



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 667 OF 2004

JANET NGUBIA GITHIEYA.....PLAINTIFF

VERSUS

WAIRIMU GITAU.....DEFENDANT

RULING

The Application, and the Depositions

This was an application by Chamber Summons dated 22nd June, 2004 and filed on the same date. It was brought under Order XXXIX rule 2 of the Civil Procedure Rules and section 3A of the Civil Procedure Act (cap 21). The substantive prayers were as follows:

- (a) that, the Court do issue a temporary injunction against the defendant restraining her, her agents or servants from proceeding with the advertised cremation of the late Johana Gitau;
- (b) that, the Court do further restrain the defendant from removing the remains of the late Johana Gitau from the Aga Khan Hospital mortuary till the hearing and determination of this matter;
- (c) that, the costs of this application and incidentals be borne by the defendant in any event.

The grounds stated on the face of the Chamber Summons are as follows:

- (i) that, the defendant has without any will or authority of the late Johana Gitau or his immediate larger-family members, proceeded to advertise his cremation;
- (ii) that, the cremation plan is unnatural and contrary to Kikuyu customs and traditions to which the deceased did subscribe;
- (iii) that, the defendant has totally ignored the wishes of the late Johana Gitau's entire family and intends to proceed with the cremation;
- (iv) that, the plaintiff and the entire family of the late Johana Gitau stands to suffer ridicule, embarrassment, loss and damage if the remains are cremated against his wish.

Further support of the application is found in the affidavit of Janet Ngubia Githieya, the plaintiff, dated 22nd June, 2004 and filed with the application. The deponent, who is the eldest daughter of the deceased and claiming to have the authority of her brothers and sisters, avers as follows:

- (a) that, Johana Gitau died at Aga Khan Hospital on 10th June, 2004;

- (b) that, the deceased, at the time of his death, lived at Kitengela with his second wife, Wairimu Gitau who is the defendant;
- (c) that, the deceased at the time of his death, owned various properties in Kitengela and in Kiambu;
- (d) that, the plaintiff's step-mother, the defendant, intends to cremate the deceased without a written will and/or personal indication favouring cremation;
- (e) that, the defendant herself has been exclusively responsible for the cremation decision, and the entire family of the deceased has not been involved;
- (f) that, the deceased had a large family and some of its members are: Janet Ngubia Githieya (aged 74); James Njenga Gitau (age 73); Josephat Kamonye Gitau (aged 69); Julie Nyokabi Gitau (aged 60); and Jemima Wamuhu Gitau (aged 58);
- (g) that, the deceased also had several grand and great grand children who have not been involved in the arrangements regarding the deceased;
- (h) that, the deceased belonged to the Kikuyu ethnic group and had always abided by Kikuyu customs and traditions;
- (i) that, it is unnatural for a member of the Kikuyu ethnic group to be cremated without his express authority and in the absence of any agreement by members of his family;
- (j) that, the deceased had expressed no desire to be cremated after his death;
- (k) that, the proposed cremation is against the rules of natural justice and against the known Kikuyu customs and traditions;
- (l) that, the plaintiff's brothers and sisters will undertake to meet any expenses incurred on account of this application;
- (m) that, the plaintiff's brothers and sisters undertake to bury the deceased as soon as proper arrangements for the same are agreed within the family.

The plaintiff's application was opposed by the defendant/respondent, who swore a replying affidavit on 24th June 2004 and filed it on the same day. Her depositions may be shortened as follows:

- (i) that, it is not true that the plaintiff/applicant has the authority of her brothers and sisters in the prosecution of her application;
- (ii) that, the deceased has six surviving children including the plaintiff, and four of them are abroad, while the eldest son, James Njenga Gitau is fully involved in the cremation arrangements;
- (iii) that, all the four sons and daughters of the deceased who stay abroad have already shown a clear indifference to present initiatives for the disposal of his body;
- (iv) that, the deceased had all along expressed his desire to be cremated upon death, and this had been communicated to the defendant and to his eldest son, his grandson (Edward Gitau Njenga), and one Benjamin Karuga Kibiku;
- (v) that, the cremation arrangement is being conducted by a funeral committee and one of the members thereof is the eldest son of the deceased;
- (vi) that, the plaintiff, after being duly informed of the death of the deceased, has remained aloof

and has out of choice not been part of the funeral arrangements;

(vii) that, all willing grand and great grand children have been fully involved in the funeral arrangements;

(viii) that, although the deceased hailed from the Kikuyu tribe, his behaviour and life-style were those to be found among white people, arising from the historical fact that he had lived continuously in the United Kingdom for 11 years, from 1955 to 1965;

(ix) that, the deceased had no attachment to or liking for the Kikuyu customs and traditions, as he had been born, brought up and educated at Majengo in Nairobi;

(x) that, the deceased had not expressed a different view on the cremation issue to the plaintiff, as he fell into a coma upon admission to hospital, and never regained consciousness;

(xi) that, the plaintiff, who got married away more than 50 years ago, is not right in meddling in matters relating to the disposal of the body of the deceased;

(xii) that, the eldest son of the deceased has sworn an affidavit in support of the defendant's case.

James Njenga Gitau, aged 71 and the eldest son of the deceased, swore an affidavit dated 24th June, 2004. His depositions may be set out in summary as follows:

(a) that, he is 71 years old and the eldest son of the deceased;

(b) that, the deceased had all along openly expressed his desire to be cremated upon his death to those close to him including the deponent;

(c) that, he the deponent and his own children have been fully involved in the funeral arrangements;

(d) that, the plaintiff has not at all been present during the funeral arrangements for the deceased, since the death took place;

(e) that, the defendant has already incurred an expenditure of over Kshs 100,000/= towards the cremation arrangements;

(f) that, the deceased was in the habit of communicating mostly in English, with a European accent, and this together with his lifestyle demonstrated that he had adopted Western values, a factor in his desire to be cremated upon his death, rather than adhering to Kikuyu customs and traditions.

Submissions for the plaintiff/applicant

Mr Nduati for the plaintiff/applicant made submissions on the plaintiff's application. He argued that cremation of the deceased, as proposed by the defendant, would be contrary to Kikuyu customs and traditions, which the deceased as a man from the Kikuyu community did subscribe to. Counsel adduced no evidence to prove the custom, as I believe he should have done. Instead, he argued that: "The burden of proof that cremation is right requires proof of the wishes of the deceased; and a mere statement in an affidavit that the deceased expressed his desire will not suffice". Counsel proceeded to quote as supporting his argument, s 107(1) of the Evidence Act (cap 80):

"Whoever desires any Court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

Such a submission is in my view suspect in its force and rationality. Who, in this case, is asserting a legal

right? Is it the applicant or the respondent? It is the applicant who has moved the Court. Therefore she must be the one asserting a legal right in the first place – a legal right founded on Kikuyu customary law. That custom must be proved; and so it is not for the defendant to prove the legal standing of cremation in the first place. It is for the plaintiff, I believe, to prove the Kikuyu custom which outlaws cremation. Since the legality of cremation has not been seriously tested at this point, I must assume that it is, indeed, an open option for the defendant. The only question, so far as I can judge from the plaintiff's submissions, is whether the deceased did truly express the wish to be cremated upon his death. On this point there are two contending positions. There are two affidavits, quite consistent, on the defendant's side which depose that the deceased expressed the wish to be cremated upon his death. There is one affidavit which avers that the deceased could have expressed no such wish. I will later on test the two claims more squarely to determine where the truth lies.

Counsel for the plaintiff stated as is common cause, that the deceased had not left behind a formal will directing how his remains were to be disposed of. He submitted that in the absence of a will, the question would not fall to be determined under any statute, or English statutes of general application, or indeed the English common law. In such a case, counsel submitted, the personal law of the deceased, and more specifically the Kikuyu customary law, would be the governing law. He cited the case, *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & Omolo Siranga* (1982 – 88) 1 KAR 1049 to support his contention that the only question to be asked was whether, under section 3(2) of the Judicature Act (cap 8), the Kikuyu customary law was, on the burial question, repugnant to justice and morality, or inconsistent with the written law. He drew an analogy between the Luo customary law of burial, which is considered in that case, and the Kikuyu customary law. And counsel affirmed that under Kikuyu customs and traditions, a dead man is buried (and not cremated) in his father's homestead, in a place to be determined by family members, if he had not established his own home at the time of his death. If a deceased man had his own separate home, counsel contended, then his body would be buried there, but not cremated. And in a situation where there is no land at all available where burial can take place, counsel submitted, then a deceased person would be disposed of by virtue at the Public Health Act (cap 242), section 144(1), by being interred in a public cemetery.

Counsel urged that as the deceased in this case was a man of means, with properties in several places, the lawful mode of disposal of his body would be by burying it on one of his lands. The decision as to the exact burial place and the manner of burial, counsel submitted, would be taken by the head of the family, with the assistance of responsible members of the family. The head of the family in this sense would be the eldest son or brother of the deceased. Counsel submitted that the defendant/respondent in this case was not competent, under Kikuyu customary law, to decide the mode of disposal of the remains of the deceased.

Submissions for the defendant/respondent

Mr Kimondo for the defendant/respondent opposed the application, and in the first place wondered whether the plaintiff had *locus standi*, whether at common law or under Kikuyu customary law, especially considering that the plaintiff was the daughter and the defendant the widow of the deceased. At common law, counsel submitted, one may not litigate on matters concerning a deceased person unless one has taken out letters of administration. He doubted whether the plaintiff would qualify under this principle. Section 82(a) of the Law of Succession Act (cap 160) thus provides:

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate ...”

Counsel submitted, relying on the *Wamboi Otieno* case, that a person who is not a personal representative, such as the plaintiff in this case, would have no *locus standi*. It was thus held in the *Wamboi Otieno* case [1982 –1988] 1 KAR 1049 (at p 1050):

“A wife who is not the personal representative of her deceased husband has no duty to bury him. In the absence of customary law, the duty can lie only with the personal representative of his estate...”

It is to be noted that section 66 of the Law of Succession Act gives guidance on how letters of administration may be issued, and the first preference in this regard would be the “surviving spouse or spouses, with or without association of other beneficiaries”. However, in accordance with the Court of Appeal’s decision in the *Wamboi Otieno* case, even such a surviving spouse will be incompetent if she will not have obtained a grant of letters of administration.

Counsel’s argument based on this point is, with respect, quite correct: the plaintiff would have no competence at common law to seek Court orders on the subject of disposal of the remains of the deceased. This is the case, too, under the provisions of the Law of Succession Act (cap 160).

Does the plaintiff have *locus standi* under the Kikuyu customary law? Mr Kimondo submitted that she does not have *locus standi*. And this, with respect, is the correct position. Counsel for the plaintiff did, indeed, acknowledge that the eldest son of the deceased would be the one having *locus standi* in respect of the disposal of the body of the deceased. The relevant authority here is *Carmelina Ngami Mburu v Mary Nduta & Others*, Civil suit No 3209 of 1981, where the late Mr Justice J M Gachuhi thus held:

“ 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...women took no part. I have also been told that even in the present days, women did not take part except carrying flowers. That being so, there is no cause for widows having a tug of war over the body of the deceased.”

Counsel contended that in the present suit and application, only women are struggling over the body of the deceased. Under Kikuyu customary law, he submitted, neither woman has a right to pursue such a claim. However, counsel submitted, the depositions on record clearly show that the respondent “is not doing it herself.” She is working with the eldest son of the deceased, who has sworn an affidavit affirming as much, and with an organised funeral committee which is conducting the arrangements for the disposal of the body of the deceased. Counsel reaffirmed, on the basis of the consistent evidence of the defendant and James Njenga Gitau, that it is not the defendant making the cremation arrangements; it is the clan, working hand-in-glove with the first son of the deceased.

Did the deceased express any wishes as to the mode of disposal of his body? Both the defendant/respondent and James Njenga Gitau have deposed that the deceased has several times indicated that upon his death, his body should be cremated. Counsel has remarked, correctly, with respect, that this averment has not been traversed by any unambiguous deposition in support of the application.

Mr Kimondo relied on the *Carmelina Ngami* case to submit, quite correctly, with due respect, that there is no property in a dead body as such; but the Court will do its best to give effect to the will of a deceased person, where there is such, regarding mode of disposal of his body after death. In the words of the Honourable Mr Justice Gachuhi in that case:

“The Court will always try to enforce the wishes of the deceased. In the case of *James Apeli & Another v Prisca Buluku*, Civil Appeal No 12 of 1979 (unreported), the Court granted the order to exhume the remains of Simon Buluku from his brother’s land to be buried in the land he had bought 10 miles away from the rest of his relatives. This was his expressed wish because he had no land of his own where he was born and grew up.”

Is cremation consistent with Kikuyu custom? Counsel submitted that there was no inconsistency with the written law or with custom, and cremation was by no means repugnant. His submission on this point was based on the principle that the correct perception of customary law, which today forms one of Kenya’s

recognised bodies of law, is that which is founded upon a dynamic and not a static framework, and, seen in this light, the Kikuyu customary law is to be held to accommodate the inexorable advent of modernity and of new practices, such as cremation. Counsel set this argument, quite meritoriously, with respect, in the context of general provisions in the Constitution of Kenya. He referred specifically to section 115(2) of the Constitution which deals with trust land and with the place of these in a customary context. That provision states:

“Each county council shall hold the Trust land vested in it for the benefit of the persons ordinarily resident on that land and shall give effect to such rights, interests or other benefits in respect of the land as may, under the African customary law for the time being in force and applicable thereto...”

The significance of this provision is that it demonstrates the recognition in the supreme law of the land that even as the constitutional order upholds the people’s customs and traditions, it also recognises that the rights and interests of the people will be best safeguarded only through change, and accommodation of modern observances. Counsel is, in effect, as I understand it, submitting that the valid Kikuyu custom pertaining to the disposal of the dead is not an old or static one, but a flexible and dynamic one which will accommodate new practices. He is, as I understand it, urging the Court to accept that the practice of cremation will fit reasonably harmoniously into the customary funeral practices among the Kikuyu people. This is a powerful and a progressive argument which, as I see it, I ought not to appear to suppress, in the absence of a truly formidable case made by the applicant. This spirit is not without precedent. The Court of Appeal, in the *Wamboi Otieno* case, had thus observed [(1982 – 1988)] 1 KAR 1049, at p 1061]:

“We can therefore state that in the course of developing a jurisprudence which ultimately will have a Kenyan identity, the Courts are enjoined to turn to African customary law as well as the applied common law, to decisions of the English Courts and Courts of Commonwealth countries. The elders, who are the custodians of African customary law, assisted by the intelligentsia, by the church and other organizations owe it to themselves and to their communities to ensure that customary laws keep abreast of positive modern trends so as to make it possible for Courts to be guided by customary laws.”

Mr Kimondo submitted that no authority had been cited by the applicant to show that cremation was in any way contrary to law. Drawing an analogy with the position at common law, counsel submitted that cremation is perfectly proper and indeed has the force of legality. Counsel cited a passage from *Williams and Mortimer on Executors, Administrators and Probate*, 15th & 3rd eds by J H G Sunnucks (1970), at page 58:

“It is not illegal to burn a dead body instead of burying it, unless it is so done as to amount to a public nuisance, or it is done against the known written directions of the deceased to the contrary.”

Counsel submitted that this common law principle be upheld, so long as it did not offend against the statute law.

Injunctive Relief

Mr Kimondo for the respondent submitted that the applicant had not made a valid case for the injunctive relief which she was seeking. Under the principle in *Giella v Cassman Brown*, the applicant should demonstrate that she has a *prima facie* case with a probability of success. Counsel submitted that the applicant’s case failed here, as she had no *locus standi*, whether at common law or under Kikuyu customary law.

Counsel also questioned the jurisdiction for an application, such as that brought by the applicant, which allowed no opportunity for the resolution of the main challenge in hand, namely, disposing of the body of the deceased. If an order was granted such as was being sought, what would then be the fate of the body itself? Would it be left to lie permanently at the mortuary? Who would pay the mortuary charges? Where and how would it ever be disposed of? These are quite pertinent questions, and truly the plaintiff’s

application has not addressed them. On this account, counsel submitted and quite rightly, in my opinion, the plaint, the application and the affidavits have not made out a credible case which the Court can respond to by making the desired orders. Counsel has further argued, I think quite correctly, that the plaintiff/applicant has not shown the irreparable injury which she would suffer unless the orders sought are granted.

Under the *Cassman Brown* principles, any doubts as to the propriety of injunctive relief are to be resolved on the balance of convenience. Counsel for the respondent has argued, quite persuasively in my view, that the balance of convenience rests squarely in favour of the respondent who, acting together with the first son of the deceased and with other members of the family, has already expended large sums of money in making constructive and effective preparations for the disposal of the remains of the late Johana Gitau. From the affidavits of the respondent and of James Njenga Gitau, it is evident that the burdens of the demise of Johana Gitau have been daily borne by the respondent, and the greatest suffering will certainly occur on that side rather than on the side of the plaintiff/applicant, if present funeral arrangements were stopped, or further delayed. I think it is right to conclude that the balance of convenience in this matter lies in favour of the respondent.

The Plaintiff's Submissions in Response

Mr Nduati for the plaintiff/applicant argued that the applicant could not rightly be said to lack *locus standi*, as she was the daughter of the deceased, and therefore a member of the larger family of the deceased. Counsel also maintained that the pristine Kikuyu customary law must apply, because the deceased belonged to the Kikuyu community. He sought to rely on a passage in the judgement of Nyarangi, JA in the *Wamboi Otieno* case:

“It matters not that the deceased was sophisticated, urbanised and developed in a different lifestyle: It appears to us quite unsustainable on the grounds suggested that a different formal education and urban lifestyle can affect adherence to one's personal laws”.

However, this passage may, as I see it, have been taken slightly out of context, considering the dynamic profile of custom acknowledged in the *Wamboi Otieno* case, which I have already set out above.

Final Analysis and Orders

My lines of analysis are already clear from the earlier part of this ruling. I will add as follows:

- (a) It has not been shown that the plaintiff/applicant does have *locus standi* whether on the basis of the common law, of the statute law, or the Kikuyu customary law
- (b) The plaintiff's account, that she is making her claim jointly with other members of the family, is doubtful.
- (c) It is apparent that the eldest son of the deceased, James Njenga Gitau, who under Kikuyu customary law has a crucial place in the burial matter, does not support the plaintiff's case or her application.
- (d) It seems clear that the main and the effectual preparation for the disposal of the remains of the deceased is taking place under the auspices of the defendant/respondent, rather than of the plaintiff/ applicant.
- (e) All indications are that the plaintiff/applicant has not shown a *prima facie* case with a probability of success.
- (f) The plaintiff, I believe, has not demonstrated any irreparable harm that she will suffer if the orders sought in her application are not granted.

(g) The balance of convenience I feel certain, rests squarely with the respondent, rather than with the applicant.

(h) I have not been persuaded that the practice of cremation, which is well recognised worldwide, and which appears to be a hygienic and an environmentally – wholesome mode of disposal of the dead, cannot in these modern times be accommodated under the evolving Kikuyu customary law or indeed any other customary law in force in this country.

I will make the following orders:

1. The applicant's prayer for a temporary injunction against the defendant restraining her, her agents or servants from proceeding with the cremation of Johana Gitau, is refused.
2. The applicant's prayer for further restraining orders against the defendant removing the remains of Johana Gitau from the Aga Khan Hospital mortuary, is refused.
3. The parties shall bear their own costs in this application.
4. The plaintiff/applicant shall pay all the mortuary fees and other charges incidental to maintaining the body of Johana Gitau at the Aga Khan Hospital with effect from 23rd June, 2004 to such time as the said body shall be disposed of, or to such date as the main suit shall have been heard and determined, whichever of the two events occurs first in time.

Dated and Delivered at Nairobi this 30th day of July 2004.

J.B.OJWANG

Ag.JUDGE