



**Momanyi v Nyambongi (Environment and Land Appeal E008 of 2023)
[2024] KEELC 492 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 492 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND APPEAL E008 OF 2023**

JM KAMAU, J

FEBRUARY 8, 2024

BETWEEN

JAMES OMBUI MOMANYI APPELLANT

AND

BEN MOGAKA NYAMBONGI RESPONDENT

JUDGMENT

1. The Plaintiff James Ombui Momanyi filed a suit on 8/9/2022 in Keroka Principal Magistrates court seeking Reliefs for:

“An order of mandatory injunction compelling the Defendant to allow the Plaintiff bury his wife in Nyansiongo sub-location, Nyansiongo location, Nyamira County, costs of the suit and any other relief the court may deem fit and just to grant”.
2. The grounds upon which the Plaintiff supported the said Suit are that the Plaintiff, the husband to one Lydia Kemunto Ombui who died on 4/9/2022 was the daughter of the Defendant, her body was booked at Christamarianne Hospital Mortuary by the Plaintiff’s son Anthony Kaiser Ombui. However, the Defendant obstructed the Plaintiff from moving the body from the mortuary despite the Plaintiff having paid dowry to the Defendant under Gusii customary law and rites and culture in spite of the Deceased and the Plaintiff having been blessed with 3 children viz. Anthony Kaiser Ombui, 27, Sarah Kerubo Ombui, 19 and NKO, 11. An order for temporary injunction restraining the Defendant from moving the said body from the mortuary was issued on 8/9/2022. In his statement of Defence dated 4/10/2022, the Defendant says that there was no marriage between the Plaintiff and the Deceased and that the 3 children of the union were born out of cohabitation.
3. He further avers that the Plaintiff is welcome to participate in the burial arrangements of the Deceased at the latter’s home in Wekuru in accordance with her wishes.



4. The case was heard and Judgment was pronounced by the Honourable C. Ombija, Senior Resident Magistrate at Keroka on 17/10/2022 allowing the Plaintiff to bury the body of the Deceased at Nyansiongo sub-location under the supervision of the area Chief. The earlier orders were vacated and the Director/Management of Christamarianne Hospital mortuary was/were ordered to release the body of the Deceased to the Plaintiff with immediate effect and further the security fees of Kshs. 500/= deposited in court was to be refunded to the depositor.
5. The Defendant having been dissatisfied with the said Judgment appealed to this court for orders that:
 - a. The Judgment against him be reversed, set aside, varied and quashed.
 - b. The court be pleased to make any other or further orders as may be fit and expedient in the circumstance.
6. The Appellant's grounds of Appeal dated 6/4/2023 and filed in court on 13/4/2023 are that the lower court failed to take into account the wishes of the Deceased regarding the place of burial, that the Respondent erred in law and in fact in not holding that the Respondent had no private land to bury the Deceased and that he was to bury the deceased on a strange parcel of land which could perpetuate illegalities, and that he made a decision against the weight of evidence produced in court and on relying on insufficient evidence.
7. As I was sifting through the pleadings in the lower court, my eyes kept looking for anything starting with LR No. and could not find any. What came close to that is only the name Nyansiongo. Nyansiongo is a very wide area owned by thousands of Kenyan citizens of all walks of life. The subject matter of both the lower court suit and this appeal is the body of the late Lydia Kemunto Ombui who died on 4/9/2022. And the issue before the court is who ought to bury the said body and not where. The court's order was that the body be released to the Respondent and it was even redundant for the lower court to order that the said body be buried at Nyansiongo. The *constitution of Kenya* 2010, under Article 162(1) and 2(b) and (3) is the foundation of the Environment and Land court:
 1. The Superior courts are the supreme court, the court of Appeal, the High court and the courts referred to in clause (2).
 2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-
 - (a)
 - (b) The environment and the issue and occupation of land and Title to land.
 3. Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
8. Under Article 162(2) (6) of the *constitution*, the Environment and Land court was enacted and established by the National Assembly under *Act No. 19 of 2011* whose preamble reads as follows:

“An Act of Parliament to give effect to Article 162(2) (b) of the *constitution*, to establish a superior court to hear and determine disputes relating to the environment and the issue and occupation of, and Title to land and make provision for its jurisdiction, functions and powers, and connected purposes”.
9. The court is established as a superior court of Record with the status of a High Court. Under part III Section 13 of the *Act*, the Act spells out the jurisdiction of the court.



10. Under Section 16A of the *Act*, appeals from the lower court it is only matters in respect of disputes falling within the jurisdiction set out in Section 13(2) of the *Environment and Land Court Act* that the court has jurisdiction and power to deal with.
11. The issue as to who shall bury the body of a Deceased has absolutely nothing to do with land under planning, Title, tenure, boundaries, rates, rents, valuating, mining, minerals or other natural resources. It also has nothing to do with a dispute resulting to compulsory acquisition of land nor land administration and management.
12. It also doesn't touch on a dispute relating to public, private and community land, contracts of land, choses in action or other instruments granting any enforceable interests in land. As to environment this court may only be invited under certain provisions of the *public Health Act*, Cap 242 of the laws of Kenya and the same is not applicable in this case.
13. In the circumstances, the long and short of the above is that this court has no jurisdiction to hear this Appeal. The same lies elsewhere and I hope the Appellant would be able to move the said court before the body is buried if it has not and also if he is within time. As much as I would imagine the strong feelings the Appellant has of not being able to bury a person he has lived with and brought up children with for a couple of decades and the corresponding desire by a loving father I am afraid that my hands are tied and all I can do is to wish and pray that father in law, son in law and their children/grand children are able to come back to terms as they mourn their loved one regardless of who buries her body. It is the relationship of those who survive the Deceased that matters since the Deceased does not know or if she does, it doesn't matter where her body is laid to rest. This Appeal is therefore disallowed and since this is a family dispute, each party shall bear its costs.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 8TH DAY OF FEBRUARY 2024.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: - Brenda

Ms. Bosire for the Appellant

Mr. Maswari for Respondent

