Ngetich v Ngetich; Cherotich & 16 others (Interested Parties) (Civil Appeal 17 & 19 of 2023 (Consolidated)) [2023] KEHC 19910 (KLR) (12 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19910 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CIVIL APPEAL 17 & 19 OF 2023 (CONSOLIDATED)

RL KORIR, J

JULY 12, 2023

BETWEEN

EVALINE CHEPKEMOI NGETICH ..... APPELLANT

AND

MAGDALINE CHEBET NGETICH ..... RESPONDENT

AND

FELISHA CHEROTICH ..... INTERESTED PARTY

DERRICK KAPWEPWE ..... INTERESTED PARTY

WEBSTAR YOP ..... INTERESTED PARTY

JACKSON NGETICH ..... INTERESTED PARTY

WILLIAM NGETICH ..... INTERESTED PARTY

RAPHAEL KUNAH ..... INTERESTED PARTY

ROSELYNE CHEPKEMOI NKERE ..... INTERESTED PARTY

CAROLINE CHELANGAT RONO ..... INTERESTED PARTY

KIPNGENO NGETICH KUNAH ..... INTERESTED PARTY

VINCENT CHEPKWONY ..... INTERESTED PARTY

GRACE CHEPKIRUI RONO ..... INTERESTED PARTY

RECHO RONO ..... INTERESTED PARTY

WILFRED SOI ..... INTERESTED PARTY

JOSEPH KIPKEMOI SOI ..... INTERESTED PARTY

ROSA SOI ..... INTERESTED PARTY

ELIZABETH CHEMUTAI NGETICH ..... INTERESTED PARTY

SARAH NGETICH ..... INTERESTED PARTY

(Being an Appeal from the Judgment of the Senior Principal Magistrate, E. W. Muleka at the Senior Principal Magistrate's Court at Sotik, Civil Suit Number E001 of 2023)

JUDGMENT

1. This Judgment determines two related Civil Appeals being Civil Appeal No. 17 of 2023 filed by Evaline Chepkemoi Ngetich and Civil Appeal No. 19 of 2023 filed by Magdaline Chebet Ngetich. Both Appeals arose out of the Judgment of Hon. E.W Muleka, PM in Sotik Civil Suit Number E001 of 2023.

2. The suit before the trial court was a burial dispute filed by the Respondent (then Plaintiff). She moved the trial court seeking a permanent injunction restraining the Appellant (then Defendant) from interring the body of Simon Kabwebwe Ngetich (Deceased) till the parties have consulted and involved the Respondent (then Plaintiff) and her children on the rightful place to bury the deceased. The Respondent also asked the trial court to direct that the deceased be buried at his home in Manaret.

3. In its Judgment dated 3rd April 2019, the trial court held as follows:-

    I. That the Defendant, Evaline Chepkemoi Ngetich is the sole widow of the deceased Simion Kabwebwe Ngetich.

    II. That the deceased's body being preserved at Tenwek Mission Hospital be released to the Defendant for his final internment.

    III. That the funeral arrangements including the funeral service be done at his home at Yaganek farm before the body is finally laid to rest at his ancestral home farm in Maranet.

    IV. That the Plaintiff is at liberty to attend the funeral as a mother to the 1st and 2nd interested parties and condole with them.

    V. Each party is to bear its cost of the suit.

4. Both the Plaintiff (Magdaline) and the Defendant (Evaline) were aggrieved with the Judgment of the trial court and filed their respective Appeals. The Defendant (Evaline Chepkemoi Ngetich) filed her Amended Memorandum of Appeal dated 14th April 2023 appealing against the Judgment by the trial court dated 3rd April 2023 and relied on the following grounds:-

    I. That the learned trial Magistrate erred in law and fact by ignoring the evidence adduced by the Appellant and that of her witness.

    II. That the learned trial Magistrate erred in law and fact by relying on his own opinions and assumptions and not the evidence on record in deciding the matter before him.

    III. That the learned trial Magistrate erred in law and fact in curtailing the Appellant's right to bury her deceased husband at Yaganek farm despite having found that she was the deceased's sole widow.

    IV. That the learned trial Magistrate erred in law and fact by deciding the case in favour of the 1st and 2nd Interested Parties which parties had not filed any claim before court.

V. That the learned trial Magistrate erred in law and fact by ignoring the fact that the Appellant and the deceased had only one home established at Yaganek farm.

VI. That the learned trial Magistrate erred in law and fact by ignoring the now established order of burying a deceased person which can only be decided by the deceased's spouse, children, parents and siblings, in that order.

VII. That the learned trial Magistrate erred in law and fact by ordering DNA samples to be taken from the remains of the deceased for succession purposes whereas the said order was not predicated on any pleading and/or proper application before the honourable court for consideration.

5. The Plaintiff (Magdaline Chebet Ngetich) filed her Memorandum of Appeal dated 18th April 2023 appealing against the Judgment by the trial court dated 3rd April 2023 and relied on the following grounds:-

I. That the learned Magistrate erred in law and in fact by holding the Respondent as the sole widow of the deceased Simon Kabwebwe Ngetich against the weight of evidence to the contrary.

II. That the learned trial Magistrate erred in law and fact when he held that the Appellant had failed to prove that she was married to the deceased consequently holding her as a mere stranger to the deceased against solid and cogent evidence.

III. That the learned Magistrate erred in law and fact in failing to consider all relevant issues in totality in arriving at the finding that the Appellant and the deceased were not husband and wife.

IV. That the learned Magistrate erred in law and fact in directing that the deceased's body be released to the Respondent for burial to the exclusion of the Appellant and Interested Parties who are closer family members contrary to obtaining customary law and rites.

V. That the learned Magistrate relied on wrong principles of law and fact in arriving at his Judgment when he held that the Appellant had ceased being a wife by effluxion of time.

6. Evaline Chepkemoi Ngetich and Magdaline Chebet Ngetich were both aggrieved by the Judgment rendered by the trial court on 3rd April 2023 and they filed separate Appeals, grounds of which have been enumerated above. On 11th May 2023, I directed that both Appeals be heard together with proceedings being taken in Bomet High Court Civil Appeal Number E017 of 2023.

7. Evaline Chepkemoi Ngetich was the Appellant in Civil Appeal Number 17 of 2023 and the Respondent in Civil Appeal Number 19 of 2023 while Magdaline Chebet Ngetich was the Respondent in Civil Appeal Number 17 of 2023 and the Appellant in Civil Appeal Number 19 of 2023. For clarity of the Record, the parties shall henceforth be referred by their respective names.

8. My work as the 1st appellate court is to re-evaluate and re-examine the evidence of the trial court and come to my own findings and conclusions, but in doing so, to have in mind that it neither heard nor saw the witnesses testify. This principle was espoused in the Court of Appeal case of Selle & another vs Associated Motor Boat Co. Ltd & others (1968) EA 123.

Magdaline Chebet Ngetich's case.

9. Magdaline Chebet Ngetich was the Plaintiff in the trial court. She stated that she was the legal wife of Simon Kabwebwe Ngetich (Deceased) and that her husband had died on 26th December 2022 at Tenwek Mission Hospital where his body currently lay.

10. It was Magdaline's case that Evaline Chepkemoi Ngetich who was the deceased's 2nd wife had made plans to bury the deceased in her homestead at Yaganek village (hereinafter referred to as Yaganek) without involving her and her children. That Evaline had demonstrated hostility towards her and her family and had barred her from arranging and attending the burial arrangements with the aim of violating the Kipsigis customary rites. It was Magdaline's further case that according to the Kipsigis customary burial rites, the remains of the deceased ought to be interred in the 1st wife's homestead and not the 2nd wife's homestead.

11. Magdaline stated that according to Kipsigis customary burial rites, all the wives and children of the deceased have to be involved in the planning and burial of the deceased. That Evaline had alienated the children of the 1st house (Magdaline and her children) from such arrangements.

12. Magdaline's Advocates filed a Notice of Motion Application dated 16th February 2023 where they sought to enjoin 19 Interested Parties. The Interested Parties included two children, some siblings and relatives of the deceased. The Application was allowed by the trial court on 14th March 2023.

Evaline Chepkemoi Ngetich's case

13. Evaline Chepkemoi Ngetich was the Defendant in the trial court. She stated that she was the only legitimate wife of the deceased, Simon Kabwebwe Ngetich having been married in the year 2001. That the marriage was solemnized at St. Peter's Catholic Church in Kaplong on 14th December 2018. It was her further case that during the subsistence of their marriage, the deceased had never recognized any other woman as his 1st or 2nd wife and that Magdaline had never been seen at her ancestral or Yaganek farm homes.

14. Evaline stated that Magdaline was married to one Philip Mutai and they operated a clinic within Litein. That her true name was Magdaline Chebet Mutai.

15. It was Evaline's case that the deceased did not have a house at their ancestral home since it was his wish to be buried at their Yaganek farm. That it was recognized under Kipsigis law that persons could be buried where they wished or where they had built a home. It was her further case that the deceased could not be buried by a stranger.

16. Evaline stated that on 28th December 2022, the Ngetich family sat and decided that the deceased will be buried at Yaganek farm as per his wishes.

17. It was Evaline's case that Magdaline used the suit to obstruct her from giving the deceased a befitting send off as per the Kipsigis burial rites.

18. On 19th April 2023, I heard submissions by the respective counsels on whether or not the two Appeals should be consolidated as one, with Appeal No. 17 of 2023 becoming the main Appeal and Appeal No. 19 of 2023 being the cross Appeal. Counsel urged the court to hear the Appeals together but not to consolidate the two for fear that if one was struck out, the other would be prejudiced. This court directed the two Appeals be heard together and through their written submissions with proceedings being taken in Appeal Number 17 of 2023 as the main Appeal.

Magdaline Chebet Ngetich's and the interested parties' Submissions.

19. In her submissions dated 10th May 2023 filed in Civil Appeal No. 17 of 2023 by Mr. Kipkoech B. Ng'etich Advocate, Magdaline submitted that when a court was faced with the issue of a burial place, it ought to be guided by customary law and she relied on Virginia Edith Wambui Otieno vs Joash Ochieng Ougo & Another (1987) eKLR. She asked this court to uphold the decision of the trial court which found that the deceased ought to be buried at his ancestral home in Manaret and not Yaganek, a place which the deceased had no ancestral ties. That it was proper for the deceased to be buried at Manaret as it was accessible to everyone and was not controlled only by the Appellant.

20. It was Magdaline's submission that the trial court rightfully ordered for DNA samples to be taken from the deceased and be preserved at Tenwek hospital. That the order for DNA was not in the Judgment but was on the basis of an application which was allowed by the consent of all parties. It was her further submission that a Consent could only be set aside on the grounds of fraud, mistake or any ground that could vitiate a Contract.

21. Magdaline submitted that Evaline was scared of the DNA and that she ought to explain the prejudice she would suffer if the DNA tissues were extracted and her children subjected to DNA. That even though this was not a succession court, the issue of paternity came to the fore and it was probable that the issue of paternity and DNA testing may arise in respect of probate and administration of the deceased's estate. Magdaline further submitted that the order was not for DNA testing but for extraction and preservation of the deceased's DNA to be used at a future date if required.

22. It was Magdaline's submission that the order for DNA was to ensure that once the deceased was interred, his remains were not to be exhumed should it emerge that a DNA test was required. That it was the desire of most men that after their death, their bodies remain in the graves undisturbed. She relied on Re Matheson (deceased) (1958) 1 ALL ER 202 at 204, Estate of Julius Kiragu Kiara (Deceased) (2018) eKLR and re Estate of JMK (Deceased) (2021) eKLR where the courts all held that once a body had been buried, it should not be disturbed.

23. Magdaline submitted that together with the Interested Parties, they met the costs of the tissue extraction and preservation of the same without asking or imposing any cost on the Appellant.

24. In her submissions dated 10th May 2023 filed by Mr. Kipkoech B. Ng'etich Advocate in Civil Appeal No. 19 of 2023, Magdaline submitted that it was a cardinal principle that the person in the first line of duty in relation to a deceased person was the one who was considered to be of the closest legal proximity, who in most cases was the spouse if the deceased was married. She relied on Ruth Wanjiru Njoroge vs Jemimah Njeri Njoroge (2004) eKLR and John Omondi Oleng and another vs Sueflan Radal (2012) eKLR.

25. It was Magdaline's submission that at the time Evaline got into a civil union with the deceased on 14th December 2018, the deceased lacked the capacity to contract a civil union as he was already married to her under Kipsigis customary law in 1988 which was a polygamous system of marriage. That Evaline's civil union to the deceased during the pendency of his customary marriage to her was null ab initio.

26. Magdaline submitted that a person married under a system of law which permitted polygamy could not contract a subsequent monogamous marriage while the polygamous one still existed and she relied on Hezron Ndanyi Lidede vs Margaret Kamunya Emonde (1992) eKLR where the court espoused the same position. She also relied on David Kiraithe Magambo vs Dorothy Ciakura David (2012) eKLR where the court found that the parties were married under customary law and that the Appellant lacked

capacity to contract a marriage under the African Christian Marriage and Divorce Act which marriage was monogamous in nature.

27. It was Magdaline's submission that there was no valid marriage between Evaline and the deceased and that the trial court erred when it held that Evaline was the sole widow of the deceased.

28. Magdaline submitted that the existence of the marriage between her and the deceased was not pleaded before the trial court. That the trial court erred in deciding the question of marriage, a matter which was not before it for determination. She further submitted that what was before the trial court was a burial dispute and not the existence or non-existence of a marriage. She relied on Elizabeth O. Odhiambo vs South Nyanza Sugar Co. Ltd (2019) and Galaxy Paints Company Limited vs Falcon Guards Limited Court of Appeal case Number 219 of 1998 where the courts held that courts were bound by the parties' pleadings. That issues for determination normally arose from the pleadings and that the courts should adjudicate upon the specific matters that have arisen from the pleadings.

Evaline Chepkemoi Ngetich's Submissions.

29. In her submissions dated 15th May 2023 filed in Civil Appeal No. 17 of 2023 by the firm of Bett & Co. Advocates, Evaline submitted that she was legally married to the deceased having solemnized the marriage on 14th December 2018. She relied on Ruth Wanjiru Njoroge vs Jeremiah Njeri Njoroge & another (2004) eKLR, where the court found that a marriage solemnized in church and registered under Cap 150 of the laws of Kenya superseded the previous customary marriage. She further submitted that Magdaline did not lead evidence in support of her claim of being the deceased's first wife and there was no indication that she had cohabited with the deceased at Manaret as claimed. That the trial court was right when it held that Magdaline had deserted the deceased 20 years prior to his demise.

30. It was Evaline's submission that Magdaline did not call any expert in Kipsigis customary law to support her assertion that the deceased being a last born in their home, ought to be buried next to his mother. That conversely, she led uncontroverted evidence that showed that the deceased had all along lived at Yaganek in the parcel of land known as Kericho/Chemagel/2247 which was registered in his name and where they had established their matrimonial home.

31. Evaline submitted that since the deceased lived most of his life at Yaganek and had made considerable developments there, the decision by the trial court to have him buried at Manaret as opposed to his matrimonial home was repugnant to justice and an affront to the deceased's personal dignity. She relied on Anne Nyathira vs Samuel Mungai Mucheru & 3 others (2016) eKLR where the Court of Appeal held that it was disrespectful to the deceased to have him buried in a desolate place as opposed to where he had built himself a mansion. That it was tantamount to elevating customary practices which were retrogressive and which were against the spirit of *the Constitution* which glorified personal dignity.

32. It was Evaline's prayer that this court sets aside the decision in the trial court which required her to bury the deceased at Manaret and substitute it with an order which would enable her to bury the deceased at Yaganek farm.

Rejoinder

33. In response to Evaline's submissions and with the leave of court, Magdaline filed further submissions dated 16th May 2023 in Civil Appeal No. 17 of 2023 where she submitted that the Record of Appeal did not have a Decree attached to it and that made the Appeal incompetent and fatal. She relied on Order 42 Rule 13(4) (f) of the Civil Procedure Rules 2010, Bwana Mohamed Bwana vs Silvani Buko Bonaya & 2 others (2015) eKLR, Chege vs Suleiman (1988) eKLR, Elvis Anyimbo Sichenga vs ODM & others (2016) eKLR and Ndegwa Kamau t/a Sideview Garage vs Fredrick Isika Kalumbo (2016)

eKLR where the courts held that failure to attach a Decree or Order appealed from was fatal and made the Appeal incompetent.

Analysis and Determination

34. I have gone through and carefully considered the Record of Appeal dated 17th April 2023, the Memorandum of Appeal dated 18th April 2023, Evaline's Written Submissions dated 15th May 2023, Magdaline's Written Submissions dated 10th May 2023 and 16th May 2023, the main issue for determination by this court is where the deceased is to be buried and by whom. Three issues that run common in the two Appeals and which have a bearing on the main issue are:-

    i. Whether the trial court erred in making a finding that Evaline Chepkemoi Ngetich was the sole widow of the deceased, a fact that was not pleaded in the trial court pleadings.

    ii. Whether the deceased had the capacity to contract a monogamous civil union with Evaline when he was already married to Magdaline Chebet Ngetich under Kipsigis Customary Law.

    iii. Whether the trial court erred in arriving at a determination that Magdaline had ceased being a wife by effluxion of time.

35. Before I proceed to the substantive issue above, there are two procedural issues that I need to address. One was whether the failure to attach a Decree in the Record of Appeal rendered the Appeal in Civil Appeal No. 17 incomplete. It was Magdaline's submission that failure by Evaline to attach a Decree in the Record of Appeal was fatal to her case as it made the Appeal incomplete and ought to be struck out.

36. Order 42 Rule 2 of the Civil Procedure Rules provided as follows: -

> Where no certified copy of the decree or order appealed against is filed with the Memorandum of Appeal, the Appellant shall file such certified copy as soon as possible and in any event within such a time as the court may order, and the court need not consider whether to reject the Appeal summarily under Section 79B of Act until a copy is filed.

37. Order 42 Rule 13(4) of the Civil Procedure Rules provided as follows:-

> Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—
>
> (a) the memorandum of appeal;
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> (b) the pleadings;
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> (c) the notes of the trial magistrate made at the hearing;
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> (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
>
> (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
>
> (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:
>
> Provided that—

(i) a translation into English shall be provided of any document not in that language;

(ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).

38. In the case of Mukenya Ndunda vs Crater Automobiles Limited (2015) eKLR the Court of Appeal emphasized that:-

> " The power to strike out an appeal or a notice of appeal on account of failure by an appellant to follow the rules of procedure requires to be exercised carefully and only in cases where it is shown that the party at fault flagrantly or deliberately or flippantly or recklessly failed to follow the rules."

39. I have gone through the Record of Appeal dated 17th April 2023 and I note that Evaline did not attach the Decree. She however attached the Judgment of the trial court dated 3rd April 2023 and a certified Order that arose from the Judgment. In my view, a Decree for purposes of an Appeal was an extract of the decision appealed against which is the Judgment. In the circumstances herein, I do not find the omission of the Decree fatal as Evaline attached both the Judgment and the Order from which this Appeal was based on. I am inclined to agree with the findings in Nyota Tissue Products vs Charles Wanga Wanga & 4 Others (2020) eKLR where the court held that:-

> " The rule applicable to the appeals to the High Court makes provision under Order 42 rule 13 (f) of the Civil Procedure Rules for the filing of a copy of the "judgment, order or decree appealed from" and does not make it mandatory to attach the judgment and the decree. The Record of Appeal herein attached the Judgment of the trial court according to the requirements of Order 42 rule 13 (4) (f) of the Civil Procedure Rules, and in my respectful view, I would agree with the Court in Silver Bullet Bus case on the point, that it would be too draconian to strike out the appeal in these circumstances."

40. Similarly, I am persuaded by Kemei J. in CWW (Suing as personal representative of the estate of PWK vs Mark Kahenya & another (2020) eKLR, where he stated that:-

> " I also note that the mentioned Order 42 Rule 13(4) of the Civil Procedure Rules provided that the record of appeal ought to contain "(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal." This means that firstly the decree or order need not be certified as contradistinguished from the Court of Appeal rules and secondly that either judgement, order or decree can serve and not the order or decree only. A perusal of the record indicates that there is the judgement of the trial court on the record of appeal meaning the challenge posed by the respondent collapses and I find that the appeal is not incompetent for failing to include a certified copy of the decree or order."

41. When discussing whether a litigant ought to attach both a Judgment and a Decree, Nyakundi J. in Paul Lawi Lokale vs Auto Industries Limited & another (2020)eKLR, stated that:-

> " To my mind, the use of the conjunction "or" suggest that litigants are not mandatorily obliged to attach both the judgement and the decree."

42. Guided by the aforementioned authorities, I find that it would be too draconian to strike out the Appeal for the lack of a certified Decree. I also find that the Appeal is competent for determination.

43. The second procedural issue was what weight this court would attach to the evidence adduced in the trial court. The law on how the evidence of witnesses is taken by the court is provided under Order 18 Rule 3 of the Civil Procedure Rules which provided that:-

> The evidence of the witnesses in attendance shall be taken orally in open court in the presence of and under the personal direction and superintendence of the judge.

44. The trial was conducted through filing of witness statements and filing of the respective written submissions. There was no record of the witnesses testifying under oath and it is not clear from the proceedings how the witness statements were adopted. The whole evidence on record contained unsworn statements and unidentified documents including photographs. In Musikari Kombo vs Royal Media Services Ltd (2014) eKLR, Odunga J. (as he then was) held that:-

> " The next issue is the legal status of witness statements in civil proceedings. On this issue the Court was urged not to ignore the witness statement of Peter Opondo though he was not called to testify in this case. Makhandia, J (as he then was) in Consolata Hospital Mathari vs. Dr. Bianka Matens Nyeri HCCA No. 17 of 2004 expressed himself as follows:
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> > "From the record there is no indication that witnesses testified on oath. It is possible they may have testified on oath but the learned magistrate inadvertently failed to record. However, this is a court of record and there is no room for speculation and or conjecture. Going by the record it can be held that perhaps the witnesses testified without being sworn. The effect of the evidence not given on oath is that it amounts to no more than a mere statement of no probative value to the case...The fact that this was not an issue canvassed before the court did not occasion any injustice and prejudice to any of the parties since the law is settled that evidence must be taken on oath unless for children of tender years as well as those who choose to be affirmed. Submissions on this issue by counsel would not have made any difference. In any event the issue in focus goes to the jurisdiction and the court has jurisdiction to address the same suo moto. On this issue alone the appeal ought to succeed."
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> The statements filed by parties together with their pleadings are not required to be on oath. Consequently they are not evidence in the case and can only acquire the status of evidence when adopted by the witness after being sworn. Otherwise they remain mere statements without any probative value."

45. Similarly, the court in Fuels Trading Company Limited & 3 Others vs David Mwangi Ngite & 3 Others (2016) eKLR, held that:-

> " The probative value of a witness statement should not be understated; they are mere statements without probative value and can only acquire the status of evidence when adopted by the witness after being sworn....."

46. In my view, such evidence would be persuasive rather than evidentiary. In Amber May vs Republic (1979) eKLR, the Court of Appeal held:-

> " From all this we are satisfied that an unsworn statement is not evidence as that expression is generally understood. It has no probative value, but should be taken into consideration in relation to the whole of the evidence".

47. Under ordinary circumstances, this court would have been minded to send the case back for retrial owing to the trial court's misstep of not taking sworn evidence or at the very least affidavit evidence. However, owing to the circumstances of this case, I shall proceed to determine the Appeals.

48. I now turn to the main substantive issue of who was to bury the deceased and where. Magdaline and Evaline both claimed to be wives of the deceased, Simon Kabwebwe Ngetich and both claimed the right to have the deceased buried in their homes being Manaret and Yaganek homesteads respectively.

49. To gain some perspective and guidance on burial disputes in Kenya, I will quote the case of SAN vs GW (2020) eKLR, where the Court of Appeal held that:-

> " In Kenya, to resolve burial disputes, the courts have variously resorted to customary law, common law, marriage law, succession law, human rights law, land law and other bodies of personal law. Customary law is applied by dint of Section 3 (2) of the *Judicature Act* that provides that:-
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> > "The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial (sic!) justice without undue regard to technicalities of procedure and without undue delay."
>
> Because of the state of burial law in the country, the courts have roundly decried the paucity of legislation to codify burial laws. In the S. M. case, the Court of Appeal expressed a wish for legislation thus:
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> > "It does appear to us that in the course of time Parliament, may have to consider legislating separately for burial matters covering a deceased's wishes and the position of his widow and so enabling courts to deal with cases related to burials expeditiously."
>
> Scholars too have similarly expressed the same sentiments.
>
> " One of the by-products of the so-called S.M Otieno 'burial saga' has been a proliferation of calls for legislation on matters relating to burial in Kenya."
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> See Ojwang J. B, Mugambi J. N. K & Aduwo G.O, 1989, pp 116 'The S.M Otieno Case: Death and Burial in Modern Kenya,' Nairobi University Press.
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> > "Legislation has made massive inroads into areas that were previously within the exclusive domain of African customary norms and regulations. Even in the arena of personal law, legislation has been enacted regarding marriage, divorce, succession etc. Indeed, the only

area where there is no legislation at present is burial and it is here that the courts have given African customs a certain supremacy that they do not enjoy anywhere else..."

50. I am persuaded by Odunga J. (as he then was) in Francis Muthusi Malombe & 7 others vs Daniel Kaloki Malombe & 9 others (2021) eKLR, where he stated that:-

> " I must point out that as long as a custom or customary law is not legally objectionable, there is nothing inherently wrong in relying the same in order to reach a just determination. It is not in doubt that customary law is one of the sources of law in this country and as was held in Dinah Odhiambo Oyier vs. Hellen Achieng & 3 Others High Court Civil Appeal No. 14 of 2017 [2017] eKLR:
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> > "In the absence of a will regarding preferred burial site courts have upheld the traditional customs so long as these were not repugnant to justice and morality or contrary to written law."

51. Similarly in GMI v DMK (2013) eKLR, the court held that:-

> " When it comes to burial disputes, it is personal law that comes into play. This is because there is no statute in Kenya that governs burials."

52. On the issue on how the court would rely on customary law, Section 51 of the *Evidence Act* provides that:-

(1) When the court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of such custom or right of persons who would be likely to know of its existence if it existed are admissible.

(2) For the purposes of subsection (1) of this section the expression "general custom or right" includes customs or rights common to any considerable class of persons.

53. In SAN vs GW (supra), the Court of Appeal held that:-

> " To prove custom, by section 51 of the *Evidence Act*, evidence of its existence must be called to provide the juridical and philosophical basis....."

54. Similarly in the case of Nyariba Nyankomba vs Mary Bonareri Munge (2010) eKLR, Makhandia J. (as he then was) stated that:-

> " Time and again it has been stated that cases resting purely on customary law, it's absolutely necessary that experts versed in the customs be summoned to testify so as to assist the court reach a fair verdict since the court itself is not well versed in those customs and traditions. In the absence of such expert testimony, there can only be one conclusion, such claim remains unproved"

55. In this case, the obtaining customs and customary law were the Kipsigis custom and customary law since Magdaline, Evaline and the deceased were stated to belong to the Kipsigis community. It was Evaline's case that she was legally married to the deceased and that they had built their matrimonial home in Yaganek. That it was proper that the deceased be buried at Yaganek farm, a land which he had bought. It was her further case that the deceased did not mention to her that he had been previously married to Magdaline.

56. Magdaline on the other hand stated that she had been married to the deceased in 1988 under the Kipsigis customary law. That under the Kipsigis Customary law, the deceased having married two wives, ought to be buried in her homestead (Manaret) as the first wife. She further stated that he never brought Evaline to his ancestral land in Manaret where he had established their home. That he later built Evaline a home in Kaplong.

57. In support of her case, Magdaline filed several witness statements all of which stated that she had been married to the deceased under the Kipsigis customary law and that they established their matrimonial home in Manaret. Vincent Cheruiyot (deceased's cousin), Philip Ngeno (deceased's brother in law), Michael Ngeno (deceased's brother in law), Elizabeth Ngetich (deceased's sister in law), Grace Rono (deceased's step mum), Recho Rono (deceased's step mum) Joseph Soi (deceased's cousin), Jackson Ngetich (deceased's brother) and Joseph Ngetich (deceased's brother) through their witness statements stated that the deceased being a last born in their homestead should be buried in Manaret next to his parents. The aforementioned witnesses did not state that they were experts in Kipsigis Customary Language.

58. John Rop filed a witness statement in support of Evaline's case. He stated that he was the Chairman of Chebororek clan where the deceased was a member. That they held a meeting on 2nd March 2023 where they recognized Evaline as the legitimate wife of the deceased. That the clan considered that Magdaline had lost her right to bury the deceased according to the Kipsigis customary rights after absconding and deserting her matrimonial home for over 20 years. John Rop also stated that the land at Yaganek was registered in the deceased's name and the deceased ought to be buried there. That the clan rejected the deceased to be buried next to his mother as that could only happen if the deceased was not married.

59. Where then should the deceased be buried in accordance with the Kipsigis customary law? This court is not an expert in the Kipsigis customs and as such required assistance of an expert in Kipsigis customs to assist it in coming to a just conclusion as stated in the case of Nyariba Nyankomba (supra). In Kagina vs Kagina & 2 Others (Civil Appeal 21 OF 2017) [2021] KECA 242 (KLR) (3 December 2021) (Judgment), the Court of Appeal cautioned on the application of expert evidence thus:-

> "..... in instances in which a court is confronted with issues of admissibility or otherwise of expert opinion evidence, the Court is enjoined to apply caution before accepting and acting on such expert evidence. It should only do so in instances where there is sufficient demonstration that the expert opinion is the independent product of the expert's own work arrived at in a manner uninfluenced by any extraneous factors as to the form or content. It is also objective and an unbiased opinion, arrived at on matters within the expert's own expertise, and lastly, that the report contains the truth and nothing but the whole truth."

60. It is trite that a court is not bound by expert opinion but it can use the expert opinion as a persuasion or in drawing a conclusion. In his statement, John Rop stated that a resolution of the clan meeting held on 2nd March 2023 was to give the court their opinion on the matter based on the Kipsigis Customary Law. That the clan meeting unanimously agreed and requested that the deceased be laid to rest at his farm at Yaganek in Sotik sub-county. Minutes of the meeting were annexed as Evaline's supporting documents.

61. There was no demonstration by either witnesses for Magdaline or Evaline that they were experts in Kipsigis customs and customary law and it was made worse by the fact that the witnesses did not testify under oath for them to be cross examined. This court is therefore forced to make a determination based on the available evidence.

62. As I have already stated hereinabove, Magdaline and her witnesses stated that she was married to the deceased under Kipsigis customary law and that according to the Kipsigis customs, the deceased having been a last born in his family ought to be buried in his ancestral home in Manaret next to his deceased parents.

63. I have considered the witness statements on record and the various documents and pictures relied on by both parties. I note that Magdaline and her witnesses proved a close familial connection. Her witnesses included her child with the deceased, the deceased's brothers, in laws and step mothers. On the other hand, Evaline through her witnesses provided minutes of a clan meeting dated 2nd March 2023 which decided that the deceased should be buried in her home on the deceased's land. The clan members present in the said meeting did not indicate their relationship with the deceased outside of being a fellow clan member. There was no family connection or proximity exhibited by Evaline's witnesses. The Minutes of the clan meeting simply proved that the deceased lived among them and that they acknowledged Evaline as the wife, an issue that will I will discuss later on in this Judgment.

64. As I have already noted earlier, there was no expert in Kipsigis customs and customary law presented to the trial court to assist it in understanding the culture and cultural practices amongst the Kipsigis community. Working with the scant evidence on record, I am persuaded by Magdaline and her witnesses that the deceased should be buried in his ancestral home in Manaret.

65. The other consideration is that the party claiming the right to bury the deceased must be one who is demonstrated to have been close to him during his lifetime. Regarding this last limb, the Court of Appeal in Samuel Onindo Wambi vs. COO & Another Kisumu Civil App. No. 13 of 2011 (2015) eKLR expressed the following view:-

> " ...A person's conduct to a deceased person can extinguish the right of that person of burying the remains of the deceased. The appellant did not show any family closeness with the deceased when she was alive. Though he said that he used to visit the deceased and that he mobilized his siblings to build a house for her at Kibos there was no credible evidence to prove so. (sic). The fact that he was the deceased's first-born son did not give him an automatic right to bury her even if Luo customary law dictates so. The court has to consider all the circumstances of the case and the justice of the case...In this case, besides the fact that given the father and his family's treatment of the deceased he is not deserving of the right to bury the deceased's remains".

66. Similarly in SAN v GW (supra), the Court of Appeal held that:-

> " In Samuel Onindo (supra) it was explained that a person's conduct towards a deceased person while alive could extinguish his or her right to bury the deceased. Since the appellant did not show any closeness towards the deceased after their separation and she did not show any sympathy towards him when he was ailing, it was only just that the deceased's wishes and choice of where he was to be buried were to be honoured."

67. The courts have provided guidance on who was supposed to play a leading role in disposing off a body of a married woman or man. In the case of John Omondi Oleng & Another vs Sueflan Radal (2012) eKLR, Mabeya J. held that:-

> " .....When it comes to the disposal of the body of a married man or woman the spouse should play a leading role. It would be better if the relatives of the deceased can sit down and agree

on how to give their loved one a dignified exit. When they fail to agree and approach the Court for solution, the court has no option but to step in...

.....There has to be somebody to bury a deceased person. In my view a surviving spouse is the person with the greatest responsibility for laying to rest the remains of the deceased spouse. That is the only way marriage can have meaningful purpose. Even if the deceased had not said anything about the disposal of (the) remains, the Defendant (spouse) would still have carried the day."

68. Similarly in Annette Yotta & 4 others vs Ambassador Idule Amako and another, Miscellaneous Cause No. 41 of 2023, the High Court of Uganda held that:-

> " The position of the law therefore is that the court has the power to intervene in order to resolve disputes as to who is to undertake the task of who is to dispose of the body and as to the manner and place of disposition; where like in this case the family members of the deceased (in this case the spouse, biological children and the family) fail to agree on the place of burial where they can lay the deceased in a dignified manner, court has no option but to step in; but taking into consideration the following; there is no property in a dead body (John Omondi Oleng & Another vs Sueflan Radal (2012) eKLR) and the deceased's body is incapable of ownership by any person (see Buchanan vs Milton (1999) 2 FL R 844); where the wishes of the deceased can be ascertainable they should be given effect so long as illegal, unreasonable or repugnant; the persons closest to the deceased must be considered".

69. Magdaline proved that she was married to the deceased through Kipsigis Customary Law. She filed several witness statements i.e. Vincent Cheruiyot (deceased's cousin), Philip Ngeno (deceased's brother in law), Michael Ngeno (deceased's brother in law), Elizabeth Ngetich (deceased's sister in law), Grace Rono (deceased's step mum), Recho Rono (deceased's step mum) Joseph Soi (deceased's cousin), Jackson Ngetich (deceased's brother) and Joseph Ngetich (deceased's brother) who all stated that the deceased married Magdaline in 1988 under the Kipsigis Customary Law. Felisha Cherotich who was Magdaline's daughter confirmed that the deceased was her father. She was an issue out of the said union between Magdaline and the deceased.

70. It was the Evaline's case that she was married to the deceased. She stated that she had been married to the deceased in the year 2001 and the marriage was solemnized at St. Peter's Catholic Church on 14th December 2018. She produced a Certificate of Marriage to prove that she was married to the deceased.

71. Felisha Cherotich through her witness statement stated that she was Magdaline's daughter and that Evaline joined their family while her father (the deceased) worked at Tengecha High School. That they lived with Evaline who took care of them while they were in school. She further stated that at this time, Magdaline resided in Manaret while they stayed in the deceased's house in Tengecha.

72. In her trial court pleadings, Magdaline acknowledged Evaline as the deceased's 2nd wife. I am satisfied by the evidence adduced by Evaline in proving that she was married to the deceased. For the purposes of this dispute, it is my finding that Magdaline Chebet Ngetich and Evaline Chepkemoi Ngetich were the deceased's 1st and 2nd wives respectively. I dismiss Evaline's submission that she was not aware that the deceased was married to another woman when he married her and together they raised the two children of the deceased from his first marriage while living in Tengecha High School.

73. In the aforementioned clan meeting, it was resolved that Evaline ought to bury the deceased as she was the only wife recognized by the clan as they were legally married in 2018. That Magdaline had deserted her home for over 20 years and only resurfaced upon the demise of the deceased. It was a resolution of

the said meeting that Evaline took care of the deceased when he was sick and she paid all the medical bills.

74. There was no suggestion by Magdaline or her witnesses whether she lived with the deceased. The consistent message from Magdaline and her witnesses was that she was married to the deceased under Kipsigis Customary Law and it was on that basis that she claimed the burial rights over Evaline.

75. Having considered the witness statements and the attached documents, I am persuaded that the deceased lived with Evaline until his last days. Though married to the deceased, there were allegations of desertion by Magdaline which unfortunately were not proved. There was also an allegation that she had remarried which was also not proved.

76. The clan members who claimed that Magdaline had deserted her home for over 20 years did not provide evidence to show that the deceased and Magdaline having been married under customary law had undergone cultural rite for a divorce. In my view, there was no evidence that Magdaline and the deceased had divorced or separated for 20 years and as such Magdaline did not cease to be the deceased's wife by effluxion of time.

77. In the absence of direct testimony by Magdaline or corroborating evidence by her witnesses that she lived with the deceased and coupled with the aforementioned allegations, doubt is created in the court's mind about Magdaline's proximity to the deceased. It is my finding therefore that Evaline has demonstrated that she was close and lived with the deceased.

78. I must fault the trial court where it found that Evaline was the sole wife of the deceased. This was the basis of Magdaline's Appeal. I agree with Magdaline's submission that the trial court made a finding on an issue that was not up for determination. In Galaxy Paints Company Ltd vs Falcon Guards Ltd (2000)eKLR, the Court of Appeal held that:-

> " .....that issues for determination in a suit generally flow from the pleadings, and unless pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial court, by dint of the provisions of O.XX rule 4 of the aforesaid rules, may only pronounce judgment on the issues arising from the pleadings or such issue as the parties have framed for the court's determination."

79. Similarly in David Sironga ole Tukai vs. Francis arap Muge & 2 others (2014) eKLR, where the Court of Appeal stated that:-

> " It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings.....
>
> .....The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice."

80. I also agree with Magdaline's submission that the deceased did not have the capacity to contract a monogamous civil marriage with Evaline whilst he was still married to her under the Kipsigis Customary Law, a marriage which was potentially polygamous. Section 9 of the *Marriage Act* is very explicit thus:-

> Subject to section 8, a married person shall not, while—
>
> (a) in a monogamous marriage, contract another marriage; or
>
> (b) in a polygamous or potentially polygamous marriage, contract another marriage in any monogamous form.

81. This provision was imported from the African Christian Marriage and Divorce Act (now repealed) and under which the deceased and Evaline solemnized their marriage on 14th December 2018 s pleaded by Evaline.

82. Even though there was sufficient evidence to find Evaline as one of the wives of the deceased for the purpose of this burial dispute, the trial court erred in finding Evaline as the sole widow of the deceased.

83. I have gone through the Plaint and the prayer was for a permanent injunction to restrain Evaline from interring the body of the deceased, Simon Kabwebwe Ngetich. From the pleadings, the issue deduced was where the deceased would be buried and who would bury him and not whether he was married to either Magdaline, Evaline or to both women. The marital status however became an issue in the course of the proceedings as it affected each of the claimant's right to bury the deceased.

84. With respect to the issue whether the two parties were married to the deceased, it was clear from the testimonies of their witnesses that the deceased had two wives, Magdaline and Evaline being the 1st and 2nd wives respectively and that the deceased had two homes i.e. Manaret and Yaganek homesteads. Having considered the said witness statements and the analysis thereof, it is my finding that for the purpose of this burial dispute that Magdaline Chebet Ngetich and Evaline Chepkemoi Ngetich were married to the deceased.

85. It was a ground of appeal that the court set aside the order of taking tissue samples from the deceased for the purpose of DNA testing. Magdaline submitted that the order for the extraction of the deceased's tissues was not in the trial court Judgment. Evaline, despite wanting that order for extraction of the deceased's tissues set aside, did not submit on it.

86. I have looked at the trial court proceedings and I have noted that it was an oral application by Magdaline's advocate, Mr. Kipkoech. Evaline's advocate, Mr. Mutai did not oppose the Application and as such the trial court ordered that tissue samples be taken from the deceased and be kept at Tenwek hospital at Magdaline's costs.

87. Magdaline submitted that together with the interested parties (in the trial court) had already met the costs of the DNA extraction and preservation. It is unclear whether the extraction has been done or not and there is a possibility of this prayer being overtaken by events.

88. Evaline has not demonstrated what prejudice she would suffer if the deceased's tissues were extracted. As earlier stated, she did not oppose the Application and she has not also demonstrated whether there was fraud, duress or misrepresentation when the Application was made and order granted. To that end, I dismiss that ground of appeal.

89. In the final analysis, I find concurrence with the decision of the Uganda High Court in Annette Yotta (supra) where it held:-

> "It is my considered view that when courts have to decide burial matters and taking into account all the parties involved, they must be cautious as these matters are sensitive in nature, because grief, tragedy and loss of a loved one; made worse also by the failure to bury the deceased in time; court must consider the expectations of the community; the relationship between the deceased (whilst still alive) and the persons disputing the spouse, fairness and reasonableness of such decision, proper respect and decency and the need to save family relationships.
>
> .....It would appear to me that the decision to bury a person in one place and not the other is informed by the emotional need for preservation of family ties that existed immediately before death; unlike other jurisdictions where the culture of burial in cemeteries is practiced; the practice in most societies in Uganda is for people to be buried at; or near the family home; in some cultures the ancestral home where the deceased had chosen to call home; I believe the burial place is as near home as possible to allow family members to heal but also not to completely forget their loved one; to continue the ancestral thread by recounting to the future generations in relation to the deceased."

90. Having considered the trial court proceedings, the various witness statements and the various attached documents, I find that both Magdaline and Evaline being the spouses of the deceased are entitled to bury the deceased.

91. With respect to the place of burial, I have already found proven that the deceased established two homes, one in his ancestral home at Manaret and the other in his property which he acquired at Yaganek.

92. Both Magdaline's and Evaline's witnesses acknowledged that Kipsigis customs demand that a Kipsigis man is buried in his ancestral home. The clan members while acknowledging that the deceased's ancestral home was in Manaret, supported the position to have him interred at Yaganek citing the reason that Magdaline the first wife was no longer a wife as she had deserted the matrimonial home in Manaret and had not taken care of the deceased the way Evaline had. From my analysis of the evidence as discussed earlier in this judgment, the allegations that Magdaline had deserted her matrimonial home and remained were not proved.

93. Both Magdaline and Evaline attached photographs showing that the deceased had a home in Manaret and Yaganek respectively. It was not true therefore that the deceased did not have a house in his ancestral home.

94. In the end having taken all factors into consideration, it is my finding that the deceased Simon Kabwebwe Ngetich should be laid to rest among his departed ancestors at his ancestral home in Manaret. It is also my finding that the deceased lived in Yaganek with Evaline his spouse. To that end, Evaline and the family are at liberty to conduct any relevant rites including a funeral service for the deceased at his Yaganek home.

95. In the end, both Appeals have partially succeeded. I set aside the trial court Judgment entered on 3rd April 2023 and substitute with this Judgment whose final orders are as follows:-

    I. That the finding that Evaline Chepkemoi Ngetich was the sole wife of the deceased is set aside.

II. That the deceased's body being preserved at Tenwek Mission Hospital be forthwith released to both Magdaline Chebet Ngetich and Evaline Chepkemoi Ngetich being his spouses for his final interment.

III. That any funeral rites including the funeral service be done at his home in Yaganek farm before the body is laid to rest at his ancestral home in Manaret.

IV. The Interested Parties and in particular the children, parents and siblings of the deceased are at liberty to participate in the funeral arrangements.

V. That the samples for DNA be taken from the deceased at Tenwek Mission Hospital and be kept in the same hospital at the cost of Magdaline Chebet Ngetich and the Interested Parties.

VI. This being a family matter, each party to bear their costs in both Appeals and in the trial court.

Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 12TH DAY OF JULY, 2023.

R. LAGAT-KORIR

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Judgement delivered in the presence of

Ms. Sang holding brief for Mr. Koech for the Appellant/Respondent

Mr. Kipkoech for Respondent/Appellant