favour of the applicant, since it had been ordered in that case that the deceased be buried in his own parcel of land which he had purchased. I doubt this, as the lasting effect of Mburu is in the principles enunciated, rather than in what the Court ordered on the facts of the case. It should also be noted that whereas Mburu was buried in his own land, the burial site proposed by the applicant has been shown to have changed hands, and is no longer registered in the name of the deceased.

Mr Gitau considered that his client's case fell quite properly within the *Giella –vs- Cassman Brown* principles. And he urged that:

"it is a primary function of the court to keep faith with the dead who, when nearing death and contemplating burial, amid evident family acrimony, expressed his wishes – by ensuring that this wish will be respected."

3. Analysis and Final Orders

Has the applicant made a cogent case to justify her prayers for certainorders by the Court? The respondents have, from the evidence, made arrangements for the burial of the deceased at Mugua/Sigona/33 and they intend to carry out these plans. The applicant, coming, avowedly, as the second wife of the deceased is seeking a temporary injunction to stop the respondents or anyone acting for the respondents, from moving the body from the funeral home and interring it, until the substantive claims in the main suit have been fully litigated and determined. Has the applicant made a case for such injunctive relief?

The fundamental issue that will resolve most of the claims in this application is marital status prior to the death of Mr Samuel Njoroge Muiruri. This position is fully recognized by the applicant and by the respondents.

As I have already stated earlier on, the person, in social context prevailing in this country, who is in the

first line of duty in relation to the burial of any deceased person, is the one who is closest to the deceased in legal terms. Generally the marital union will be found to be the focus of the closest chain of relationships touching on the deceased. And therefore, it is only natural that the one who can prove this fundamental proximity in law to the deceased, has the colour of right of burial, ahead of any other claimant.

Does the applicant enjoy the said colour of right on a higher scale than the first respondent and her sons, that is, the blood brothers of the deceased?

It is proven in this case that the first respondent was the lawfully wedded wife of the deceased, their marriage having been celebrated in church, and legally sanctified under both the African Christian Marriage and Divorce Act (cap 151) and the Marriage Act (cap 150). It is also quite apparent that, in the practice of married life between these spouses, there were misunderstandings, resulting in quarrels, and even occasional avoidances. But neither the first respondent herself nor anyone on her side nor indeed anyone at all on the applicant's side, has averred that there was ever a legal divorce between the first respondent and the deceased. Therefore, in law, we see nothing but a family hub of relations, featuring a husband, a wife, and their children. As a matter of law, this apparent unity and reality of family life cannot be overlooked. The alternative would not, in my view, be tenable in law.

When we apply the same yardstick to the applicant, we find that she cannot prove an authentic structure of social family relations enacted by father and-mother-and-children. It is true that the applicant justifiably pleads episodes showing that her presence was known by the first respondent, and by those related to the first respondent and that lots of time, she was in the life of the deceased – indeed that she was even with him at the time of his death, and she had taken all the responsible courses of action to attend to him during his hour of need. Yet only custom, habit and repute could accord the applicant's position legitimacy, in relation to the family life of the deceased. While this is only right and proper, so far as it goes, it falls a foul of the official legal system, which through section 37 of the Marriage Act, (cap 150), has provided unchallenged protection to the first respondent's monogamous marriage.

Although Mr Gitau has maintained that the relationship between the deceased and the applicant was on a par (if not better) with that between the deceased and the first respondent, counsel's reliance for authority on the provisions of the Law of Succession was misplaced. The law of marriage expsressly protects the position of the first respondent, rather than that of the applicant, but the law of succession will protect the first respondent and could protect the applicant. Now whereas the Law of Succession is first and foremost concerned with the distribution of possessions, the law of marriage is particularly concerned with the standing of persons within the family unit. It follows that it is the marriage regime, rather than the succession regime, that should prevail in determining questions of burial. And on this principle, I would hold that the applicant's claim to the body of the deceased is not nearly as strong and authentic as the claim such as would be made by the respondents.

It is strange that Kikuyu custom, on the basis of which the applicant founds her claim to marital status, is precisely what would most decidedly deny her claims to the body of the deceased. It is not contested that under Kikuyu customary law today, responsibility for the burial of a man falls in the first place on his eldest son and on the brothers of the deceased.

The applicant has not, in my view, satisfied the basic tests set out in *Geilla –vs- Cassman Brown & co ltd* (1973) EA 358, for the grant of injunctions.

From the foregoing analysis, I have serious doubts that the applicant, in her main suit, has a *prima facie* case with a probability of success; or that the applicant stands to suffer irreparable injury if her prayers are not granted; or indeed, that the balance of convenience would, in the prevailing circumstances, lie in favour of the applicant.

Consequently I will respond to the applicant's Chamber Summons by making the following orders:

1. The prayer for a temporary injunction restraining the respondents, their servants and/or agents or any

third parties claiming through them from preventing the applicant from accessing the body of her husband, ex- Councilor Samuel Njoroge Muiruri (deceased) and/or removing the body from Lee Funeral Home, interring it and/or in any way interfering and dealing with the deceased's body without her consent, knowledge and participation pending the determination of this suit, is refused.

2. The prayer that the Officer Commanding the Nairobi Area Police Station be ordered to supervise the enforcement of the court order herein until the determination of this sit, is refused.

3. The applicant shall pay all mortuary bills, in accordance with the orders of this Court made on 7th April, 2004; 3rd May, 2004; 18th May, 2004; 28th May, 2004; and 28th June, 2004.

4. Each party shall bear their own costs.

Dated and Delivered at Nairobi this 25th day of June 2004

J.B.OJWANG

JUDGE