



**RN v MAO (Civil Appeal E170 of 2023)
[2023] KEHC 22155 (KLR) (12 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22155 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E170 OF 2023
HM NYAGA, J
SEPTEMBER 12, 2023**

BETWEEN

RN APPELLANT

AND

MAO RESPONDENT

*(Being an Appeal from the Judgment of Hon. R.Kefa (PM) in
Nakuru Civil Suit No. E367 of 2023 delivered on 28th July, 2023)*

JUDGMENT

Introduction

1. RO A.K.A RT A.K.A GT (herein after ‘the deceased’) died on 2nd July, 2023 at Mediheal Hospital after a short illness and currently, her body is lying at the P.N.N Workshop & Services Limited, Nakuru.
2. The parties herein are the biological parents of the deceased. After her demise, the Respondent asserted his right to bury the deceased by virtue of being her father. Vide a plaint dated 7th July, 2023 and filed on the same day, he instituted a suit in the Lower Court against the Appellant seeking inter alia, an order that he be allowed to bury the deceased at Kakamega in accordance with the Luhya Customs and an order of permanent Injunction restraining the Appellant by herself, agent, children, family members, employees from in any manner interfering with, interring and/or burying the deceased’s body.
3. The Appellant filed her defence and a counter-claim wherein she averred that in or around the year 1999 she met the respondent and they started courting with an intention of getting married and on 28th July,2002 the deceased was born. However, they never got married in accordance with Kamba Customary Law and currently they are living separately. She sought inter alia a declaration that there was no marriage between her and the Respondent in accordance with Kamba Customary Law or any other law and an order that the remains of the deceased be interred at her maternal grandparents’ home, according to Kamba Customary Law.



4. After a full trial, the Learned Trial Magistrate allowed the plaintiff/respondent's suit and dismissed the defendant/appellant's counter claim.
5. The Appellant being aggrieved by that Judgement, filed the instant Appeal.

The Appeal

6. The Appeal, filed on 9th August, 2023, is premised on the following grounds:-
 - i. That the Trial Magistrate erred in Law and fact in disregarding the Appellant's evidence adduced, the submissions filed and the authorities in support hence arriving at an erroneous finding.
 - ii. That the Trial Magistrate having found that the Respondent never celebrated the mandatory Ntheo ceremony, erred in law and in fact in holding that the Respondent has the right to bury the deceased herein.
 - iii. That the Trial Magistrate erred in Law and in fact in finding that there was presumption of marriage between the Appellant and the Respondent herein notwithstanding that the same was not pleaded and/or was not an issue for determination before her hence arriving at an erroneous determination.
 - iv. That the Trial Magistrate erred in Law and in fact by arriving at her finding on the existence of a valid marriage when the evidence on record by both Appellant and Respondent's witnesses pointed to the fact that the necessary customary rites towards validating marriage were not performed.
 - v. That the learned trial magistrate erred in law and fact when she relied on extraneous and presumptuous matters to arrive at her findings, which matters could not negate the Kamba customary law on marriage.
 - vi. That the trial magistrate erred in law and in fact in finding that the Appellant's counterclaim was lacking in merit hence arriving at an unfair determination.
 - vii. That the trial magistrate erred in law and in fact by failing to consider the standards of proof expected of the Respondent and his failures to discharge the same for orders of permanent injunction to issue against the Appellant hence arriving at an unfair determination.
 - viii. That the Trial Magistrate erred in Law and in fact in failing to consider that the conduct of the Respondent towards the deceased herein extinguished his right, if at all, to inter the remains of the deceased herein at the Respondent's home in Kakamega hence arriving at erroneous determination.
 - ix. That the Trial Magistrate erred in Law and in fact in finding that the Respondent had close relationship with the Deceased hence arriving at erroneous determination.
 - x. That the Trial Magistrate erred in Law and in fact when she failed to make a finding based on the Kamba Customary law and decided the whole case against the weight of the evidence.
 - xi. That the trial magistrate erred in law and in fact in addressing herself on extraneous issues not borne of the pleadings and evidence hence arriving at an erroneous finding and determination.
7. The Appellant thus prayed that the Appeal be allowed with costs to her and the said judgement be set aside and substituted with a judgement of this court.



8. The Appellant was represented by learned Counsel Mrs Mukira and the Respondent opposed the appeal through the representation of learned Counsel Miss Ondande. Pursuant to the court's directions, the appeal was canvassed by way of written submissions. The Appellant filed her submissions on 16th August, 2023 whereas the Respondent filed his on 21st August, 2023.

Appellant's Submissions

9. In regards to whether the Respondent was entitled to orders allowing him to bury the deceased according to Luhya Customary Law, citing the provision of Section 107 of the Evidence Act and the case of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Appellant's counsel submitted that the Respondent did not meet the required legal threshold to demonstrate that he was deserving of this prayer.
10. The counsel further contended that the Appellant had extensively submitted on the issue of the legal burden but the trial court disregarded the same. Counsel argued that the trial court in its decision was not guided by Article 2(4) of the Constitution of Kenya 2010, Section 3(2) of the Judicature Act and the decided cases on marriage and right to bury the deceased herein.
11. The counsel referred to the Court of Appeal decision of *Edwin Otieno Obanjo v Martin Odera Okumu*, [1996] eKLR where it was held:
- “...if African customary law is not caught up by the qualifications under section 3(2) of the Judicature Act then it must be given effect by the courts and must be applied in deciding cases before it but according to ‘Substantial justice.’”
12. The Appellant also cited the case of *Francis Muthusi Malombe & 7 Others v Daniel Kaloki Malombe & 9 Others* [2021] eKLR where the court inter alia held that as long as a custom or customary law is not legally objectionable, there is nothing wrong in relying on the same in order to reach a just determination.
13. The Appellant further submitted that there was no evidence on record to the extent that either Akamba or Luhya customary law was legally objectionable and therefore it was the duty of the court to have given sufficient reasons for its choice to apply Luhya customs over the Akamba customs.
14. The Appellant also argued that had the trial court applied its mind on the applicable laws, it would have certainly arrived at a finding that the remains of the deceased ought to have been interred in accordance with Akamba Customary law. Guided by the holding in the case of *Jacinta Nduku Masai v Leonida Mueni Mutua & 4 others* [2018] eKLR, the Counsel submitted that in determining a burial dispute, the trial court should have considered the wishes of the deceased and the kind of relationship the deceased had with the parties.
15. The Counsel further argued that since the deceased herein had not stated her preferred burial site, the applicable custom was Akamba. To buttress this point, she submitted that DW1 and DW3 demonstrated that according to Akamba Customs customary marriage is only considered valid once Ntheo has been paid. That if the same was not paid the bride is considered unmarried and the children belonged to her.
16. She further submitted that it was clear through the Respondent's testimony that he had not paid Ntheo and the trial court correctly found so. That having found so, the trial court ought to have also held that the Respondent had no right to inter the remains of the deceased in Kakamega. To bolster her submissions reliance was placed on the cases of *In Re Andrew Manunzyu Musyoka (deceased)* [2005] eKLR and *Shem Navade Asuluda v Peter Irungu Kamakia* [2009] eKLR.



17. With respect to grounds 3, 4, 5 and 11 of the Appeal, the Appellant's Counsel submitted that the Respondent neither pleaded presumption of marriage nor led any evidence that clothed the trial court with the legal strength to arrive at a safe finding that there was presumption of marriage. To buttress her submissions, the Appellant's Counsel relied on the case of *In re Burial of Musa Magodo Keya (Deceased)* [2021] eKLR for the proposition that parties are bound by their pleadings and any evidence led by the parties which are at variance with their pleadings should be disregarded.
18. The Counsel further submitted that the Respondent failed to demonstrate to the required legal threshold that he cohabited with the Appellant with an intention of contracting a marriage. To buttress this position, the Appellant's counsel referred this court to the holding in regards to presumption of marriage in *MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) (Petition 9 of 2021) [2023] KESC 2 (KLR) (Family) (27 January 2023) (Judgment)*, *Shem Navade Asuluda v Peter Irungu Kamakia (supra) & ASA v NA & another* [2020] eKLR
19. With respect to ground 7 of the Appeal, the Appellant's Counsel cited the Court of Appeal case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR on the triple requirement which the applicant must satisfy for an order of injunction to issue and submitted that the Respondent did not demonstrate the existence of any compelling reason to warrant issuance of orders of permanent injunction against the Appellant for reasons that: there was no evidence that the Respondent had a close relationship with the deceased; the trial court having found that there was no customary marriage between the parties erred in allowing the respondent to exclusively inter the deceased at Kakamega; there was evidence that the Appellant and her family played a pivotal role in the upbringing of the deceased; there was no evidence that the Respondent owned a specified ancestral land & that the trial court failed to appreciate that the consideration as to whether the deceased established a home referred to the deceased herself and not those who sought to inter her remains had established their homes. In support of the last ground the counsel relied on the case of *M'imanene M'rutere v Lewis Kirimi & 2 others* [2018] eKLR where the court stated that the place of burial of a person in Kenya is closely linked to three things; the person's wishes, though not absolutely binding on his personal representative, secondly, the duty imposed on those so closely related to the deceased during his lifetime (e.g. spouse, his/her children and/ or parents) to bury the deceased and whether the person had established his own home.
20. It was submitted that the trial court not only failed to consider the standard of proof expected of the Respondent but also considered extraneous issues not borne of the pleadings and evidence.
21. In regards to ground 8 of the Appeal, the Appellant's Counsel cited the case of *Samuel Onindo Wambi v C O O & another* [2015] eKLR where the court inter alia held that a person's conduct to a deceased person can extinguish the right of that person of burying the remains of the deceased. Also cited was *SAN v GW* [2020] eKLR where the court held that the person claiming to bury the deceased must be one who demonstrated to have been close to him or her during his or her lifetime.
22. The Counsel thus submitted that the person who was close to the deceased was the appellant and as such the trial court erred by finding that the respondent had a close relationship with the deceased hence arriving at erroneous decision.
23. The appellant ultimately prayed that she be awarded costs of this appeal in line with the provisions of Section 27 of the Civil Procedure Act.



Respondent's Submissions

24. On Grounds 2,3,4,5 and 10 of the Memorandum of Appeal, the Respondent's counsel submitted that the same raises questions on the kind of marriage that existed between the parties and the validity thereof, which were conclusively handled by the trial magistrate in her judgement.
25. It was further argued that the issue of presumption of marriage arose in the evidence of the appellant and her witness on cross examination, making it an issue for court to determine. To buttress their submissions, the Respondent's counsel relied on the case of *Ann Wairimu Wanjohi v James Wambiru Mukabi* [2021] eKLR which cited with approval the case of *Odd Jobs v Mubia* [1970] EA 476
26. The Respondent's counsel further submitted that presumption of marriage is a point of law and can be raised at any time of the proceedings.
27. It was submitted that presumption of marriage is said to cover two aspects; that the parties must have had the capacity to enter into a marriage and have carried themselves as such. The counsel submitted that parties herein had intention to marry each other and that the evidence of both parties buttressed the idea of presumption of marriage within the strict parameters of law. In support of this proposition, the Respondent's counsel placed reliance on the case of *MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae)* (supra)
28. The Respondent further submitted that even without marriage, the deceased was an adult, unmarried with no land of her own, and therefore being an African child she should be buried at her home in accordance with her patrilineal customs, which is Luhya. She relied on the case of *Virginia Edith Wambui Otieno v Ochieng' Ougo & Anor.* [1987] KLR 371 (the SM Otieno's Case) where the court held that an African citizen of Kenya cannot divest himself of the association with the tribe of his father if those customs are patrilineal.
29. The Counsel further submitted that if the appellant is allowed to bury the deceased, she will do so in her parents' parcel of land at Ukambani. That this would preclude the Respondent from visiting the grave whenever he wishes since the Appellant witnesses' exhibited a lot of bitterness and difficulty in accepting him.
30. It was further submitted that there was no evidence that the Appellant owned any land, unlike the Respondent who proved that there was ancestral land available.
31. The Counsel also submitted that contrary to the Appellant's submissions, the respondent intends to bury the deceased on his ancestral land at Butere within Kakamega County and not in his brother's land at Busia.
32. To further support of their submissions the Respondent counsel referred this court to the case of *PZG & 2 Others v TMT* [2019] eKLR
33. On grounds 1, 6 and 11, the Respondent's Counsel submitted that the trial court analyzed the evidence and submissions of the respective parties and as such these grounds lack merit and should be totally disregarded.
34. On ground 7, the Respondent's counsel submitted that the Respondent satisfied the entire prerequisite for granting an injunction as was laid out in the case of *Giella v Cassman Brown and Co Ltd* [1973] EA 358.



35. On the first prerequisite, she contended that the Respondent established a prima facie case when he stated that the appellant had threatened to bury the deceased to his exclusion even though it was not in contention that he was present in the deceased's life and they had a close relationship with each other.
36. On the issue of irreparable damages, the Counsel submitted that the Respondent demonstrated before the trial court that he stands to suffer irreparably if denied the chance to bury the deceased with whom he shared a close bond with. That the respondent even further went ahead to desperately request the court to be allowed to do whatever may be required to enable him inter the remains of his beloved daughter which was an indication that he was ready and willing to jointly and peacefully bury the deceased with the appellant and her family owing to the circumstances of the case. That this was quite different from the appellant who only wanted to bury the deceased and did not want to pay the hospital bill or the funeral expense or do anything else.
37. The Respondent's counsel further contended that if all the above were to happen then the inconvenience caused to the Respondent would be greater than that of the appellant as the security proposed by the appellant to this Honourable Court is insufficient for the performance of the decree.
38. From the foregoing, Counsel submitted that the balance of convenience tilts in the Respondent's favour.
39. In regards to grounds 8 and 9 of the Appeal, the Respondent's counsel submitted that the evidence on record demonstrated that the deceased had a good relationship with the Respondent and there was nothing in the conduct of the Respondent towards the deceased at any point during her lifetime that could extinguish his right to inter her remains at his home in Kakamega.
40. The Respondent's counsel further submitted that during the trial the Appellant testified that she conceded to the Respondent burying the deceased at Kakamega but changed her mind when she found out the Respondent had filed a case before court. The Counsel averred that this clearly showed that no prejudice could be occasioned if that were to still happen.
41. The counsel prayed for dismissal of appeal in its entirety with costs to the Respondent.

Analysis & Determination

42. As a first appellate court, the duty of this court is first to comply with the requirements under section 78 of the Civil Procedure Act. It is long established that the role of this court on first appeal is to re-evaluate all the evidence availed in the lower court and to reach its own conclusions in respect thereof. This was restated in *Oluoch Eric Gogo v Universal Corporation Limited* [2015] eKLR and in *Peter M. Kariuki v Attorney General* [2014] eKLR where the court held inter alia as follows:

“We have also as we are duty bound to do as a first appellate court [to] reconsider the evidence adduced before the trial court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See *NGUI v REPUBLIC* [1984] KLR 729 and *Susan Munyiv Keshar Shiani*, Civil Appeal No. 38 of 2002 (unreported).”
43. The above holding captures the locus classicus decision in the case of *Selle v Associated Motor Boat Co.* [1968] EA 123 where it was held that:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the



evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

44. Having carefully considered the appeal herein, the pleadings and evidence presented before the trial court and the submissions filed by both parties, the following issues, I am of the view that the following issues fall for determination:-
- i. Whether the trial court erred in finding that Ntheo, a crucial ingredient of Akamba custom in marriage had not been conducted.
 - ii. Whether the trial court erred in determining an unpleaded issue;
 - iii. If the answer to the above is in the negative, whether there was a presumption of marriage and whether the same subsisted at the time of demise of the deceased
 - iv. Whether the trial court erred by finding that the Respondent enjoyed a close relationship with the deceased;
 - v. Whether the trial magistrate erred in ordering the deceased's body be released to the Respondent for burial at Kakamega;
 - vi. Whether the trial court erred by granting a permanent injunction against the Appellant; &
 - vii. Who should bear the costs of this Appeal?

Whether Ntheo had been performed by the parties or not.

45. At the trial, the respondent had asserted that he had performed his obligation by undertaking Ntheo, a custom under Akamba customary law, and thus he was deemed as having been married to the Appellant. This was denied by the Appellant who called witnesses who stated that although the Respondent had presented himself to the Appellant's home, he asked for time to comply with the custom and he never returned. The trial court found that indeed, the Ntheo ceremony was never conducted.
46. The essentials of a Kamba customary law marriage were summarized in *Munyao Ndolo & 3 Others v Mary Nduku Mutisya* [2018] eKLR, where the court said -
- 'It is clear from the evidence of all the witnesses that the most essential step in a Kamba custom marriage is the ntheo. That once the ntheo ceremony has been performed, there exists a valid Kamba custom marriage.'
47. In *Re Estate of Benson Ngao Wambua - (Deceased)* [2019] eKLR, the court stated that -
- 'Dealing with the essentials of Kamba customary marriage, Kneller, J (as he then was) in *Anna Munini & Another v Margaret Nzambi* [1984] eKLR expressed himself as hereunder:
- "The usual steps taken for a marriage between a Kamba man and a Kamba woman according to their customs were not dealt with in much detail in the evidence. Nzambi's father Muli said they included these: - ...the man has to ask the woman to marry him and if she agrees they begin living together. An elder of the man's clan goes to the parents of the girl and says they are married. There are two types of marriage. First, where it is the first time she is married or secondly it is not the first time. Her parents



must know if she is to be married on any occasion but the first. She will have returned from the previous marriage to the home of her parents. On the first occasion the parents will not know she is married until the man sends a messenger to tell them their daughter is with him, married to him.

The man's father prepares African liquor. He takes it to the father of the woman. He tells the girl's father his son has married the girl. The fathers then meet when the man's father brings the girl's father 7 goats. The seventh is eaten. The father of the man then pays the agreed dowry. The standard rate is plenty of African liquor prepared by the boy's father, the amount the elders on each side fix as the dowry, say 8 head of cattle, 46 goats, Kshs 5,000 (or Kshs 4,000 or Kshs 3,000) cash.

The others who spoke about them each added further ones but they were by no means unanimous about them. Thus, between them, they listed these. Each party must consent to the marriage. The bride-price or dowry must be paid by the man's father, or, if he is dead, his guardian, in the presence of some elders. The mother of the groom must discuss the proposed marriage of her son with the father of the girl (and, presumably inspect her") If it is a second or third marriage then the man must tell his wife or wives he is marrying again so they may go and see the woman and attend the ceremonies. (Munini and Musangi were adamant that if this were omitted, why then the union was no marriage).

At the end Mr. Mututo brought in Dr Cotran's summary of the essentials of a valid marriage in Kamba customary in Kenya: I Marriage and Divorce, 1st edn, [1968] 28 which is:

- a. Capacity
- b. Consent
- c. Slaughter of a Billy goat
- d. Marriage consideration
- e. Cohabitation

Dr Cotran deals with each, save for cohabitation, in greater detail beforehand (see pp 23 and 24) and I set out some of these details.

At one time the male and female had to be circumcised to marry (p 23). The female may still not marry before she has had her first menstrual period. The man may enter into any number of marriages provided each subsequent one is valid. A woman may not do so while her husband is alive. Consanguinity, affinity, a blood brotherhood relationship or the fact that the intended parties were breast fed by the same woman are bars to marriage among the Wakamba.

Dr Cotran has the same steps in the formation of the marriage as those in the evidence though he has it that the mother of the man visits the mother of the woman to see that she is satisfied, though which mother is meant to be satisfied is not clear. At any rate it is not the man's father she visits, as Ruth Gatongu would have it. Then there are visits with presents of goats and beer made by the man's father or relatives to the woman's father (and during one of those the dowry is fixed) and a return visit by the man's father and some of his elders to see what sort of family his daughter is joining. Later, the girl is collected by her future husband and escorted to his house. He is accompanied by one male and two female relatives. The bride's neck is smeared with ghee by her mother-in-law on arrival. The marriage is not consummated that night but on the next. The bride is visited by her friends on the third day with presents and



they wail with regret because she has left the ranks of the unmarried (and what the husband's reaction to that, if he hears it, is not revealed).

Dr Cotran includes one that was not touched upon in the evidence. One of the Billy goats (which he calls a ram) belonging to the man's father or guardian must be slaughtered by the woman's father and its blood allowed to seep into the ground.

So some of the conditions are in the evidence and some in the book and some in both. It all depends, of course, on what questions the witnesses in this trial and members of the special law panels, made up of persons having special knowledge of the Kamba law, were asked. They were not the same and they were more numerous for the panel."

48. It is thus clear that there is an elaborate custom that is performed when parties are to get married under Akamba customary law. It is not necessary, in my view to have all these customs followed to the letter, but the crucial parts ought to be shown to have been undertaken.
49. From the evidence adduced there was no clarity as to whether the Respondent complied with the crucial requirements of Ntheo as he had alleged. The burden of proof lay on him to prove this. The trial court found that he had not. Having looked at the evidence adduced, I am in agreement that the Ntheo ceremony was not conducted as required.

Whether the trial court erred in determining an unpleaded issue

50. Indeed, it is clear that in his plaint, the respondent did not plead any presumption of marriage. It was his pleading and position that he was customarily married to the appellant in accordance with Kamba Customary Law. The appellant disputed the existence of a valid Kamba customary marriage as Ntheo ceremony was not performed. I have already dealt with that issue.
51. During hearing, the issue of presumption of marriage was brought up by the parties and their witnesses. They all told the trial court that parties herein had lived together for some considerable time in an on and off manner. In particular, the Respondent, during cross examination, testified that the longest he had separated with the Appellant was 7 years and that cumulatively he had lived with the Appellant for 14 years as 'a husband and a wife'. On the Appellant's part she told court that "the defendant was my husband it was come we stay marriage. We did not live consistently. It was on and off relationship. We cohabited together for 5 years consistently..."
52. It is thus clear from the above that the issue of presumption of marriage though not pleaded was raised by the parties during hearing.
53. The Court of Appeal of East Africa in *Odd Jobs v Mubia* [1970] EA 476 held as follows:
 - a) A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue had been left to the court for decision;
 - b) On the facts the issue had been left for decision by the court as the advocate for the appellant led evidence and addressed the court on it."



54. In *Kenya Commercial Bank Ltd v Sheikh Osman Mohammed*, CA No. 179 of 2010 the Court expressed itself thus:

“It is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff’s claim. Pleadings must be deployed to serve their function, namely to inform the other party, and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear.”

A court may validly determine an unpleaded issue where evidence is led by the parties and from the course followed at trial it appears that the unpleaded issue has been left to the court to decide (See *Odd Jobs v Mubea* [1970] EA 476). However, that was clearly not the case in this appeal.”

55. In *Magnate Ventures Limited v Alliance Media (K) Limited & Others* [2015] eKLR the Court of Appeal had this to say on the same issue:

“In *Gandy V. Caspar Air Charters Ltd*[1956] 23 EACA”, 139 the former Court of Appeal for Eastern Africa expressed itself as follows on the purpose of pleadings:

“...the object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them; so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule, relief not founded on the pleadings will not be given.”

And in *Galaxy Paints Co. Ltd. v Falcon Guards Ltd.* [2000] 2 EA 385, this Court stated that the issues for determination in a suit flowed from the pleadings and that a trial court could only pronounce judgment on the issues arising from the pleadings and that unless pleadings were amended, parties were confined to their pleadings. (See also *IEBC & Another v. Stephen Mutinda Mule & Others*, CA No. 219 of 2013).

The exception to the general rule that parties are bound by their pleadings, expounded in such cases as *Odd Jobs v. Mubia* [1970] Ea 476 And *Vyas Industries Ltd. v. Diocese of Meru*[1982] KLR 114) arises where the parties raise and address unpleaded issues and leave them to the Court to decide.”

56. In *Christopher Orina Kenyariri T/A Kenyariri & Associates Advocates v Salama Beach Hotel Limited & 3 Others* [2017] eKLR the same court reiterated this view when it held that:

“Those therefore were the crisp and only issues before the learned judge. As has been stated time without number, a court will not determine or base its decision on unpleaded issues. However, if it appears from the cause followed at trial that an unpleaded issue has been left to the court to decide, the trial court may validly determine the unpleaded issue. (See *Odd Jobs v. Mubea* [1970] 476, and *Baber Alibhai Mawji v. Sultan Hashim Lalji & Another*, CA No 296 of 2001).”

57. Lastly, the same Court in *Rosemary B. Koinange* (suing as legal representative of the Late Dr. Wilfred Koinange and also in her own personal capacity) & 5 others v *Isabella Wanjiku Karanja & 2 others* [2017] eKLR held that:

“The law on unpleaded issues and parties being bound by their pleadings, as relates to this question, is amplified by a long line of authorities as correctly illustrated by the appellants.



But there is an equally long line of authorities unequivocally asserting the power of a court to determine issues which the parties have not raised in their pleadings. They may allow the court to do so by consent, as stated, for example, in *Chalicha FCS Ltd v Odhiambo & 9 Others* [1987] KLR 182, that:

“Cases must be decided on the issues on the record. The court has no power to make an order, unless by consent, which is outside the pleadings. In this instance, the issues raised by the Judge and the order thereon, was a nullity.”

The decision of *Odd Jobs v Mubia*, [1970] EA 476, may also apply where it was held that a court may base its decision on an unpleaded issue, if it appears during the trial that the issue was pursued and left for the court to determine.”

58. Guided by the above authorities, it is my considered view that in their evidence, the parties brought up the issue of presumption of marriage and left it to the court for a decision. As such, it cannot be said that the magistrate erred in applying the principle of presumption of marriage by conduct of the parties as an alternative to a formal customary marriage.

Whether there was a presumption of marriage and whether the same subsisted at the time of demise of the deceased

59. The Supreme Court, in *MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae)* (supra) on presumption of marriage, held as follows: -

“The strict parameters within which a presumption of marriage could be made were:

- a. The parties must have lived together for a long period of time.
- b. The parties must have the legal right or capacity to marry.
- c. The parties must have intended to marry.
- d. There must be consent by both parties.
- e. The parties must have held themselves out to the outside world as being a married couple.
- f. The onus of proving the presumption was on the party who alleged it.
- g. The evidence to rebut the presumption had to be strong, distinct, satisfactory, and conclusive.
- h. The standard of proof was on a balance of probabilities.”

60. On the same issue the Court of Appeal in *Phyllis Njoki Karanja & 2 Others v Rosemary Mueni Karanja & Another* [2009] eKLR stated that -

‘Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage.’

61. And in *Hortensiah Wanjiku Yawe v The Public Trustee Court of Appeal Civil Appeal 13 of 1976* Nairobi August 6 1976 the former Court of Appeal for East Africa (Wambuzi P, Mustafa VP and Musoke JA) held that :-



- i. The onus of proving customary law marriage is generally on the party who claims it;
 - ii. The standard of proof is the usual one for a civil action, namely, ‘on the balance of probabilities;
 - iii. Evidence as to the formalities required for a customary law marriage must be proved to that standard: (cf *Mwagiru v Mumbi*, [1967] EA 639, 642)
 - iv. Long cohabitation as a man and a wife gives rise to a presumption of marriage in favour of the party asserting it;
 - v. Only cogent evidence to the contrary can rebut the presumption (*Toplin Watson v Tate*, [1937] 3 All ER 105)
 - vi. If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage (*Sastry Veliader Aronegary v Sembecutty Vaigalie* [1880-1] 6 AC 364; *Shepherd George v Thye*, [1904] 1 Ch 456)
62. In regards to presumption of marriage, the Respondent testified that he had lived cumulatively with the Appellant as a husband and wife for 14 years. His witness (PW2) told the trial court that the parties herein had lived together for about 20 years. DW1, who was the Appellant’s mother, confirmed that the parties herein had cohabited together, though she did not specify the duration. DW2, who was the Appellant’s brother, told court that the parties herein lived together though it was on and off relationship. The Appellant testified that the respondent was her husband and that their union was a ‘come we stay’. She said their relationship was on and off but confirmed that she cohabited with the Respondent 5 years consistently.
63. It is clear from the evidence on record that parties herein lived together for a long time, albeit in an on and off manner. They appear to consider themselves as a husband and wife. The parties had capacity to marry, they had intended to marry and by dint of the cohabitation they had consented to such marriage. I therefore find and hold that there was an irrefutable legal presumption of the marriage between the Appellant and the Respondent.
64. So were the parties herein presumed to be married at the time of the deceased’s demise or had they divorced?
65. On this issue, I associate myself with the sentiments of my brother Nyakundi J in *In re Estate of Jecinter Njoki Okoth (Deceased)* [2020] eKLR where he stated thus:-
- “Divorce is not the procedure of filing for a decree nisi in court per se. On a much broader perspective, divorce pertains to the intention and conduct of parties. If parties in a marriage show an intention not to continue with their marriage or conduct themselves as unmarried persons, then the same should be treated as such. The law cannot attach obligations upon persons who have decided to part ways but fail to formalize the same, because that is not the true reflection of what they want. In that regard the objector stopped being the deceased’s husband when they separated and moved on.....
- In my Judgment pursuant to Section 119 of the Evidence Act, it is proper for their marriage to be construed for purposes of the Law to have ended by presumption of divorce, notwithstanding that no formal petition was filed in a Court of Law to be decreed as such in accordance to the Law.”
66. Relying on this case, my answer to the above question is that the parties cannot be deemed to have been married at the time of the demise of their daughter. This is because they had, indisputably, separated



for 7 years prior to the deceased's demise. Therefore, just as there would be a presumption of marriage between the parties by long cohabitation, there would also be a presumption of divorce by a lengthy separation. Seven years is not a short period and if the parties had not lived together for that long, they had for all intents and purposes shown their intention not to be considered as married. As Justice Nyakundi put it in the above cited case, the appellant and the respondent had ceased to be married and had moved on.

Whether the trial court erred by finding that the Respondent enjoyed a close relationship with the deceased

67. It is the Appellant's position that the Respondent did not enjoy a good relationship with the deceased during her lifetime and that such conduct extinguished his rights to bury her remains. The respondent is of the contrary view. According to him, he enjoyed a good relationship with the deceased and there was nothing that could preclude him from burying her remains.

68. The Court of Appeal in Samuel Onindo Wambi v COO & Another (supra) 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”.

69. The above decision was cited at length in SAN v GW (supra) 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.”

70. During hearing in the lower court, the Respondent adopted his written statement as his evidence. In that statement, he stated that though he had separated with the Appellant, they co-parented the deceased until her untimely demise. He stated that on 18th June, 2023 while at Mount Kenya University the deceased fell ill and on 19th June, 2023 he took her to Vineyard Hospital at Thika, but on 21st June, 2023 the Appellant went and took the deceased to Mediheal Hospital in Nakuru without his knowledge. He further stated that on 22nd June, 2023 he visited the deceased at Mediheal Hospital, stayed with her and took care of her with the Appellant and that on 30th June, 2023 he travelled back to Nairobi to look for funds to pay the hospital bill. Sadly, on 2nd July, 2023 he was apprised of the deceased's death.

71. The Respondent also testified that he was a close friend to the deceased and took care of her. He produced M-Pesa statements showing up-keep money that he had sent to the deceased, Mount Kenya University Cheque deposit fees showing payment of the deceased's school fees, admission and bursaries



forms showing he admitted the deceased to the said university, clearance forms showing that he cleared the deceased at Buruburu School.

72. The Appellant on her part testified that when the deceased fell ill she called the Respondent who advised her to go to a school hospital. After she learnt of the deceased illness she travelled to Nairobi to pick her and took her to Mediheal Hospital, Nakuru where she was admitted for three days then discharged. She added that the deceased's condition did not improve and so she took her back to the hospital where she was placed in the ICU until her death. It was her testimony that the Respondent visited the deceased while she was in the ICU but prior to that he had not done so. In cross examination, she admitted that the Respondent had a good relationship with the deceased and that he paid her secondary school and university fees. She also stated that the Respondent used to communicate with the deceased.
73. In view of the foregoing I do not find any fault with the trial magistrate's finding that the Respondent equally had a close relationship with the deceased. Whether that close relationship could supersede the one the appellant had with the deceased is for this court to determine.

Whether the trial magistrate erred in ordering the deceased's body be released to the Respondent for burial at Kakamega

74. Customary law has been previously used by courts in adjudicating upon matters of burial. The Constitution recognizes the customs and culture of the Kenyan people, and in its preamble it states that we the Kenyan people are proud of our ethnic, cultural and religious diversity, and determined to live in peace and unity. Further, Article 2 (4) and Article 11 (1), provides as follows;

“Any law, including customary law that is inconsistent with this constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”

75. Article 11 (1) stipulates:

“This constitution recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.”

76. Section 3 (2) of the Judicature Act stipulates that:

“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 justice without undue regard to technicalities of procedure and without undue delay.”

77. Finally, Article 44 (1) of the Constitution provides that every person has a right to participate in the cultural life of their choices.

78. It is not in contention that parties herein belong to different ethnic tribes. It is also trite that no tribe is superior or inferior to the other.

79. Considering there is no cross appeal on the trial's court finding on the nonexistence of a valid Kamba Customary Law and my finding that the parties herein were presumably divorced then it is clear that the Appellant is to be considered as an unmarried woman.



80. According to the Appellant, the deceased should be buried according to Akamba customary Laws since children of unmarried woman belong to the mother. This position was corroborated by DW2 who testified as an expert in Kamba Customs.
81. According to the Respondent the deceased should be buried in Kakamega in accordance with her patrilineal customs.
82. The Appellant in support of her position relied on two cases of *In Re Andrew Manunzyu Musyoka* (deceased) *supra* and *Shem Navade Asuluda v Peter Irungu Kamakia* (*supra*).
83. In *Re Andrew Manunzyu Musyoka* (deceased) the witness who testified as an expert in Kamba Customs told court that Ntheo has to be paid to conclude a marriage under Kamba customary marriage and that if a woman leaves a husband's house with children after Ntheo has been paid and one of the child dies he or she has to be returned to his/her father's place for burial. In this case I have already found, and in agreement with the trial court, that Ntheo ceremony was not conducted as required.
84. In *Shem Navade Asuluda v Peter Irungu Kamakia supra Nambuye, J* (as she then was) held that;
- “Having removed the veil of existence of customary marriage, and payment of dowry, from the children, their status is relegated to the status of children born to an un married woman and since the father has custody of the same, he is liable to pay compensation to their late mother father.”
85. The respondent on his part relied on the case of *S.M. Otieno's Case* and *PZG & 2 Others v TMT* (*supra*).
86. In *PZG & 2 Others v TMT* (*supra*) the facts of the case were quite similar to the case herein save that parties subscribed to same customs i.e Giriama Customs. The Respondent was estranged from the Appellant and each party wanted to bury the remains of their son. The trial court decided in favour of the Respondent as he had permanent home. The High Court on Appeal upheld the judgement of the trial court by stating thus:
- “...From the evidence on record it is clear that the respondent has a permanent home constructed by the deceased brother at Kwa Mdomo, Malindi Township whereas the 1st appellant has not established whether she has established the homestead at Matsangoni, Kilifi County which belongs to her father, the deceased grandfather. In my view by virtue of the respondent being estranged of the 1st appellant should not relieve him of his responsibility to assert his legal right that is to dispose the body according to Giriama customs. Relying on the above stated reasons, I concur with the trial magistrate's decision that the respondent should have the remains of the deceased and have the same interred.”
87. The trial court in allowing the Respondent's case found that parties were presumed married and by dint of Article 45 (1) and (3) and Article 27(3) and (4) of the Constitution they were entitled to inter the remains of the deceased and there should be no discrimination brought upon by any cultural practices. The court also held that the Respondent *prima facie* established that he owned a land where the remains of the deceased will be interred and as such balance of convenience tilted in his favour.
88. To me, the trial court erred to the extent of finding that the parties were presumed married without considering that they had indisputably separated for a period of about 7 years' prior the deceased demise. It is also correct, as submitted by the Appellant, that there was no concrete evidence that the Respondent owned a piece of land as alleged.



89. On land ownership, the Respondent testified that he intended to bury the deceased on his paternal grandfather's land in Kakamega. He confirmed that the ancestral land had not been subdivided. It was also his testimony that he owned a land in Nairobi and at the ancestral home. He stated that his father stays in Busia on his brother's land and he did not wish to bury the deceased there.
90. PW2, was a cousin to the Respondent. It was his testimony that they have a land in Butere and that the registered proprietor of the land was their grandfather one Justus Ongale. He said all his descendants reside there and have a share on the ancestral land. He told court that the Respondent's mother was buried in Busia and not on the ancestral land as there was a land dispute. He stated that the Respondent's father used to stay on the ancestral land but moved to Busia on his own volition and that he constructed houses on the ancestral land. However, he had no proof to that particular averment.
91. The Appellant on her part testified that she wished to bury the deceased at her rural home in Ukambani. She testified that the Respondent's father did not live on the ancestral land and that he told her that no one should be buried there. She said respondent's father purchased a parcel of land at Bumala where the Respondent's mother was buried. The Appellant further stated that there was a land dispute between the Respondent's father and Tony, his brother.
92. In view of the above evidence and on a balance of probability, I find that the said there exists a dispute in regards to the said ancestral land hence the reason the Respondent's father moved out from there and chose to bury his deceased wife at Bumala, where he resides. The land at Butere has not been subdivided and there was no proof that the same belonged to the Respondent's grandfather. Equally there was no conclusive evidence led to prove that the Respondent owned any parcel of land. It is trite that the onus of proof is on he who alleges. Section 107 of the Evidence Act provides that 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.
93. In light of the above, I am of the considered view that the trial court erred by finding that the Respondent owned a parcel of land where the deceased will be interred.
94. Further based on evidence on record, there was no proof that Luhya customs are patrilineal. The Respondent told cthe ourt that in Luhya customs children belong to their father which position was echoed by his witness. This position, in my view, is repugnant to justice as it is discriminatory on the part of a woman/mother. The Respondent's witness added that according to Luhya customs, if a child who stayed at his/her maternal grandparent's home dies the parents have to agree on what should be given to maternal parents so as to bury the child. It is imperative to note that this witness did not disclose whether he was an expert on Luhya customs.
95. The law is that if the custom in question is notorious enough, the Court can take judicial notice of it without evidence being called to prove it. Section 59 of the Evidence Act (cap 80) provides that no fact of which the Court shall take judicial notice need be proved. And section 60(1)(a) of the Evidence Act provides that the facts of which the Court shall take judicial notice include all written laws, and all laws, rules and principles, written and unwritten, having the force of law. Customary law falls into this category.
96. The former Court of Appeal for East Africa in the case of *Kimani v Gikanga* [1965] EA 735, held that where African customary law is neither notorious nor documented it must be established for the Court's guidance by the party intending to rely on it and that as a matter of practice and convenience in civil cases the relevant customary law, if it is incapable of being judicially noticed, should be proved by evidence or expert opinions adduced by the parties.
97. In *Ernest Kinyanjui Kimani v Muiru Gikanga and another* [1965] 1 EA 735 (CAN) the Court held;



‘As a matter of necessity the customary law must be accurately and definitely established. The court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward the customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially, of the present apparent lack in Kenya of authoritative text books on the subject, or of any relevant case law, this would in practice, usually mean that the party propounding the customary law would have to call evidence to prove that customary law, as he would prove the relevant facts of his case.

98. In the instant case, the Respondent did not adduce evidence to prove the relevant Luhya customary law on burial. The Appellant on her part proved through her witnesses’ testimonies more particularly through DW3 who was an expert on Kamba Customary law that children of an unmarried woman belong to the woman and that she is the one entitled to inter the remains of his or her child.
99. It was also clear from the evidence on record, that the deceased spent more time with her mother than the Respondent herein. She had primary custody of the deceased throughout her lifetime, although the Respondent also played his part which was to educate her. It is quite apparent that the Appellant was closer to her. When she was born it was the Appellant and deceased’s maternal grandparents who took care of her, on account of the Appellant not being in employment for some time. In the latter stages of the deceased’s life, the parties were living separately. The deceased was even enrolled in a school at the Appellant’s rural home. It is apparent from the record that from the time parties separated in 2018, the Appellant had custody of the deceased. The deceased also spent more of her years at her maternal grandparents’ home than at her paternal grandparents’ home. It is thus evident that the place which she had the closest connection was ‘Ukambani’, and in my opinion, that should be her ultimate resting place.
100. In view of the above, it is my considered view, that the trial court erred by not properly considering the Appellant’s counterclaim and her evidence vis-à-vis the Respondent’s case and as such erred in ordering the deceased body to be released to the Respondent for burial at Kakamega.
101. I must state that it is quite difficult for the court to make a determination in a case like this. The ultimate aim of the court ought to be to ensure that the parties are not unduly inconvenienced by any orders issued. In my view, the orders issued by the trial court had the effect of doing the exact opposite. The deceased had been primarily living with her mother all through. She should have been given the chance to bury her daughter at her place of choice. The Respondent, to his credit, was taking care of part of the upkeep for the deceased and even played a crucial role when the deceased fell ill. The Respondent happens to have had a better financial position but that should not be the sole consideration. His argument during the Appellant’s application for stay of the judgment seemed to suggest that he was more focused on the financial implications rather than the emotional aspect of the dispute. A burial is a sentimental issue and care has to be taken in determining where a deceased is to be buried. I find that the evidence, the law and convenience tilted in favour of the Appellant.

Whether the trial court erred by granting a permanent injunction against the Appellant

102. In *Nguruman Limited v Jan Bonde Nielsen & 2 others*, CA No. 77 of 2012; [2014] eKLR, the Court of Appeal reiterated the conditions to be met by a litigant who seeks injunctive relief 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. ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests 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.”

103. Flowing directly from the consideration on the earlier issues, it is my considered view that the Respondent did not establish a prima facie case or demonstrate likelihood of irreparable damage to warrant the grant of injunctive order. In essence, the Respondent did not establish he owned a land where the deceased will be interred and did not adduce conclusive evidence on Luhya customs. He also did not demonstrate any right that required protection by the court as no evidence was led to prove that the Appellant planned to inter the remains of the deceased in secrecy or to his total exclusion. The only point he was able to show was that the Appellant was preparing to bury the deceased in her parents’ home. There was no secrecy about it. That in itself is not a wrong, and it was not an action that required a restraining injunction at the conclusion of the trial. In the circumstances, I am of the view that he was not deserving of the injunctive order granted. The order, as issued, could have been interpreted in a manner that excluded the Appellant from participating in the burial of her own daughter.

Who should bear the costs of this Appeal?

104. Section 27 (1) of the Civil Procedure Act, chapter 21 of the Laws of Kenya provides as follows;

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes foresaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

105. The case of Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another [2016] EKLK illustrates that as much as the court has discretion to award costs the same should be exercised judiciously, because normally the costs should follow the events; departure from that calls for good grounds of doing so.
106. Although the Appellant has succeeded in this appeal, I am of the view that this is matter where each party ought not to be burdened with extra expenses and therefore order that each party should bear their own costs.
107. The upshot of the foregoing is that the appeal herein succeeds in the following terms: -
 1. The trial court’s order issued in favour of the respondent allowing him to bury the deceased at Kakamega in accordance with the Luhya Customs is hereby set aside and replaced with an order as sought by the Appellant, namely that remains of the Late R O A.K.A Grace Tamara be interred at her maternal grandparents home according to Kamba Customary Law;
 2. The order of permanent injunction restraining the Appellant by herself, children, family members, employees from in any manner interfering with, interring and/or burying the deceased’s body is hereby set aside;



3. The Respondent and his family members are free to participate in the funeral and burial arrangement of the deceased and the Appellant should facilitate their unrestricted access;
4. The Appellant shall, as per her undertaking, cater for all the outstanding hospital and mortuary fees from the time of delivery of the lower court's judgment to the date of the delivery of this judgment.
5. Each party to bear their own costs

DATED, SIGNED AND DELIVERED AT NAKURU ON 12TH SEPTEMBER, 2023.

H.M. NYAGA

JUDGE

In the presence of:

Mrs Mukira for the Appellant

Ms Odande for the Respondent

C/A Jeniffer

