



**Gathogo & another v Ng'ang'a; Kenyatta National Hospital (Interested Party) (Civil Appeal E178 of 2024) [2025] KEHC 10959 (KLR) (Family) (25 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10959 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
CIVIL APPEAL E178 OF 2024  
PM NYAUNDI, J  
JULY 25, 2025**

**BETWEEN**

**MILKA WANJIRU GATHOGO ..... 1<sup>ST</sup> APPELLANT**

**SAMMY KURIA GATHOGO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**PATRICK RUKUNGU NG'ANG'A ..... RESPONDENT**

**AND**

**KENYATTA NATIONAL HOSPITAL ..... INTERESTED PARTY**

*(Being an appeal from the Judgment of Hon G.M Gitonga (MR), Principal Magistrate delivered on 4th December 2024 in Milimani Commercial Courts Civil Case No.E039 of 2024)*

**JUDGMENT**

1. Before this court for determination is the Appeal filed by Milka Wanjiru Gathogo and Sammy Kuria Gathogo (the Appellants) through a Memorandum of Appeal dated 11<sup>th</sup> December 2024. The Appeal arises out of a Judgment delivered on 4<sup>th</sup> December 2024 by Hon.G.M Gitonga (MR),Principal Magistrate in Milimani Commercial Courts Civil Case No.E039 of 2024.
2. The Appeal was canvassed by way of written submissions. The Appellants filed the written submissions dated 7<sup>th</sup> July 2025. The Respondents rely on submissions filed in the trial Court

**Background**

3. The Appellants filed an amended plaint dated 7<sup>th</sup> August 2024 seeking the following orders;



- a. An order restraining the defendant either by himself ,servants, agents and employees from receiving or interring the remains of Mary Wambui Gathogo (Deceased) or in any manner howsoever interfering with her burial by the plaintiffs.
  - b. A declaration that the plaintiffs have exclusive legal and cultural rights to receive and inter the remains of Mary Wambui Gathogo (Deceased).
  - c. An order directing the interested party to release the remains of Mary Wambui Gathogo (Deceased) to the plaintiffs for the subsequent interment at their place of their choice.
  - d. The OCS Njambini Police Station be and is hereby directed to assist in the enforcement of these orders.
  - e. Costs of this suit be awarded to the Plaintiff.
  - f. Any other and further order that this Honourable Court may deem fit and just to grant.
4. The Appellants are the step mother and step brother of Mary Wambui Gathogo (Deceased) respectively. The Respondent in the trial court stated that he was the husband of the deceased and had cohabited together for 17 years. They had a child who is 15 years old. He asked the court to declare that he and the deceased were married nder Kikuyu Customary Law and in the alternative, an order be made that the defendant and deceased were married prior to her death under the doctrine of presumption of marriage from 2007.
5. The suit was fully heard and on 4<sup>th</sup> December 2024, Hon. G.M, Principal Magistrate delivered a judgment in which he made the following orders ;
1. That the 1<sup>st</sup> defendant is a spouse of the deceased Mary Wambui Gathogo by the application of the doctrine of presumption of marriage due to long cohabitation. It is an undisputed fact that the second defendant is a son of the deceased.
  2. The body of the deceased shall be released to the defendants herein for burial.
  3. The said burial shall be at the defendant’s land in Murang’a and not Njiru or Njabini in Nyandarau County.
  4. The 1<sup>st</sup> Defendant shall make arrangements for the burial of the deceased remains and invite all family members including the plaintiffs herein if they are desirious of attending the final send off ceremony of the deceased.
  5. Each party bears their own costs.
  6. The appellants filed an application for saty of execution of the judgment of 4<sup>th</sup> December 2024 which was granted on 16<sup>th</sup> January 2025.
  7. The Appellants also filed a Memorandum of Appeal dated 11<sup>th</sup> December 2024 in which they listed seven (7) grounds of appeal as follows:
    1. The learned trial magistrate erred in law and facts in holding that long cohabited amounted to lawful marriage against clear legal provisions in the [Marriage Act 2024](#) thereby making a wrong judgment.
    2. The learned trial magistrate erred in law and in fact in finding that common law marriage is a recognized system of marriage under Kenya law thereby making a wrong judgment.



3. The learned trial magistrate erred in law and in facts in holding that the doctrine of legal proximity to the deceased tilted in favour of the respondent thereby failing to distinguish between social proximity and legal proximity hence made a wrong decision.
4. The learned trial magistrate erred in law and facts by failing to find that the appellants had legal authority to manage the estate of Benard Gathogo (deceased) of whom the deceased was clearly one of the beneficiaries thereby made a wrong judgement.
5. The learned trial magistrate erred in law and facts by ordering the release of the body of the deceased to the respondents against clear provisions of the law and the weight of evidence.
6. The learned trial magistrate erred in law and facts by making a judgment that stood contrary to the weight of evidence and law.
7. The learned trial magistrate erred in law and fact by relying on extraneous matters raised by the respondent hence made a wrong judgment.
8. They asked the court to set aside the judgment of 4<sup>th</sup> December 2024 and judgement be entered as follows;
  - a. An order restraining the Respondent either by himself, servants, agents and/or employed from receiving or interring the remains of Mary Wambui Gathogo (Deceased) or in any manner howsoever interfering with her burial by the plaintiffs.
  - b. A declaration that the appellants have exclusive legal and cultural rights to receive and inter remains of Mary Wambui Gathogo (deceased).
  - c. An order directing the interested party to release the remains of Mary Wambui Gathogo (deceased) to the appellants for subsequent intermittent and place their choice.
  - d. The OCS Njambini Police Station be directed to assist in the enforcement of this order.
  - e. Costs of the appeal.
  - f. Any other and/or further order as the court may deem just and expedient.

### **Appellant's Submissions.**

9. The Appellants submitted that the respondent relied on the doctrine of presumption of marriage which no longer exists and has been replaced by the Marriage Act 2014. They cited Section 59 of the Marriage Act 2014 which defines what a marriage is and how a marriage is proved in Kenya. They sought to rely on the decisions of Ngeywa vs another v Watima (Civil Appeal 61 of 2021) [2022] KEHC 13421 KLR and CWN v DK (Civil Suit 17 of 2017) [2021]KEHC 12535 (KLR). They also sought to rely on the Supreme Court decision of TMG & another v AP (Application E012 of 2024) [2024] KESC 48 KLR where the court held that there is no ambiguity in what constitutes marriage in Kenyan law and that a marriage ought to be celebrated in accordance to one of the systems. They urged the court to hold that there was no marriage between the deceased and the respondent.
10. Relying on the decision of Imbogo v Imbogo (Civil Appeal E030 of 2023) [2023] KEHC 24707 (KLR), the appellants submitted that there being no marriage between the respondent and the



deceased, they were the closest person to the deceased legally. They argued that the minor was not a competent person to inter the deceased. They urged the court to dismiss the appeal.

### **Analysis And Determination.**

11. The duty of the first appellate Court was stated in *Peters V Sunday Post Limited* (1958) EA 424 as follows:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”

12. The Appellant herein faults the decision of the Magistrate in finding that there was a marriage by presumption between the respondent and the deceased. It is their assertion that the *Marriage Act* ousted the doctrine of presumption of marriage, in this regard reference is made to Section 59 that sets out how a party can prove a marriage.

13. In presuming the existence of a marriage, the Court relies on Section 119 of the *Evidence Act* which provides-

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

14. With the enactment of the *Marriage Act*, it is desirable that all parties register their marriages, for different reasons we will still have parties who will not register their marriages notwithstanding this statutory imperative. What happens when Courts are invited to make a determination as to the existence of a marriage? The Supreme Court was unequivocal in the decision of *MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae)* [2023] KESC 2 (KLR) where it emphasized that with the enactment of the *Marriage Act*, Presumption of Marriage would be the exception rather than the rule. Courts will therefore when invited to still determine whether or not there was a marriage by presumption but apply the strict parameters set out by the Court as hereunder-

1. The parties must have lived together for a long period of time;
2. The parties must have the legal right or capacity to marry.
3. The parties must have intended to marry.
4. There must be consent by both parties.
5. The parties must have held themselves out to the outside world as being a married couple.
6. The onus of proving the presumption is on the party who alleges it.
7. The evidence to rebut the presumption has to be strong, distinct, satisfactory and conclusive.
8. The standard of proof is on a balance of probabilities.

15. According to the *Halsbury's Laws of England*, 3<sup>rd</sup> Edition vol.19 at para.1323-

the presumption of marriage from cohabitation is imputed where a man and a woman have cohabited for such a length of time and in such circumstances as to have acquired the



reputation being a man and a wife, a lawful marriage may be presumed though there may be no positive evidence of any marriage having taken place, and the presumption can only be rebutted by only strong and weighty evidence to the contrary.

16. In *Njoki vs Muthero* (1985) KLR 487, Nyarangi, JA (as he then was) stated that:-

In my judgment, before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute.

17. In the case of *Mary Wanjiru Githatu vs Esther Wanjiru Kiarie, C.A. Civil Case No.20 of 2009 (Eldoret)* cited in *Milena Bora vs Liana Tamburelli* (2016) eKLR, Bosire JA (as he then was) stated that:-

In the circumstances where parties do not lack capacity to marry, a marriage may be presumed if the fact and circumstances show the parties by long cohabitation or other circumstances evidenced an intention of living together as husband and wife.

18. From the evidence on record it is clear the Respondent did visit the home of the Deceased and performed some rites in accordance with Kikuyu Custom towards formalisation of the marriage, this was acknowledged by the paternal uncles of the respondent who recognise him as the husband of the deceased. The Appellant did not controvert this evidence. There is also evidence showing that according to the NHIF records, the deceased and the respondent had each indicated the other as the spouse. The child's birth certificate produced also showed the respondent and the deceased as his parents. . Based on the foregoing, the trial court cannot be faulted for finding that it was safe to presume a marriage.

19. Having held that the respondent was the husband of the deceased, the next question to determine is who has the right to bury the deceased?

20. The appellants who are the step mother and the step brother of the deceased argued that they have the legal proximity to bury the deceased. The respondent on the other hand argued that he is the husband of the deceased, and therefore, legally, he should bury the deceased.

21. The principle of legal proximity applies so that the person who is closest to the deceased in legal terms will rank in priority in having the right to bury the deceased. For this reason a spouse ranks first unless there are compelling reasons to the contrary. The doctrine of legal proximity was enunciated in *Ruth Wanjiru Njoroge vs. Jemimah Njeri Njoroge & Anor* [2004] eKLR, by J.B. Ojwang, J. (as he then was) when his Lordship reasoned that;-

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.

22. The principle was further reiterated in the decision of *Christopher Muthini Mbatha vs. Florence Mukii Mukita* [2008] eKLR and in *John Omondi & Anor vs. Sueflan Radal* [2012] eKLR, where Mabeya, J. stated that

...when it comes to the disposal of the body of a married man or woman the spouse should play a leading role...



23. The Respondent hinged his right to bury the deceased on the fact that he is a Spouse. The Appellants on the other hand base their claim on the fact that they are the administrators of the estate of the father of the deceased. As was emphasized by Hon. Sergon J in *Mary Nyang'anyi Nyaigero & another v Karen Hospital Limited & another* [2016] eKLR, there is no property in a dead in a dead body. Their claim was therefore dead on arrival, doomed to fail.
24. The deceased herein died on 7<sup>th</sup> July 2024. Her body lies at the Kenyatta National Hospital and there are mortuary fees that continue to accrue. It is only fair that the mortuary fees be shared between the parties equally.
25. In conclusion, I have no hesitation in upholding the decision of the trial court and proceed to dismiss the appeal in its entirety with the following orders
  - a. The deceased's body to be released to the Respondent for burial.
  - b. The Respondent shall involve the deceased's immediate and extended family members in the funeral arrangements.
  - c. The deceased shall be buried on the respondent's land in Murang'a.
  - d. The parties will equally share the mortuary fees outstanding as at the date of the judgment.
  - e. Each party will bear their own costs.

It is so ordered.

**SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25<sup>TH</sup> DAY OF JULY, 2025.**

**P. M. NYAUNDI**

**JUDGE**

In the presence of:

Nyongesa for Appellant

Ndambiri for Respondent

Fardosa Court Assistant

