



**Migosi & 2 others v Migosi & 3 others (Civil Appeal E005 of 2025)
[2025] KEHC 10532 (KLR) (10 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10532 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E005 OF 2025**

**WA OKWANY, J
JULY 10, 2025**

BETWEEN

**DENNIS MOGAKA MIGOSI 1ST APPELLANT
ZACHARIA OBWAYA MIGOSI 2ND APPELLANT
MAURINE MIGOSI 3RD APPELLANT**

AND

**NYAKUNDI MIGOSI 1ST RESPONDENT
ELISHA MIGOSI 2ND RESPONDENT
EZEKIEL MIGOSI 3RD RESPONDENT
JOSEPH MOGAKA ONKANGI 4TH RESPONDENT**

(Being an Appeal from the Judgment in Keroka Chief Magistrate's Court Keroka CMCC No. E118 of 2024 delivered by Hon. C. Ombija, Senior Resident Magistrate on 22nd January 2025)

JUDGMENT

1. The Appellants herein were the Plaintiffs before the trial court where they sued the Respondents vide amended Plaint dated 7th August 2024, seeking the following orders: -
 1. A Declaration that the Plaintiffs are adopted children of the deceased in accordance to Gusii Customary Laws having been adopted since 1988.
 2. A permanent injunction do issue restraining the Defendants either by themselves, through their agents, servants, workmen and/or assigns from preventing, interfering with the Plaintiff's involvement in the burial of their deceased mother and from evicting them from their matrimonial home/land.



3. Costs of the suit
 4. Any other reliefs as the court may deem fit and expedient to grant.
2. The 1st – 3rd Respondents filed a Joint Response in which they denied the averments made by Plaintiffs and stated inter alia that the Appellants did not tender any documentary evidence to show that they were adopted by the deceased Florence Bwari Moturi, or that there was a Gusii Customary law marriage as alleged. The Respondents averred that their father, the 4th Respondent, was only married to their biological mother, Aska Moraa, through a Christian marriage which was by its very nature monogamous. They exhibited a marriage certificate (annexure “OEM-1”).
 3. They further stated that the documents adduced as proof of ownership of the land (“ZOM-2”) were unclear and did not make reference to the land parcel number where the Appellants’ houses were built and that the Appellants merely wanted to inherit the deceased’s property by alleging that they were her adopted children because the deceased had inherited all her parents’ property. They averred that the Appellants’ biological mother was buried in their biological grandparents’ home and that the Appellants could inherit that property as a share of their biological mother’s inheritance. They prayed for judgment against the Plaintiffs as follows: -
 - a. The case filed by the Plaintiffs lacks merit and is therefore dismissed.
 - b. The 2nd Plaintiff has committed an offence in misleading this court by giving false testimony under oath.
 - c. The 2nd Plaintiff makes a public apology through the local media they used and withdraw the allegations they made.
 - d. The Respondents may file for compensation for any losses that may have arisen due to this case.
 - e. The Plaintiff incur all mortuary, transport and any other expenses that may arise in the preparation of the interment of the deceased.
 - f. Costs of the suit be borne by the Plaintiffs.
 - g. Any other relief as the court may deem fit and expedient to grant.
 4. At the hearing of the case, the Appellants presented the evidence of four witnesses in support of their case while the Defendants adopted their joint response and did not call any witnesses. Judgment was thereafter entered in favour of the Defendants/Respondents as the suit was dismissed. The trial court ordered that the deceased’s body be released to the Respondents for interment with no orders as to costs.

The Appeal

5. Aggrieved by the trial court’s decision, the Appellants filed the present Appeal seeking orders to set aside the judgment of the trial court and for the entry of judgment in their favour as sought in their amended Plaint. They listed 17 grounds of appeal which can be summarized as follows: -
 1. That the learned trial magistrate erred in law and in fact in failing to consider and appreciate that the Appellants were adopted under Gusii Customary law before the Adoption laws were enacted.



2. That the said judgment went against the doctrine of stare decisis and was marred with bias, condemnation and castigation against the Appellants with disregard to the fact that the balance of convenience tilted in favour of the Appellants.
3. The Appeal was canvassed by way of written submissions which I have considered.
4. The duty of a first appellate court was restated in the case of *Pandya vs. Republic* (1957) EA 336 wherein it was held thus: -

“ An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence.”

Analysis and Determination

5. I have considered the record of appeal and the submissions of the parties. I find that the main issue for my determination is whether the Appeal is merited.
6. The gist of this appeal is the Appellant’s claim that they were not considered as the children of the deceased person and were therefore not allowed to participate in her burial rites. PW1,
7. Maurine Migosi, the 3rd Appellant herein testified that the deceased and the 4th Respondent were her adopted parents and that they were recognized as children from the ‘small house’. She stated that she lived with the deceased from 1995 to the time of her demise and that the process of adoption was facilitated by ‘woman to woman’ marriage in accordance with the Abagusii Customary laws.
8. On cross examination, PW1 stated that the deceased and the 4th Respondent who is her father, participated in her marriage ceremony and received dowry, as her parents, when she got married in 2015. She stated that they convened a meeting to prepare for the burial of their mother to the exclusion of the 1st to 3rd Respondents, which meeting was chaired by their father the 4th Respondent.
9. The evidence of PW1’s was corroborated by the testimonies of PW2 Dennis Mogaka Migosi (the 1st Appellant) who stated that he was adopted on or about the year 1996 when he was in class 2 and that PW3 Jackson Machogu Monayo who is their biological uncle testified that the deceased and her husband (the 4th Respondent) visited their home and paid dowry in the form of two cows according to the Kisii Customary laws and adopted the Appellants who were very young at the time.
10. PW4 Charles Ohuru Getwambu, the Appellants’ grandfather confirmed that the Appellants were adopted by the deceased and had been fully recognized by the family as children of the home,
11. The Respondents, on their part, stated, in their Joint Response, that the Appellants had not presented any documents to show that they were adopted by the deceased. They argued that the marriage between the deceased and the 4th Respondent was void because their father was married to their biological mother, one Aska Moraa, through a Christian marriage which was monogamous in nature.
12. I however note that the marriage certificate that they annexed to their response marked ‘OEM-1’ was not produced during the hearing before the trial court so as to enable the Plaintiffs to interrogate the same through cross-examination. To this extent, I am unable to verify the claim that their father, Joseph Mogaka, was only married to Aska Moraa and not the deceased.
13. From the uncontroverted evidence presented by the Appellants herein, this court is convinced that there was a customary law adoption relationship between the Appellants and the deceased. This court is therefore at a loss as to why the Respondents would want to exclude the Appellants from the



burial ceremony of the deceased yet they (Respondents) did not demonstrate their biological or nature of relationship with the deceased. This court finds it ironical that while the Respondents deny the existence of a marriage relationship between the deceased and their father, they in the same breath want to exclude the Appellants from participating in the deceased's burial rites. It is quite confusing that the Respondents want to be the ones to bury the deceased who is technically a stranger to them.

14. I have considered the sentiments made by the trial court to the effect that there is no property in a deceased person, which I fully endorse. My considered view of the gist of this case is whether the Appellants had proved, on a balance of probabilities, that they are related to the deceased and are therefore entitled to participate in her burial.
15. I find that the evidence presented by the Appellants showed, on a balance of probabilities, that they were indeed adopted by the deceased and the 4th Respondent. The evidence further showed that the Appellants were raised by the deceased and the 4th Respondent and that they have known only the two as their parents. Indeed the 3rd Appellant testified that the deceased and the 4th Respondent received her dowry as her parents when she got married, a fact which was not controverted by the Respondents.
16. For these reasons I have stated in this judgment, I find that the Appellants proved, on a balance of probabilities, that they are the adopted children of the deceased and should therefore not be denied the opportunity to participate in her burial arrangements.
17. On the prayer for a permanent injunction, I am guided by the decision in *Kenya Power & Lighting Co. Limited vs. Sheriff Molana Habib* [2018] eKLR where it was held that: -

“It is apparent from the pleadings that the Respondent was seeking a permanent injunction against disconnection of his electricity by the Appellant. A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.

18. In *Bandari Investments & Co. Ltd vs. Martin Chiponda & 139 others* [2022] eKLR, where it was held thus: -

“Unlike Temporary Injunction which are granted only to be in force for a specified time or until the issuance of further orders from Court, Permanent Injunction are rather different, in that they are perpetual and issued after a Suit has been heard and finally determined. Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Plaintiff in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the Civil Procedure Code, 2010 if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just seat, wait and watch under these given circumstances.

19. Guided by the decisions in above cited case, I hold that this Court cannot countenance a situation where legally recognized children of a deceased person are excluded from participating in and preparing for their mother's burial ceremony, whether the parent-child relationship arose from biological means, customary means or by adoption. I find that the Appellants have established a case for the granting of orders of permanent injunction against the Respondents and I hereby allow the said prayer.



20. In the final analysis, I find that the Appeal is merited and I hereby allow it. I set aside the judgment by the trial court and enter judgment as follows: -
- a. A Declaration is hereby made that the Appellants are the adopted children of the deceased in accordance with Gusii Customary Laws having been adopted since 1988.
 - b. A permanent injunction is hereby issued restraining the Respondents either by themselves, through their agents, servants, workmen and/or assigns from preventing, interfering with the Plaintiffs' involvement in the burial of their deceased mother and from evicting them from their matrimonial home/land.
 - c. The Appellants are directed to ensure that the remains of the deceased are interred within 14 days from the date of this judgment.
 - d. the costs of the suit before the trial court and the appeal are hereby awarded to the Appellants.
21. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS
THIS 10TH DAY OF JULY 2025.**

W. A. OKWANY

JUDGE

