



REPUBLIC OF KENYA



KENYA LAW
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**Nyaringo v Peter (Civil Appeal 160 of 2021)
[2024] KEHC 1241 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1241 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 160 OF 2021
PN GICHOHI, J
FEBRUARY 15, 2024**

BETWEEN

RUTH KEMUNTO NYARINGO APPELLANT

AND

JACKLINE KERUBO PETER RESPONDENT

*(Being an appeal from the judgment and decree in Ogembo CMCC
No. E132 of 2021 by Hon. P.C. Biwott (SPM) on 10th December, 2021)*

JUDGMENT

1. The background of this Appeal is that when one Peter Otieno (deceased) died on 23rd July, 2021, his wife Jackline Kerubo (Respondent), her children and family members started making burial arrangements for the interment of his body.
2. Subsequently by plaint dated 29th July 2021 and filed on 30th July, 2021, Ruth Kemunto Nyaringo (Appellant) pleaded to be the 2nd wife of deceased and sought orders to permanently bar the Respondent from interring the remains of the deceased and a declaration that the Respondent was incapable of conducting the burial rites of the deceased without involving her and her children. She also sought those costs of the suit be borne by the Respondent.
3. After hearing both parties and their witnesses, the trial court came to the conclusion that Appellant was not deceased's wife and dismissed her claim with costs.
4. The dismissal prompted the filing of this appeal mainly on the ground that the court erred in failing to recognize the Appellant as deceased's wife. The Appellant therefore sought orders that:-
 - a. The Appeal herein be allowed and the decision and decree of the of the trial court be set aside in its entirety.



- b. The plaintiff's suit in being Ogembo Chief Magistrate Court Civil Case No. E132 of 2021 be allowed as prayed.
- c. The costs of the appeal and in the lower court be borne by the Respondent.
- d. A declaration be issued that the appellant herein was legally married to the deceased under Abagusii Customary marriage.
- e. Such further and /or other relief as the court may deem fit to grant.

Analysis And Dermination

5. As the first appellate court, this Court is mindful of its duty as set out in *Selle & another v Associated Motor Boat Co. Ltd & others* (1968) EA 123, that is, to reconsider the evidence, evaluate it and draw its own conclusions.
6. To start with, the Plaintiff (Appellant) therein sought specific prayers and this is what the trial court should have focused on. She prayed "for judgment to be entered against the Defendants for:
 1. A permanent injunction does issue restraining the defendants, their agents ,assignees or anybody working under their instructions form interring the remains of Peter Otieno until the plaintiff and her children are involved.
 2. A declaration that the defendant and her children are incapable of conducting the burial rights of the deceased without participation of the plaintiff and her children.
 3. Costs of this suit be borne by the Defendant.
 4. Any other relief that this Honourable Court may deem fit to grant."
7. Simultaneously, she filed a Notice of Motion under a Certificate of urgency seeking orders:-
 1. Spent
 2. That a temporary injunction does issue restraining the defendants by themselves, agents, servants , assignees or anybody working under their instructions from interring, disposing and /or burying the remains and /or the body remains of one Peter Otieno (deceased) pending the hearing and determination of this suit.
 3. That the OCS Nyangusu police station to assist in enforcing the order
 4. Costs be provided for.
8. The trial court record shows that on 2/8/2021, the court granted orders in terms of prayer 2 and gave a mention on 9/8/2021 for inter-partes hearing.
9. Eventually, the court made the following orders on 18/8/2021:-

"Notice of Motion dated 29/7/2021 be compromised that status quo remains and each party to comply with Order 11 of the Civil Procedure Rules 2010 and hearing of the main suit."



10. In her statement of defence dated 18th August 2021, the Respondent denied that the Appellant was a wife of the deceased and her children were his children. Lastly, she prayed that the suit be dismissed with costs for reasons that:-

“The plaintiff has not satisfied the conditions for granting the restraining orders.”

11. The main issue for determination before the trial court and which flows from the pleading is whether the Appellant made out a case that would have warranted the court to issue an order of permanent injunction restraining the Respondent who she acknowledges is a wife of the deceased, and her children from permanently barring them from interring the remains of the deceased and a declaration that the Respondent was incapable of conducting the burial rites of the deceased without involving her and her children.

12. It is to be remembered that no party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit. This procedural imperative was discussed by the Court of Appeal in *Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others* [2014] eKLR, in which the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC 91/2002* was quoted with approval thus:

“...it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

13. From the pleadings filed, the issue of whether or not Appellant was or was not wife of deceased was not one of the issues for determination. There was no prayer for a declaration of either party as a wife of the deceased. It is a surprise to this Court that the parties and the court proceeded with the hearing and heard numerous witnesses on a non-issue as a result of which the court made a decision and a declaration on a matter that was not pleaded.

14. Consequently, this Court cannot make such a declaration on this appeal as proposed by the Appellant.

15. The foregoing notwithstanding, it is noted that no evidence was tendered that the Appellant and her children had been barred from participating in the funeral arrangements and in any event, the Appellant did not seek such an order.

16. It is further noted that the trial court did not address itself to the said prayer seeking a declaratory order but from the evidence tendered, no material was placed before the court and the trial I find that Appellant failed to discharge her burden of proof bestowed on her by Section 107 of the *evidence Act* which states that;

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.



17. The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in *East African Industries vs. Trufoods* [1972] EA 420 and *Giella vs. Cassman Brown & Co. Ltd* [1973] EA 358 where the Court restated the law as follows: -

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

18. Further, while discussing the principles of injunctions, the Court of Appeal in the case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 others* [2014] eKLR opined that:

“...these are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”

19. As stated at paragraph 9 of this judgment, Appellant did not tender any evidence that she and her children had been barred from participating in the funeral arrangements of the deceased. Appellant acknowledged in her pleadings and evidence that the Respondent was the deceased’s wife. In fact, she referred to Respondent as deceased’s 1st wife.

20. The foregoing being factual, the Appellant in my considered view failed to demonstrate any reasonable cause that would warrant the court to permanently bar deceased’s legal wife and children from interring his remains.

21. Even though this Court has found that the trial court did not address itself to the issues in dispute, but which in this Court’s view does not swing the scale in favour of the Appellant one way or the other. This Court finds that the evidence tendered by the Appellant was at variance with her pleadings.

22. From the foregoing analysis, this Court finds that this Appeal is without merit and therefore dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KISII (VIRTUALLY) THIS 15TH DAY FEBRUARY, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

N/A for Appellant

Mr. Ochwangi for Respondent



Laureen Njiru / Aphline , Court Assistant

