



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 11 OF 2019

IN THE MATTER OF THE BURIAL OF MUSA MAGODO KEYA (DECEASED)

GLADYS NEKESA PETER.....PLAINTIFF/APPLICANT

VERSUS

ALICE INGAIZA SIAHL.....DEFENDANT/ RESPONDENT

JUDGMENT

Introduction

1. This is a classical burial dispute pitting communal customs against the individual rights of the deceased. The contentious issues to be determined are the burial site of the deceased and, in whom the right to bury the deceased vests. The dispute was triggered by the diverging claims of the deceased's immediate family, his extended family and his clan. Their motivation being to protect what in their respective views constitute the deceased's individual rights and further to preserve his standing in society.
2. The late Musa Magodo Keya whose burial is in dispute died domiciled in Kenya on 1st September, 2019. At the time of his demise, the deceased was serving as the Archbishop of Magodo Ministries, which he founded. On 11th September, 2019, this court granted interim orders restraining the Defendant either by herself, her agents, family members, relatives and/or any other person whomsoever acting under her instructions from removing and disposing of the body of the deceased Musa Magodo Keya from Umash Funeral Home, interring the remains of the deceased and/or interfering with the said body in any manner whatsoever pending the *inter partes* hearing and determination of this application. The orders have remained in force until now and the remains of the deceased continue to lie embalmed at the Umash Funeral home, almost two years since his demise.
3. This Court was first moved vide a Notice of Motion application dated 10th September, 2019 filed under Certificate of Urgency. The Notice of Motion application was later Amended on 14th October, 2019 pursuant to leave granted by this court on 8th October, 2019. In it, the Applicant urged the court to issue orders that:
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. DNA samples be extracted from the deceased's remains prior to burial for purposes of testing and confirming the Paternity of the defendant's 3 issues namely Emmanuel Gabriel Magodo, Lamuel Gabor Magodo and Gabriel Lamuel Magodo. The said samples be deposited with qualified pathologists to be identified by the parties.
 - e. A temporary injunction do issue restraining the defendant, either by herself, her agents, family members, relatives and/or any other person whomsoever acting under her instructions from preventing the Plaintiff and any of the children of the deceased from participating in the funeral preparations of the deceased Musa Magodo Keya.
 - f. The court direct the release of the deceased's remains to the Plaintiff as the legitimate widow of the deceased and that the Burial Permit in respect of the deceased's remains be hereby released to the Plaintiff.
 - g. The final rites and resting place of the deceased be determined by the entire family of the deceased in accordance with Luhya Customary Law failure to which the Plaintiff shall determine the date and place of burial.

h. The Officer Commanding the nearest police station ensure compliance of these orders.

i. The costs of this application be provided for.

The Plaintiff's Case

4. The application was premised on the ground that the Plaintiff/Applicant was the putative and legal wife of the late Musa Magodo Keya, the deceased herein, having solemnized a civil union before the Registrar of Marriages on 14th June, 1991. That at all material times to this suit and subsequent to the said marriage, the Plaintiff cohabited with the deceased as husband and wife for over 15 years in various locations.

5. According to the Plaintiff, the Defendant came into their family in 1994 as a house maid and nanny for the Applicant's children. It was during her employment that the Defendant began an illicit affair with the deceased. Sometime in the course of the year 2000, during the Plaintiff's stay in her Matrimonial home at Uhuru Estate, the deceased moved out of the master bedroom he shared with the Plaintiff and moved into the guest bedroom where he commenced an open sexual affair with the Defendant. The Plaintiff's attempts to stop the affair were met with violent resistance from the deceased.

6. In 2004, the deceased moved the Plaintiff to the family's residence in Milimani area, Nakuru where she stayed until 2006 when the deceased forcefully evicted her from the home. Thereafter, the deceased commenced open cohabitation with the Defendant at the family's homes in Karen and Ngong' areas in Nairobi.

7. According to the Plaintiff, her marriage to the deceased was subsisting up to and including the date of his death. She asserted that no divorce proceedings had been commenced or concluded between her and the deceased, urging that the Defendant was, at all material times, aware that the deceased had no capacity to contract a subsequent marriage. She asked the court to find that the Defendant's purported marriage to the deceased was illegal, and therefore null and void.

8. Further, the Plaintiff contended that the Defendant denied her consortium with the deceased during his lifetime and as such she should not be denied an opportunity to mourn his death. She asserted that if the court did not intervene, she and her children would be occasioned extreme mental, emotional and physical trauma and anguish, and great social embarrassment.

9. There is on record a further affidavit dated 7th October, 2019 sworn jointly by Knight Muhonja Magodo, Ronald Nabiswa, Joshua Peter, Caroline Khasandi Magodo and Linda Kavele Magodo in support of the Notice of Motion application in which they echo the Plaintiff's sentiments. The application is also supported by a further affidavit sworn on 2nd October, 2019 by Margaret Makungu Luvisai, the biological mother of four of the deceased's children.

10. On 8th October, 2019 the Court directed that a post mortem be performed by the Government pathologist while giving each party liberty to bring an additional pathologist. A post-mortem report dated 14th October, 2019 is on record. It indicates the deceased's cause of death as "*effects of increased intracranial pressure due to a solid pituitary tumour. Hypertensive heart significant finding.*"

11. Nine (9) witnesses testified in support of the case of the Plaintiff/Applicant. I will however only consider the evidence of eight (8) witnesses since both the affidavit of Jackline Kanaiza Adenya of 5th November, 2019 and her testimony as PW6 were withdrawn and expunged by an order of this court of 18th December, 2019.

12. The Plaintiff testified as PW1; Margaret Makungu testified as PW2; Knight Muhonja Magodo testified as PW3; David Joseph Isachi testified as PW4; Andrew Ayimba Akalomba testified as PW5; Dimina Khapere Solomon testified as PW7; Caroline Khasandi Magodo testified as PW8 and Anthony Fundia Simbiri who had worked in close proximity with the deceased from 1997 until 2004 testified as PW9. All witnesses adopted into evidence their respective affidavits sworn in support of the application.

The Defendant's Case

13. Thereafter on 22nd October, 2019 the Defendant filed a replying affidavit sworn by herself on 18th October, 2019 in which she deposed that she and the deceased lived together as husband and wife until his demise on 1st September, 2019. She lives in Karen, Nairobi but works as a Bishop in Huruma area. After the deceased's demise, she also took up the responsibility of running the Kenya Church of Christ which was founded by the deceased herein. She first joined the church in 1991 as a Bible teacher during which time she lived with the deceased's family.

14. It was the Defendant's statement that the deceased had during his lifetime performed all marriage rites and paid bride price to her father. Upon their marriage, she adopted the deceased's surname. She urged that it was only after the Plaintiff permanently removed herself from the life and affairs of the deceased that she and the deceased entered a marriage in 2007, which marriage bore three (3) issues. The deceased had been married twice previously. His first wife was one Margaret Makungu whereas his second wife was Gladys Nekesa Peter, the Plaintiff/Applicant herein. The union of the deceased and his first wife Margaret bore four (4) issues whereas his union with the Plaintiff, his second wife, bore one (1) issue. It was the deceased who cared for, educated and raised the children with the help of the Defendant until they attained the age of majority.

15. The Defendant denied the allegations that she commenced a sexual relationship with the deceased in the presence of the Plaintiff, dismissing them as falsehoods meant to tarnish her name and reputation in the eyes of the court. She further denied the averments that the deceased and the Plaintiff lived together in the residences at Karen, Gataka and Ngong' and contended that she and the deceased acquired and established those homes long after he had separated from both the Plaintiff and his 1st wife Margaret Makungu.

16. The Defendant's position was that her marriage and cohabitation with the deceased was in the public knowledge and it is therefore malicious, unfair and oppressive for the Plaintiff to seek to have the children she sired with the deceased subjected to intrusive paternity tests. She urged that the prayers for extraction of DNA samples violate the constitutional rights of privacy, dignity and parental responsibility and the best interests of the said children.

17. On the allegations that the deceased died mysteriously while at home, the Defendant contended that the deceased died at Nairobi Hospital where he had been hospitalized and later admitted to the Intensive Care Unit when his condition worsened. She asserted that at all material times of the deceased's illness and deteriorating health, neither the Plaintiff nor Margaret Makungu visited or communicated with the deceased. Upon his demise, she informed all of the deceased's children, family and church congregation.

18. The Defendant asked the court to find that she was the legal wife and companion of the deceased and therefore vested with the right to bury the deceased's remains as per his last wishes and with the concurrence of his children and family members.

19. Five (5) witnesses testified on the Defendant's part. Evans Akalemba Magodo, a son of the deceased and one Margaret Makungu testified as DW1. The deceased's father Michael Keya Kalomba testified as DW2 while the deceased's brother Whiki Moshi Keya testified as DW3. Julius Shibayanga testified as DW4 and the Defendant herself testified as DW5. The Defendant's testimony marked the close of her case. All of the witnesses adopted into evidence their respective affidavits sworn in support of the Defendant's case. Notably, one Roseline Kasandi who swore an affidavit on 18th October, 2019 in support of the Defendant's case declined to testify and her affidavit was consequently withdrawn.

Written Submissions

20. Learned Counsel M/s Kimeto filed written submissions dated 22nd February, 2021 on behalf of the Plaintiff/Applicant in which she asked the court to grant the prayers sought in the application with costs. She proposed five (5) issues for determination:

- a. The law applicable to the burial of the deceased and where the deceased should be buried.
- b. Whether the deceased was married and to whom.
- c. At what stage the deceased lost the legal capacity to marry.
- d. To whom the deceased's body should be released and who should conduct the burial ceremony and final rites.
- e. Whether the court should order the extraction of DNA samples of the deceased before burial.
- f. Who should bear the cost of the suit.

21. Ms. Kimeto submitted that the existing legal jurisprudence on burial disputes in Kenya has developed into three distinct but unrelated dimensions: the principle of binding customary law, the principle of legal proximity to the deceased and the wishes of the deceased versus the notion that there is no property in a dead body.

22. Ms. Kimeto asserted that the deceased entered into a civil union with the Applicant on 14th June, 1991 as evinced in the copy of the marriage certificate produced hereto, and therefore that in the absence of any divorce decree or evidence of the nullification of the marriage, the court should make a finding that at the time of his death, the deceased was still legally married to the Applicant. Further that upon marrying the Applicant, the deceased lost the capacity to contract a consequent marriage and as such, any marriages celebrated thereafter, including that to the defendant are null and void. In support of this assertion, Counsel relied on the decision in **Machani vs. Vernoor [1985] eKLR**; **Victoria Mwhaki Muchira & 2 others vs. Wanjiku Mwenja Mwangi & 3 others [2016] eKLR** and **Ruth Wanjiru Njoroge vs. Jemimah Njeri Njoroge & Another [2004] 1 KLR 611**. Counsel noted that whereas it was averred that the deceased married Margaret Makungu as his first wife, and witnesses testified to their cohabitation, no evidence of a customary marriage or otherwise had been adduced to support that averment.

23. It was submitted that the first in line of duty in relation to the burial of any deceased person is the one closest to the deceased in legal terms, which in a marital union is the deceased's spouse as held in the cases of **Ruth Wanjiru Njoroge vs. Jemimah Njeri Njoroge & Another (supra)**; **Martha Wanjiku Kimata & Another vs. Dorcas Wanjiru & Another [2015] eKLR** and **John Omondi Oleng & Another vs. Sueflan Radal [2012] eKLR**. Therefore, that the determination of the place of burial ought to be based upon the proof by the parties in the dispute of their proximity to the deceased. She urged that the Applicant had demonstrated that she possesses the closest legal proximity to the deceased by virtue of marriage and the court ought therefore to release the deceased's body to her for burial.

24. According to Ms. Kimeto, the properties to which all the parties have access are the ancestral home in Kamukuywa, Bungoma County and the family home in Kitale, Trans Nzoia County where the Plaintiff resides. It was asserted that the burial of a deceased person must be at a place where all parties are free to attend as held in **Jacinta Nduku Maasai vs. Leonida Mueni Mutua & 4 others [2018] eKLR**. On this basis, Counsel urged that while the deceased's home in Gataka, Kajiado County had been fronted as a viable burial place, the testimony of the Plaintiff's witnesses was that they had been denied access thereto.

25. With respect to who should undertake the burial preparations and final rites, it was submitted that the custom of the Bashirima Clan of the Tiriki sub-tribe of the Luhya Community, from which the deceased hailed, was that the clan takes over the burial ceremony and eventually buries the body of the deceased in the homestead of the first wife. Counsel implored the court to uphold this custom urging that it is not inconsistent with written laws and passes the repugnancy test set down in the **Judicature Act**. Counsel cited the decision in **Salina Soote Rotich vs. Caroline Cheptoo & 2 others [2010] eKLR** and asserted that it was irrelevant that neither the deceased nor his father

recognized the customs, or that the deceased being a Christian, abandoned his Luhya customs. She urged that the evidence adduced hereto was that the deceased was following Luhya custom when he purported to marry the defendant and it cannot therefore be stated that he did not ascribe to Luhya customs in his personal life.

26. On extraction of DNA samples, Ms. Kimeto contended that throughout these proceedings the paternity of some of the deceased's children had come into question and it would become a necessity at some point of succession of the deceased's estate that the paternity of these children be established. She urged that in order not to interfere with the deceased's body at a later date which after his interment would mean exhumation, it was necessary that the court grant orders for DNA extraction before the deceased's remains are interred.

27. In opposition, learned Counsel Mr. Muga filed written submissions dated 7th April, 2020 on behalf of the Defendant/Respondent in which he submitted that the Applicant had failed to prove her case on a balance of probabilities, reasons for which the suit should be dismissed with costs. Counsel proposed five (5) issues for determination:

- a. Whether the Plaintiff has established a cause of action as against the defendant.
- b. Whether the Plaintiff is entitled to the reliefs sought.
- c. To whom the deceased's body should be released for burial.
- d. Where the deceased should be buried.
- e. Who should bear the cost of this suit.

28. On the first issue, Mr. Muga contended that the Applicant had failed to disclose a reasonable cause of action against the defendant, and instead attempted to introduce new evidence at the submission stage in disregard of the court process. Counsel noted first, that it was submitted that Margaret Makungu was not the deceased's wife yet the Applicant had testified that Margaret was the deceased's first wife. Second, that it was submitted that the deceased and the Defendant hail from the same clan and it was therefore taboo for them to marry when no evidence was adduced to this end.

29. Third, that it was submitted that the deceased owned land in Trans Nzoia when this was never adduced at trial. Fourth, that the deceased sired children out of wedlock when this was never pleaded or adduced at trial. Counsel urged that the court had in **Trans Mara Sugar Co. Ltd. & Another vs. Ben Kangwaya Ayiimba & Another [2020] eKLR** crystallized the position that the evidence adduced from the bar is immaterial and inadmissible before court. To this end, Counsel urged the court to reject the said evidence citing it as a desperate attempt by the Plaintiff to breathe life into her case.

30. On the second issue, it was Mr. Muga's submission that the Plaintiff had failed to establish her legal marriage and proximity to the deceased to sustain an action in law on the right to bury the deceased as her husband. Counsel contended that contrary to the claims that the Plaintiff is the legitimate and only wife of the deceased, the oral and documentary evidence adduced hereto overwhelmingly prove that the said marriage was void *ab initio* for want of capacity. That at the time of the deceased's statutory marriage to the Plaintiff, he was married to one Margaret Makungu under customary law, with whom he separated in 1994. Therefore, that the Plaintiff's case is lost and ought to be dismissed *in limine*. Counsel asserted that burial disputes are now crystallized such that the issue of marriage and its legality are central to it as held in the case of **Ruth Wanjiru Njoroge vs. Jemimah Njeri Njoroge & Another (supra)** and **Jacinta Nduku Masai vs. Leonida Mueni Mutua & 4 others (supra)**.

31. Counsel drew attention to the Plaintiff's testimony in which she stated that she and the deceased separated in 2004 and that she has never lived in their matrimonial home since 2005. That she did not participate in the affairs of the deceased during his lifetime, not even at the point of his sickness. She also conceded that she was aware of the deceased's open sexual relationship with the Defendant since 1996. On this basis, Counsel urged that it was apparent that the deceased and the Plaintiff did not by their conduct carry themselves as husband and wife. Therefore, that the marriage could not be presumed by the conduct of the parties.

32. Submitting on the third issue, Mr. Muga asserted that the defendant had proved, on a balance of probabilities, that she was duly and validly married to the deceased under customary law, and that she and the deceased cohabited and carried themselves out as husband and wife. Counsel stated that the Defendant had adduced evidence to show that the deceased paid dowry of Kshs. 120,000/= as an equivalent of 12 cows and a dowry agreement dated 19th March, 2007 was produced in this respect.

33. Further that the witnesses who testified in support of the Defendant's case had demonstrated that the defendant and the deceased performed all the rites and formalities of the marriage as required by the Bashirima Bitale clan with respect to the negotiation, payment and acceptance of the dowry. He urged that since the marriage between the deceased and the Plaintiff was a nullity, the deceased had the requisite capacity to contract another customary marriage which he did with the Defendant. That in any event, the defendant's marriage to the deceased could be presumed through cohabitation.

34. On the allegation that it was taboo for the deceased to marry the defendant, it was Mr. Muga's submission that contrary to the allegations, the deceased belonged to the Bashirima Basingire clan whereas the defendant belongs to the Bashirima Bitale Clan which clans are allowed to intermarry. Therefore, that the marriage of the deceased and the defendant was valid. Counsel urged that the defendant gave undisputed evidence that she was involved in the deceased's personal, family, financial and church affairs and their conduct, actions and pronouncements leave no doubt that they held themselves out as husband and wife.

35. Mr. Muga submitted that the Plaintiff had failed to prove her case against the defendant as demonstrated and she was therefore not entitled to any of the reliefs sought in the application. Counsel asserted that the Plaintiff has no *locus standi* under common law, statute or customary law to institute these proceedings. That in any event, she had not taken out letters of administration to seek the reliefs sought

herein. He cited the decision in **Janet Ngubia Githieya vs. Wairimu Gitau [2004] eKLR** in support thereof.

36. With respect to the injunctive orders sought, it was Mr. Muga's submission that contrary to the claims made by the Plaintiff, none of the deceased's family members had been prevented from attending the burial. He contended that the evidence demonstrates that all of the deceased's children participated in the burial preparations, noting that even the deceased's mother who was long separated from the deceased's father was informed of the burial arrangements. Counsel took issue with the testimony of PW4 David Joseph Isachi and PW5 Andrew Akalomba that they had been sent away from the deceased's home on 12th September, 2019 urging that at that date the burial had already been stopped. Indeed, the record shows that the court order stopping the deceased's interment was issued on 11th September, 2019.

37. On DNA extraction, Mr. Muga submitted that the prayer for extraction of DNA samples was immaterial to the issues for determination hereto and should not be granted. Counsel asserted that the legitimacy of children born in a marriage is now settled by dint of **section 18 of the Evidence Act (CAP 80)**, and that in any event, the defendant had produced the respective birth certificates of her three biological children, and whose authenticity had not been challenged. He urged that from the evidence on record the Defendant's three children are the legitimate children of the deceased and such a presumption of legitimacy cannot be rebutted by the outcome of the proposed paternity test to be conducted on the deceased's DNA sample.

38. In the end, Mr. Muga asked the court to release the deceased's body to the Defendant as the wife and therefore person of closest proximity and direct that the deceased be buried in Gataka, Kajiado County. Further that the court find that the Plaintiff has failed to prove her claims and order that the Plaintiff pay both the cost of the suit and the cost of the mortuary expenses for the deceased since the date of filing the suit to the date the body is released for burial.

39. The parties also raised issues with respect to the management of the deceased's estate and collection of revenue therefrom. Notably, this court is not sitting as a succession court at this time and these proceedings are limited to the burial dispute at hand. As such, I will not belabor those arguments.

40. I have carefully considered the pleadings filed hereto, the oral testimonies of the witnesses who testified in support of the respective cases, the written submissions filed by the respective Counsels on record and the authorities relied upon therein, and delineated the following issues for determination:

- a. What is the applicable law in determining this burial dispute.
- b. Where should the deceased be buried.
- c. To whom should the deceased's body be released for burial.
- d. Whether the orders for DNA extraction should issue.
- e. Who should bear the costs of this suit.

I will now proceed to interrogate each of these issues based on the existing law and the evidence on record.

a. What is the applicable law in determining this burial dispute.

41. It is now settled that in determining burial disputes in Kenya, customary law is the applicable personal law as held in **Virginia Edith Wambui Otieno vs. Ochieng' Ougo & Anor. [1987] KLR 371** (*hereinafter referred to as the SM Otieno Case*). Courts are therefore guided by both case law and the customs of the deceased. This is so because there is no codified statute on burial disputes in Kenya. The application of customary law is by dint of **section 3(2) of the Judicature Act (CAP 8)** which prescribes that courts apply customary law where one or more of the parties is subject to it or affected by it, in so far as it is not repugnant to justice and morality or inconsistent with any written law. It is noteworthy that the place of customary law as the personal law of the people of Kenya is complementary to the relevant written laws and the Constitution, which is the supreme law.

42. Whereas Counsel for the Defendant Mr. Muga argued that neither David Isachi nor Andrew Akalemba qualified as experts on the customs of the Bashirima clan, this court is cognizant of **section 51 of the Evidence Act (CAP 80)** to wit that 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. Notably, none of the parties and the witnesses who testified in support of their respective cases took issue with the customs as stated only that the deceased did not ascribe to them and his burial ought therefore not to be subject to them.

43. Of relevance is the testimony of DW3 Whiki Moshi who expressed his dismay at the plans by the clan to bury the deceased "in accordance with tradition" stating that none of those who had previously died in their family had been buried in line with any traditions, not even his late grandmother. He urged that whereas they were a Luhya family of the Bashirima clan, he had no knowledge of their traditions because they are Christians who do not ascribe to any of the Luhya traditions. Indeed, even his and the deceased's father Michael Keya, despite confirming that he belongs to the Bashirima clan, had no knowledge of the customs and cultural practices of the Bashirima clan. Interestingly, he also denied knowledge of any plans by the clan to bury the deceased.

44. The argument by Whiki Moshi gives rise to the question of whether an individual has the liberty to consciously take themselves out of the ambit and operations of the tribal customary norms associated with their tribe. In the instant case, the question is whether the deceased rightfully abandoned his customs and ascribed fully to Christian norms. Our Constitution guarantees freedom of conscience, religion, belief and opinion and the freedom of expression as enumerated under its **Articles 32 and 33** respectively.

45. According to the **Black's Law Dictionary, 10th edition** at p. 779 "freedom" is *the quality, state, or condition of being free or liberated; esp., the right to do what one wants without being controlled or restricted by anyone* and "freedom of choice" is *the liberty embodied in the exercise of one's rights*. It is therefore evident that the Constitution guarantees each individual the freedom of expressing their wishes, beliefs and opinions on personal matters. This includes the freedom to practice a religion of one's choice and to express themselves on how they wish to be treated upon their death. Numerous case law on burial disputes recognize that the wishes of a deceased, though not binding, ought to be given effect in so far as is practicable. This demonstrates that whereas a corpse has no legal standing or personality, the courts have given effect to past rights created during a person's lifetime with respect to the manner in which their remains should be handled.

46. In the instant case, the deceased is said to have divested himself of his tribal customs and ascribed to Christianity. The Court in the **SM Otieno Case** deliberated upon this and observed that there is no way in which an African citizen of Kenya can divest himself of the association with the tribe of his father if those customs are patrilineal. While this court is cognizant of this holding, it is noteworthy that **Article 32(4)** of the **Constitution** is categorical that a person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion. While this court is duty bound to apply the landmark decision in the **SM Otieno Case** as precedent, it is also obligated to uphold the provisions of the Constitution 2010 which is the supreme law of the land and which was promulgated long after the decision in the **SM Otieno Case**. This obligation is in tandem with the transformative character of the 2010 Constitution.

47. It is my considered opinion therefore, that where one chooses to exercise their freedom of conscience, religion, belief and opinion and thereby adopt different practices, the court should uphold their opinions and beliefs as to do otherwise would amount to a violation of an enumerated constitutional right.

48. On the conduct of the burial, David Isachi testified that where the deceased was polygamous, the body is interred in the first wife's compound. However, before interment, the deceased's remains must lie in each of the houses of the other wives. The grave is set out and dug at 2.00 a.m. in the presence of a clan elder, after which it must be filled within twelve (12) hours upon its being dug. In the morning, the clan conducts prayers before handing over the burial program to the church. It is therefore evident that even the clan itself recognizes the church and to a certain extent incorporates the doctrines and values of the church in the conduct of its affairs. This goes to show that the Bashirima clan recognizes that, to a certain extent, adherence to customs is individually specific and customs can be adhered to selectively.

49. In the instant case, it has been demonstrated that the deceased practically removed himself from custom, ascribed to Christianity, and consequently established a church of which he was the Archbishop at the date of his demise. It is therefore right to conclude that one can arrive at a conscious decision to take themselves out of the ambit of their tribal customary norms, and has the freedom to choose and ascribe to customs which are compatible with their conscience and which protect their human dignity. Therefore, in determining this burial dispute, the court will be guided by both customary law and the Constitution which is the grundnorm.

b. Where should the deceased be buried.

50. The place of burial of a person is closely linked to three things: the person's wishes, the duty imposed on those closely related to the deceased during his lifetime to bury him and whether the deceased had established a home. Additionally, the custom to which the deceased is subject comes into play. (See – **M'imanene M'rutere vs. Lewis Kirimi & 2 others, Civil Appeal No. 20 of 2018 [2018] eKLR**).

51. On this ambit, Ms. Kimeto submitted that having demonstrated that the deceased was a member of the Bashirima clan of the Tiriki sub-tribe of the Luhya community, this dispute ought to be determined in accordance with the burial customs of the Bashirima clan, which require that the deceased be buried in the 1st wife's homestead. She noted that whereas the Defendant had alluded to the deceased's oral wishes as to the place of burial, the principle was that the deceased's wishes cannot be respected if they contravene the customary law.

52. To buttress the Applicant's case, Counsel cited the decisions in: **SM Otieno Case (supra)**; **Kandie & 2 others vs. Beatrice Jepkemoi Chergony [2002] eKLR**; **Salina Soote Rotich Case**; **Pauline Ndeti Kinyota Maingi vs. Kinyota Maingi [1984] eKLR** and **James Apeli and Enoka Olasi vs. Prisca Buluku [1985] KLR 777**. Counsel contended that it was irrelevant that the deceased had ascribed to the Christian faith and abandoned his Luhya customs. She urged that the court had in the **SM Otieno Case** held that an African citizen of Kenya cannot divest himself of the association with the tribe of his father if those customs are patrilineal.

53. Ms. Kimeto further urged that the Defendant had by her own admission, supported by the evidence she adduced, shown that the deceased was adhering to customary law when he purported to marry her by paying her dowry. Therefore, that the Defendant could not now say that the deceased did not adhere to customary law in his lifetime.

54. In opposition, Mr. Muga submitted that the wishes of the deceased on how his remains should be interred must be given effect as practicable as possible. Counsel asserted that it is common ground that the wishes of a deceased person are a paramount consideration in a burial dispute as held in the case of **Jacinta Nduku Masai vs. Leonida Mueni Mutua & 4 others [2018] eKLR**. He urged that the property rights enshrined in **Article 40** of the **Constitution** include one's right to be buried in their property anywhere in Kenya, subject to the limitations under **Article 40(2)**.

55. Mr. Muga contended that the deceased's wish was to be buried at his home in Gataka, Kajiado County where he had built and established his family home. This wish, he stated, found support in the testimonies of the witnesses herein that the deceased had permanently relocated from his former home in Kamukuywa in Bungoma to Gataka, Kajiado County, and that the Defendant had produced a copy of the title deed as proof that the land was duly registered in the deceased's name. Therefore, that the deceased had expressed an unequivocal wish of where he wished to be buried.

56. Counsel took issue with the testimony of PW4 David Joseph Isachi that the deceased's wish to be buried in Gataka ought not to be enforced as it was contrary to the Bashirima customary practices, stating that the testimony did not meet the threshold of an expert opinion. Counsel contended that to qualify as an expert on a particular issue, one must demonstrate peculiar skills gained either from professional exposure or experience, and the opinion must be independent. In this respect, he cited the decisions in **Maina Thiongo vs. Republic [2017] eKLR** and **Christopher Ndaru Kagina vs. Esther Mbandi Kagina & Another [2016] eKLR**.

57. Counsel urged that David Joseph Isachi failed to meet any of the set criteria, noting that he did not demonstrate the foundation of his knowledge of the various cultural practices of the Luhya community nor produce any academic writing or literature in support of his opinion. Further, that PW4 did not tender evidence of his appointment as the Chairperson or spokesperson of the Bashirima Clan and in any event, by dint of being the deceased's paternal Uncle, David could not qualify as an independent expert witness. Therefore, that the court should find that the evidence was incompetent, incredible and inadmissible as an expert opinion. Counsel however pointed out that David had conceded that the deceased can be buried in Kajiado if he bought land and established his home thereon. Counsel urged that this statement settled the position that the deceased's wishes were not contrary to the Luhya customary practices. Notably, the evidence of PW4 was never contested during the trial or on cross-examination.

58. According to Mr. Muga, it is the argument that the deceased should be buried in Kitale or Trans Nzoia that is against custom, the law and public policy. With respect to Trans Nzoia, Counsel noted that this land was introduced by the Plaintiff in her submissions and was neither pleaded nor adduced in evidence at trial. Counsel urged that it was undisputed that the Plaintiff's father was buried on the land in Kitale and contended that it was against custom for a man to be buried on the same land as his father in law. He urged that in any event, the Plaintiff had not adduced evidence to show that the deceased owned land in either of the two places. I wish to point out that a reading of the Plaintiff's submissions reveals that there is no reference to Kitale and Trans Nzoia as two distinct places but rather a mention that Kitale is situated in Trans Nzoia County. As such, the argument raised by Counsel is misguided.

59. Mr. Muga urged the court to adopt the *ratio decidendi* in **Jacinta Nduku Masai vs. Leonida Mueni Mutua & 4 others** (*supra*) and hold that the deceased's wish to be buried in Gataka, Kajiado was clear and ascertainable and in tandem with the customary practices, the law and public policy and direct that the deceased be buried thereon.

60. From the record, it is without doubt that the deceased was born into the Bashirima Clan of the Tiriki sub-tribe of the Luhya community. It is undisputed by the parties that the clan should play a role *albeit* restricted in the interment of the deceased. What is disputed is where the deceased ought to be buried and whether the customs of the Bashirima clan should take center stage in making this determination. The proposed burial locations are Kamukuywa in Bungoma County, Kitale in Trans Nzoia County and Gataka in Kajiado County.

61. Various witnesses testified that the deceased had clearly expressed his wish to be buried in Gataka, Kajiado County where he had built and established his home. This court is alive to the fact that in the African set up, it is unusual and almost taboo for one to talk about death or identify where they wish to be buried unless in contemplation of death. Based on the medical evidence on record which indicates that the deceased had been diagnosed with a brain tumor for which he had undergone two operations, was hypertensive and was experiencing diminished vision, and in the days leading up to his death, the deceased's health further deteriorated, it is right to assume that there may have been contemplation of death. Further that the deceased expressed his wish on where he wanted to be buried, which wishes were discernable and accurate. After all, both his ancestral land in Vihiga, and where he grew up in Kamukuywa, were no longer existent. The Kamukuywa land had been sold in 2008, a decade before the deceased's death, and the deceased started establishing his home in Gataka, Kajiado in 2007.

62. As such, it is imperative on this court to weigh the wishes of the deceased against the applicable customs, if any, in discerning where the deceased ought to be buried. In **SAN vs. GW, Civil Appeal No. 1 of 2020 [2020] eKLR** the Court of Appeal (Ouko (P), Gatembu & Murgor, JJ.A.) expressed itself thus:

“...courts have also been unanimous as far as we can tell from decided cases that, both laws, common and customary, have one thing in common, in so far as burial is concerned; that the wishes of the deceased, though not binding, must so far as is possible, be given effect, so long as those wishes are not contrary to custom or to the general law or policy. See Apeli vs. Buluku [1980] eKLR and Samuel Mungai Mucheru & 3 Others vs. Ann Nyathira [2014] eKLR.

The wishes or a will on how the deceased's remains will be disposed of upon death are not, as a general rule binding because, in the first place, there is no property in a dead body and secondly, because a dead person cannot take part in the decision of his or her own burial. There must, however, be compelling reasons for not heeding the expressed wishes of the deceased.”

63. The representatives of the Bashirima clan who testified with respect to the clan's burial practices are PW4 David Isachi and PW5 Andrew Ayimba Akalomba, paternal uncles to the deceased herein. It was asserted in a joint affidavit sworn on 22nd July, 2019 by Andrew and one Ezekiel Akalomba that both Andrew and Ezekiel were elders of the Bashirima clan and therefore clothed with the knowledge of the intricate details of Luhya customs. Further that the elders of the Bashirima clan had elected one David Isachi, also an elder, as the Clan's spokesperson in this matter.

64. According to David, the clan wanted the deceased buried on his land in Kitale. The argument for this was that since the deceased was married, he cannot be buried on his father's land, but must instead be buried on his own land, where his wife too would be buried. Expounding on this, Andrew added that if the person who dies is indigent, such a person can be buried on their brother's land. Further that if the deceased was married and his wife has land, the deceased would be buried on his wife's land. Of importance is David's statement that if it was indeed true that the deceased had land and a family in Kajiado, then he can be buried thereon. This negates the argument that to bury the deceased in Kajiado would be contrary to custom.

65. In her testimony in examination in chief, the Plaintiff confirmed that the deceased had a home in Gataka and stated that if it was the deceased's wish that he be buried thereon, she would respect that wish provided that it was made in writing and not verbally. She stated that she and the deceased lived in Kitale when they first got married, but that the Kitale property had since been sold. However, on re-examination, she stated that the deceased had land in Kitale and in Kamukuywa but did not produce any documentary evidence in support thereof. Her sentiments to have the deceased buried in Kitale were echoed by PW4 David Isachi and the deceased's mother Dimina who testified as PW7.

66. Neither PW4 nor PW7 stated whether the land in Kitale belonged to the deceased. In fact, PW7 on her part admitted that she had never been to the land in Kitale, or that in Kamukuywa, but stated that the land in Kamukuywa had been sold. Whereas the clan is also said to have proposed that the deceased should be buried in Kitale, it failed to establish the existence of any piece of land in that area on which the

deceased could be buried.

67. The Defendant on her part maintained the position that the deceased ought to be buried at Gataka because that was his wish. Further that the deceased's father, brother and children were all in agreement that he should be buried thereon. She urged that the property in Gataka, known as NGONG/NGONG/18074 KAJIADO, is registered in the deceased's name, and a copy of the Title Deed is on record. The Title indicates that Musa Magodo Keya, the deceased herein, is the absolute proprietor of the land having been registered as such on 2nd May, 2006.

68. In opposing the arguments to have the deceased buried in Kamukuywa in Bungoma, the Defendant asserted that the said land parcels had been disposed of during the deceased's lifetime. Further that the deceased had no land in Kitale as claimed. She admitted that the deceased had plots in Naivasha, Nakuru and Kakamega but maintained that he could not be buried on either of those plots since the Naivasha land had no title deed whereas in Nakuru and Kakamega there were only houses. Therefore, that the deceased had no other home or land in which he could be buried, save for Gataka.

69. The argument to have the deceased buried in Gataka, Kajiado County is that not only is the deceased the duly registered proprietor of the land, but also that he had built and established his home thereon and before his death expressed his wish to be buried there. There is on record a copy of a Certificate of Title of the Gataka property known as NGONG/NGONG/18074 KAJIADO registered in the deceased's name on 2nd May, 2006. The date of registration of the property lends credence to the testimony of the deceased's daughter Caroline Khasandi who testified as PW8 that upon completing her secondary school education in 2007, she lived with her father, the deceased herein, in both Karen and Gataka. She and her siblings lived in the Gataka house while the Karen house was being built.

70. According to the deceased's daughter PW3 Knight Muhonja, the deceased wished to be buried in Gataka, and that she and her siblings had also agreed to have him buried there. Her sister Caroline however stated that the deceased had not indicated to her where he wished to be buried, only that he had acquired a big farm in Naivasha which would become their rural home. Caroline further narrated that when she got married in 2017, her dowry was paid at the Karen home. She pointed out that she and her siblings had not visited either Kitale or Kamukuywa since 2007.

71. The deceased's son Evans Akalomba also testified that the family had agreed to bury the deceased in Gataka area, Kajiado County in accordance with the deceased's wish. He affirmed that the deceased had during his lifetime lived in Kamukuywa, Buruburu, Gataka and Karen but contended that the deceased had never lived in Kitale. He narrated that he had lived with his mother Margaret in Kamukuywa before she sent him to live with the deceased in Nairobi. The deceased would later sell the land in Kamukuywa and buy land in Gataka for use as their family's rural home. It is on that land that he too has built his home. Additionally, that no one had disputed the deceased's burial ground on the Gataka land and that a grave had already been dug thereon.

72. The deceased's father Michael Akalomba confirmed that the deceased had during his lifetime lived in Kamukuywa, Gataka and Karen in Nairobi but asserted that at the time of his death, the deceased lived in Karen. He however asserted that the deceased had intended to be buried in Gataka. The deceased had informed him that since they had established their home in Gataka, they should both be buried thereon on their demise. It is on that land in Gataka that Michael currently resides.

73. It was Michael's statement that upon the deceased's demise, he and the deceased's children began to make the burial arrangements and they agreed to have the deceased buried in Gataka. All of the deceased's children with the exception of Linda who lives abroad were consulted. The Plaintiff was however opposed to the idea and consequently instituted this suit.

74. Michael insisted that the deceased had never lived in Kitale. To his knowledge, the Kitale property on which the Plaintiff proposed to have the deceased buried belongs to her family. That the Plaintiff's late father Peter Manyifu is buried thereon and it is on that land that his widow, the Plaintiff's mother, resides. He contended that the deceased cannot be buried on the same land as his father in law. That in any event, he had not seen a title deed to show that the deceased owned land in Bungoma or Kitale on which he could be buried as proposed by the Plaintiff.

75. Similar views were held by the deceased's brother Whiki Moshi who asserted that the deceased's land is in Gataka, Kajiado County where he settled and built his home. It was there that he wanted the deceased buried. As for the land parcel in Kitale, he averred that the land belonged to Gladys Nekesa and the title deed was registered in the name of her late father Peter Manyifu, who is buried thereon. He had no documentary proof thereof and instead claimed that it was Gladys who was in possession of the title deed. He further stated that the talks to have the deceased buried in Kamukuywa were surprising since the deceased had no land in Kamukuywa.

76. Whereas it was averred that the Plaintiff owned land in Kitale, all there is is the oral statements of the Plaintiff and the witnesses who testified in support of her case without any documentary proof thereof. In any event, the evidence which remains undisputed is that it is on that land that the Plaintiff's father is buried and where the Plaintiff's mother currently resides. None of the parties testified that it is custom for a married man of the Bashirima clan to be buried on the land in which his in-laws are buried or upon which his in-laws reside.

77. The ancestral or clan land alluded to should be somewhere in Shamakhokho in Vihiga County. It is however no longer in existence and does not therefore come to play in this dispute. In his testimony, DW2 Michael Keya narrated that he was born in Shamakhokho in Vihiga as his parent's first born son. His parents then purchased a parcel of land in Kamukuywa, Bungoma to which their family relocated. His testimony was echoed by Whiki Moshi who narrated that he and the deceased were born in Vihiga but that they grew up in Kamukuywa. On cross-examination, Whiki Moshi maintained that the Kamukuywa land was not clan land, stating that their clan land remained in Vihiga, Shamakhokho.

78. From the evidence adduced, the deceased had no land in Kamukuywa, ancestral or otherwise. The testimonies of DW2 Michael Keya and DW3 Whiki Moshi Keya which proved convincing lend credence to this. Whereas it is undisputed that the deceased grew up in Kamukuywa, not only does that land not qualify as ancestral land but it has also long been disposed of. It is on the land in Kamukuywa that Michael Keya's parents, the deceased's paternal grandparents, were buried. The deceased later sold the land, with the graves on it, which act,

according to Michael, was not against their cultural practices.

79. Michael testified that upon selling the Kamukuywa land, the deceased relocated him to Gataka. He has not returned to Kamukuywa since then. As for Michael's brothers, seven in number, the deceased bought each one of them half an acre of land on which to put up their respective homes. Michael and his siblings do not however share a close bond and live separate lives with their wives and children.

80. His testimony was echoed by Whiki Moshi who narrated that the land in Kamukuywa was too small for their large extended family: his father came from a family of eight boys, who coupled with Whiki Moshi and the deceased, made them ten in number. This saw them arrive at a decision to sell the land in 2008. After the land was sold, the proceeds were shared amongst the ten family members. Each one was to buy their own land wherever they pleased. Whiki Moshi bought a parcel of land at a shopping center in Kamukuywa while his brother, the deceased herein, moved to Nairobi and bought land in Gataka. His father Michael Keya would later move and settle with the deceased in Gataka. His uncles also bought land in various locations. None of them remained on the original property.

81. It is trite that the burial of a deceased person must be at a place where not only all parties are free to attend, but also where the ownership of the land is undisputed. From the foregoing, it emerges that of all the proposed burial places, the land whose ownership can be ascertained is that situated at Gataka, Kajiado County, and on which the deceased had wished to be buried. In my view, burying the deceased's remains on the Gataka property would not only be in line with custom because that is where he established his home, but would also uphold the wishes of the deceased. The testimony of David and Andrew who testified to the customs of the Bashirima clan, was that a married man ought to be buried either on his land, or if he was indigent, on either his brother's or his wife's land. In the instant case, it has been demonstrated that the deceased had his own land. As such, the lands of either his brother or wife are not to be considered. Additionally, it was stated that in the case of a polygamous man, the body is buried in the first wife's compound. This calls for an interrogation of the marital status of the deceased.

c. To whom should the deceased's body be released for burial.

82. At the center of every burial dispute is the issue of marriage and its legality. This is so because of the cardinal principle that the person in the first line of duty in relation to a deceased person is the one who is considered to be of the closest legal proximity, who in most instances is the spouse if the deceased was married. The decisions in **Ruth Wanjiru Njoroge vs. Jemimah Njeri Njoroge & Another** (*supra*) and **John Omondi Olang and another vs. Sueflan Radal** (*supra*) speak to this. In the instant case, there are three individuals who have been fronted as the spouses of the deceased: the Plaintiff Gladys Nekesa Peter, the defendant Alice Ingaiza and one Margaret Makungu. Having established where the deceased ought to be buried and the manner in which the burial is to be conducted, the deceased's marital status now takes center stage.

83. I will begin by examining the relationship of the deceased and one Margaret Makungu who is alleged to have been the deceased's first wife. The relationship between the deceased and Margaret Makungu bore four (4) issues. It is curious that in her written submissions, the Plaintiff denies there having been any marriage between the deceased and Margaret Makungu when this fact was never disputed by either parties throughout the trial to afford Margaret an opportunity to advance evidence in support of her case and which would guide this court in reaching a sound finding. In her pleadings, the Plaintiff herself indicated that Margaret was the deceased's first wife and I find it deceptive for her to now state that the marriage between the deceased and Margaret was non-existent. By raising a new issue in her submissions, the Plaintiff has not only deviated from her pleadings but has prejudiced Margaret who was not a party hereto but merely a witness. It is trite that parties are bound by their pleadings. For this Court to pronounce itself on matters not pleaded or argued at trial would be tantamount to entering into a realm of speculation. Therefore, any evidence led by the parties which is at variance with the averments of the pleadings goes to no issue and must be disregarded. (See – **Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others [2014] eKLR**).

84. Whereas the parties in this case testified that Margaret was the deceased's first wife, the only evidence chronicling the elements of their customary marriage is that of Margaret. This is possibly because her marriage was never in issue and was not disputed during the trial. It was only questioned in the Plaintiff's written submissions. In her testimony, Margaret mentioned in passing that she and the deceased entered a customary marriage in 1984 after the deceased presented two heads of cattle as her dowry. She and the deceased resided in Kamukuywa in Webuye and their union bore four (4) issues. The deceased would later in 1994 chase her out of their matrimonial home when her youngest child was aged only two (2) years. Her children remained in the custody of the deceased and were raised in part by the Applicant. She conceded that she did not have a relationship with her children but stated that they had knowledge that she was their biological mother and asked the court to recognize her as such.

85. Various witnesses, to wit PW4 David Isachi, DW2 Michael Keya and DW3 Whiki Moshi, testified that Margaret was the deceased's first wife without more. Additionally, the deceased's paternal uncles Andrew Akalomba and Ezekiel Akalomba in their joint affidavit of 22nd July, 2019 acknowledged that Margaret Makungu was one of the deceased's wives. Indeed, even the Plaintiff in her testimony conceded that the deceased was previously married to Margaret Luvisai which union bore four issues. Margaret however left the marriage in 1994 and returned to her home in Vihiga, a statement the Plaintiff testified to in her testimony.

86. By dint of the fact that the marriage of the deceased and Margaret Makungu was never disputed during these proceedings, I find that to delve into the legality or otherwise of the marriage, when Margaret was neither a party hereto nor granted an opportunity to adduce cogent evidence in this respect would be prejudicial to her. As such, I find that Margaret Makungu was the deceased's first wife but in Margaret's words, they separated in 1994 when the deceased took her from her matrimonial home in Bungoma and abandoned her at her mother's shop at Kamukuywa center.

87. On her part, the Plaintiff testified that she was legally married to the deceased having entered into a civil union on 14th June, 1991. To this end, she produced in evidence a copy of the original Certificate of Marriage of serial no. 40291 issued under the Marriage Act (CAP 150), and a photograph of the marriage ceremony. There is also on record a copy of a Certified Copy of a Marriage issued under the Marriage Act, 2014 on the strength of the original certificate, and which bears the serial number 036069. To the Plaintiff's knowledge, her marriage to the deceased has never been dissolved. Their union bore one issue.

88. The evidence of the witnesses who testified as to the deceased's and Plaintiff's marriage was that prior to solemnizing their union at the Registrar's office, the deceased and the Plaintiff were married under customary law.

89. PW4 David Isachi testified that it was the Plaintiff whom he recognized as the deceased's wife since he was involved in the payment of the Plaintiff's dowry and had knowledge that the union was solemnized in 1991. To his knowledge, the two never divorced, and Gladys' home is in Kamukuywa. His sentiments found support in the testimony of PW5 Andrew Akalomba. David further confirmed that Margaret was the deceased's first wife but stated that she had walked out of the marriage.

90. Adding to this, the deceased's mother Dimina testified that the Plaintiff was the rightful wife of the deceased having solemnized their union in a civil wedding in 1991. She asserted that the Plaintiff lived harmoniously with the deceased's family, and even contributed towards the purchase of the family land in Kamukuywa. That it was only when the deceased started an extra marital affair with the Defendant that the deceased ejected the Plaintiff from their matrimonial home leading to a breakdown of their marriage.

91. The deceased's father Michael Keya and the deceased's brother Whiki Moshi also testified that the Plaintiff was the deceased's wife but maintained that the deceased had three wives, with the Plaintiff being the second wife.

92. The evidence on record demonstrates that at the time the Plaintiff entered into a civil union with the deceased in 1991, the deceased lacked capacity to contract a civil union as he was already married to Margaret Makungu under customary law, which is a polygamous system of marriage. As such, the Plaintiff's purported civil union to the deceased in 1991, when his customary marriage to Margaret was in existence until 1994, was null and therefore, void *ab initio*. This is because a person who is married under a system of law which permits polygamy cannot purport to contract a subsequent monogamous marriage whilst the previous polygamous one is still subsisting.

93. Before solemnizing their civil union, the deceased and the Plaintiff were married under customary law as testified by the witnesses hereto. The copy of the Certificate of Marriage and the Certified Copy of a Marriage on record which indicates the status of both the deceased and the Plaintiff at the date of their civil union as "married under customary law" also lent credence to this version of events. As such, whereas the purported civil union between the deceased and the Plaintiff was void *ab initio*, the Plaintiff still finds refuge in her customary marriage to the deceased which had been celebrated prior to the civil union.

94. Eugene Cotran's "**Restatement of African Customary Law, The Law of marriage and Divorce**" Vol. 1 sets out the essentials of a valid Luhya marriage at page 53 as:

- a. Capacity to marry.
- b. Consent by parties to the marriage and their respective families.
- c. Marriage consideration: payment of dowry.
- d. Cohabitation: the man and woman legally become husband and wife upon commencing cohabitation.

95. Since the deceased had married his first wife Margaret under customary law, he had the capacity to contract a subsequent marriage to the Plaintiff under the same system of law. The consent of the parties to the marriage can be implied since they cohabited and even went ahead to solemnize their union an act which demonstrates the element of consent. Additionally, the deceased's paternal uncle David Isachi testified that he played a role in the payment of the Plaintiff's dowry but did not give any further details. The record also shows that prior to their being estranged, the deceased and the Plaintiff cohabited as husband and wife for a period of over 15 years and sired one child.

96. The question that remains then to be answered is whether the Defendant also qualifies as a wife of the deceased. Various witnesses who testified in support of the Plaintiff's case testified to the deceased's relationship with the Defendant. Testifying to this, the Plaintiff narrated that she came to know the defendant when she employed her as a nanny for the deceased's children. That the deceased would later enter into a relationship with the Defendant leading to a breakdown of their marriage. This prompted her to move to Milimani area, Nakuru where she and the deceased had established a home. She stayed in Nakuru from 2002 until 2006 when the deceased evicted her therefrom. From thereon, the deceased lived together with the defendant together with all the children of the marriage who remained in his custody.

97. On her part, the deceased's mother Diminah, maintained that it was the Plaintiff whom she recognized as the deceased's widow but that she was nonetheless acquainted with the Defendant, and was aware that it was she who lived with the deceased at the date of his death. She however had no knowledge of how the Defendant came to be a wife of the deceased. Notably, Dimina and the deceased's father Michael separated in 1967 and Dimina remarried seven (7) years later.

98. The deceased's daughter Knight Muhonja Magodo testified that she has two mothers, her biological mother Margaret and Gladys, the Plaintiff herein. She stated that it was the Plaintiff who raised her. She acknowledged that the Defendant took care of her, but asserted that she did so as a nanny. She first knew of the Defendant in 1994 when the Defendant was employed as a house help in their home. She was aged 10 years at the time. She knew the defendant as Alice Ngaiza Siale and later as Alice Ngaiza Keya. She averred that the tune changed in the year 2000 when the deceased began to treat the Defendant differently and demanded that his children regard her as their Aunt.

99. According to Knight, it was not until the family relocated from Ngong' to Karen that she noticed that the Defendant was sleeping in the same room as the deceased. The deceased would later inform her that he wanted the defendant to be regarded as their mother. She confirmed that at the time of his death, the deceased was living with the Defendant but maintained that she did not recognize the Defendant as her father's wife since she was never invited to any ceremony to formalize the union. She reiterated that she only recognized Margaret and Gladys as her mothers. She however left it to the court to make a determination as to who were the wives of the deceased.

100. PW4 David Isachi also admitted that he knew the Defendant, but only as the Plaintiff's house help and not the deceased's wife. He took issue with a dowry agreement on record and argued that those dowry negotiations were not legal. He asserted that under the customary law of the Tiriki sub-tribe of the Luhya community, a customary marriage entails the man's relatives going to the girl's home to ask for her hand in marriage. If the offer is accepted, they return on another date to agree on the dowry. His view was that at no point in time is the girl being married involved in her own dowry negotiations. He urged that even if there existed a marriage between the deceased and the Defendant, the marriage was not valid in their custom because the clan elders were not in attendance.

101. PW8 Caroline Khasandi Magodo also testified to the Defendant's marriage. She affirmed that she knew the Defendant as their house help until the deceased asked them to regard her as their mother. Whereas she was never invited to a wedding between the deceased and the Defendant, it was her testimony that the two lived together during the deceased's lifetime, and regarded each other as husband and wife up to the time of the deceased's demise. She however asked the court to release the deceased's body to the Plaintiff for burial and further direct that the whole family participate in the burial. She had no objection to the deceased's church being involved in the burial arrangements only that restrictions on their involvement be in place.

102. On his part, PW8 Anthony Simbiri testified that it was the Plaintiff whom he recognized as the deceased's wife as she had been so introduced by the deceased, and that he only knew the Defendant as a house help. He however confirmed that it was the Plaintiff who wrote the article on the ordination of the Defendant as a Bishop of Shiloh Church of Christ in 2002. Nowhere in the article was the Defendant referred to as a house help. He averred that even after the Defendant was ordained as a Bishop, she continued to work as a house help in the deceased's household.

103. It is uncontroverted that the Defendant was a constant figure in the deceased's life as attested to by witnesses who testified for both sides. Even the Plaintiff herself admitted that the Defendant played a pivotal role and had an influence in the deceased's life. What is controverted is the breadth of the Defendant's role in the deceased's life. Whether it was that of a nanny or house help or that of a wife.

104. The Defendant's case was that she was duly married to the deceased under customary law and ought therefore to be regarded as the deceased's wife. Her position was affirmed by the testimonies of the witnesses who testified in support of her case.

105. DW1 Evans Magodo confirmed that the Defendant was indeed their house help but stated that the deceased had at one point informed him of his intention to marry her, because both Margaret and Gladys had left him. Later, the deceased informed all his children of his intention to marry the Defendant. He asserted that it was the Defendant who took care of the deceased in his sickness and was present at the time of his death. Alice bore three children, two sons and one daughter: Emmanuel Magodo, Levey Magodo and Manwela Magodo. He pointed out that all three children were taken into police custody in September 2020 on allegations of child theft.

106. To Evans, it was the Defendant who was the deceased's wife. He avowed that the Plaintiff had not lived with the deceased since 2004 up to the time of his death and claimed that the deceased had informed him that they had gone their separate ways. He however conceded that he was not aware of any details of a divorce between the deceased and the Plaintiff.

107. The Defendant's case found further support in the testimony of the deceased's father Michael Keya who testified that the deceased had three wives: Margaret Makungu, Gladys Nekesa and Alice Ngaiza. He had four children with Margaret, one child with Gladys and three children with Alice. That Margaret and Gladys would later abandon the marriage leaving the Defendant, who lived with the deceased until his death. Michael echoed Evan's statement that neither the Plaintiff nor the deceased's first wife Margaret visited the deceased in hospital and maintained that it was the Defendant who cared for the deceased in his ailments until his demise.

108. The deceased's younger brother Whiki Moshi further affirmed that the deceased was a family man. He narrated that the deceased's first wife was Margaret Makungu. She was married in 1980 and begot four children. She and the deceased lived in Kamukuywa before the land was sold. They would later differ, prompting her to abandon the marriage in 1994. She resettled in Migori. The deceased then married Gladys Nekesa, the Plaintiff herein, in 1990. He however had no knowledge of how the marriage was formalized and denied knowledge of a marriage certificate shown to him during cross-examination. Gladys begot one child. She left the marriage in 2004. Both Margaret and Gladys left their children in the deceased's custody and it was the deceased who raised them.

109. Whiki Moshi contended that as at the date of his death, the deceased was married to Alice Magodo, the defendant herein with whom he begot three children. Further that he had been invited to Gataka to negotiate the Defendant's dowry, which was paid in 2007. He attended the negotiations with his father, brother and some of the Defendant's relatives. Therefore, that he recognized the Defendant as the deceased's wife. It was she who had called to inform him of the deceased's death upon his demise.

110. The testimony of the Defendant's brother DW4 Julius Shibayanga also shed light to the Defendant's marriage to the deceased. He narrated that sometime in 2007, the Defendant had informed their family that she had found a husband called Musa Magodo. Julius and his father Peter Siah embarked on a journey to Gataka, Kajiado on 19th March, 2007. This was in line with their traditions which dictate that the parents of a woman should go to the home of the one to whom she is to be married. They were served with food and thereafter engaged in dowry negotiations. They settled on 12 heads of cattle as dowry, the equivalent of a sum of Kshs. 120,000/=. The deceased paid the sum in two installments of Kshs. 110,000/= and Kshs. 10,000/= respectively. A copy of a "Dowry" agreement signed in this respect is on record. On the way home, they bought cattle at a place called Seremi and took them to their home at a place known as Danger. The deceased would later travel to their home where he was given a sheep to seal the agreement. From then on, the deceased and the Defendant lived together as husband and wife.

111. Julius produced in evidence a pamphlet the deceased had given him to show how his sister, the Defendant, had risen through the ranks in the Magodo Ministry to become a bishop. The Defendant was ordained as Bishop in 2002. He pointed out that at the time the Defendant began working at the church, she was not married to the deceased. Further that both the Defendant and the deceased are from the Bashirima clan, though they come from different sub clans. The Defendant's family belongs to the Bashirima Bamasingira sub-clan.

112. In her testimony as DW5, the Defendant narrated that the deceased proposed to her in the year 2006 but it was not until 2007 that she

agreed to marry him. She reiterated that her father Peter Siah and brother Julius visited the deceased thereafter in Gataka for dowry negotiations, and the deceased presented a sum of money equivalent of the 12 heads of cattle as agreed upon. The deceased then visited Defendant's home where he was given a sheep to seal the marriage. The marriage begot three children. At the time of her testimony, all three children were in police custody pending investigations on their parentage. She however maintained that the deceased was their biological father. Further that when she married the deceased she had no knowledge of whether the deceased's marriage to the Plaintiff had been dissolved.

113. The dowry agreement in question was however contested by the Plaintiff as evinced in the testimony of PW9 Anthony Simbiri who had worked as an employee in the deceased's church from 1997 until 2014. He averred that the job brought him in close proximity to the deceased and as such, he came to know the intricate details of both the deceased's family and church, including their financial status. Whenever the deceased wanted to purchase property, it was Anthony who would scout around and get quotations which the deceased would then consider in making his purchases.

114. Anthony affirmed that the deceased was diagnosed with a brain tumor for which he underwent two brain surgeries. His condition however worsened and he went blind. He contended that after the deceased went blind, it was he who would prepare documents for the deceased and thereafter guide him on where to append his signature. He stated that whereas he was not a document examiner, he knew that the signature on the dowry agreement presented by the Defendant was not that of the deceased. His claims were however not corroborated by any expert evidence.

115. On this, the Defendant testified that the signature on the agreement was that of the deceased, urging that the tumor only affected the deceased's vision and not his mental faculties. Further that even though the deceased had diminished vision at the time of signing the agreement, he could still see and read. Save for the dowry agreement, the additional documentation to show that Alice was married to the deceased was her I.D card acquired in 2009 to effect a change of name to include that of the deceased. At the time of Alice's marriage to the deceased, the deceased's youngest child was aged 15 years. On cross-examination, she stated that the youngest child may have been aged 10 years at the time. Further that it was she who helped the deceased raise the children, all of whom are educated up to the university level. All of the deceased's five daughters are now married.

116. In spite of the claims by the Plaintiff and her witnesses, I am persuaded that the Defendant's marriage to the deceased satisfied the elements of a Luhya customary marriage. To begin with, the deceased, having been previously married under customary law, a polygamous system of marriage, had the capacity to contract a subsequent customary marriage. The consent of the parties is evident by dint of their cohabitation and that of their respective families was evinced in the testimonies of the deceased's father and brother on one hand and the Defendant's father and brother on the other hand. On the aspect of payment of dowry, I am persuaded by the evidence led by the Defendant and her witnesses in this respect.

117. The signature of the deceased on the dowry agreement was called into question, and rightfully so, because the report dated 28th August, 2014 prepared by one Dr. C.K. Musau observed that the deceased was not able to read and had to rely on others. I observe that whereas Anthony Simbiri testified that the deceased was blind at the time the dowry agreement was signed, his claims were not anchored on any medical evidence as they should have been. In fact, none of the witnesses testified to corroborate his claims. A clinical summary dated 28th August, 2004 prepared by one Dr. Alfred Odhiambo does not state that the deceased was blind, only that he had progressive visual impairment. Dr. Musau had also in 2014 indicated that there was improvement in the deceased's left eye, but that the deceased's vision remained poor.

118. In any event, the prevailing circumstances are such that the common law doctrine of presumption of marriage between the deceased and the Defendant can be invoked by dint of their prolonged cohabitation. This presumption does not depend on the law or a system of marriage. It is simply an assumption based on very long cohabitation and repute that the parties are husband and wife. This was aptly stated in **Hortensiah Wanjiku Yawe vs. The Public Trustee, Civil Appeal No. 13 of 1996** (unreported).

119. Additionally, in **Joseis Wanjiru vs. Kabui Ndegwa Kabui & another [2014] eKLR**, the Court of Appeal (Visram, Koome & Odek, JJ.A.) opined thus:

The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except where by reason of a written law it is excluded. For instance, a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties, by a long cohabitation or other circumstances evinced an intention of living together as husband and wife.

120. In the instant case, it was evinced that the deceased and the Defendant lived together as husband and wife. The only basis for the opposition of their cohabitation being that the deceased was previously married under statute, a civil union which was monogamous in nature. Therefore, that the Defendant could only be but a mistress.

121. Based on my finding that the deceased's previous marriages were contracted under customary law, it therefore follows that he was not precluded from contracting a subsequent marriage under customary law. Additionally, no evidence was led to show that the Defendant lacked the capacity to enter into a customary marriage with the deceased. On a balance of probability, I am therefore convinced that there existed a customary marriage between the Defendant and the deceased, which can also be presumed by dint of their long cohabitation, which was uncontroverted by the evidence adduced. In fact, all the witnesses who testified affirmed this cohabitation.

122. I find refuge in the holding in **Beth Nyambura Kimani vs. Joyce Nyakinywa Kimani & 2 others [2006] eKLR** where the Court of Appeal (Bosire, Waki & Deverell, JJ.A.) observed thus:

“For it matters not whether statutory or customary marriage requirements are strictly proved in a marriage. The Court

must go further and consider whether, on the facts and circumstances available on record, the principle of presumption of marriage was applicable in the appellant's favour. Such was the situation facing the predecessor of this Court in Hortensiah Wanjiku Yaweh vs. Public Trustee, Civil Appeal No. 13 of 1976 where Mustafa J.A. in his leading judgment stated:

I agree with the trial Judge that the onus of proving that she was married to the deceased was on the appellant. But in assessing the evidence on the issue, the trial Judge omitted to take into consideration a very important factor. Long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant. Only cogent evidence to the contrary can rebut such a presumption, see re: Taplin – Watson v Tate (1973) 3 ALL ER 105...Such presumption carries considerable weight in the assessment of evidence. Once that factor is put into the balance in the appellant's favour, the scale must tilt in her direction.

...The presumption is nothing more than an assumption arising out of long cohabitation and general repute that the parties must be married irrespective of the nature of the marriage actually contracted. It may be shown that the parties are not married after all but then the burden is on the party to assert that there was no marriage. It is at this stage that the nature of the marriage becomes relevant and the incidents thereof examined.

The evidential burden of proof is not on the appellant, but on the respondents to show that the appellant was not the deceased's wife, or put another way, to rebut the presumption of marriage. This was stated in the Yahweh Case."

123. Whereas it was alluded that the deceased and the Plaintiff had divorced, no evidence was led in this respect. Not even in respect of her customary marriage. Eugene Cotran's book "**Restatement of African Law; The Law of Marriage and Divorce Volume 1**" at page 56 on the machinery for divorce in the Luhya community, states that if a man wishes to divorce his wife, he sends her back to her father, and if the woman wishes to divorce her husband, she runs away to her father and tells him of her wish. Eugene Cotran goes on to state that there is no right under Luhya customary law for a woman to be maintained by her husband in any way after divorce. None of the parties led evidence to show that the deceased had during his lifetime divorced any of his wives in one way or the other. Only that they had separated.

124. Having found that the deceased was polygamous, it is important to establish which of his wives enjoyed the closest legal proximity to him and to whom the deceased's remains ought to be released for burial. In SAN vs. GW (supra), the Court of Appeal observed thus:

"The third aspect of this dispute is that the law only recognizes the persons who are closest to the deceased to have the right to bury the deceased. Those persons have been identified as the spouse, children, parents and siblings, in that order.

The other consideration is that the person claiming the right to bury the deceased must be one who is demonstrated to have been close to him or her during his or her lifetime."

125. This was expounded by the Court of Appeal (Maraga, Gatembu & Murgor, JJ.A.) in Samuel Onindo Wambi vs. COO & Another, Kisumu Civil App. No. 13 of 2011 [2015] eKLR thus:

"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. ...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."

126. The evidence led by the respective parties demonstrates that the deceased and the Plaintiff were estranged in the year 2004, which was fifteen years prior to the deceased's demise. When the deceased fell ill, the Plaintiff did not visit him at home or in hospital despite having knowledge of his illness. Her testimony on cross-examination was that the last time she accompanied the deceased to hospital was in 2005. It was the Defendant who took care of the deceased through his illness in addition to taking care of all the children from the deceased's first and second marriages until they attained the age of maturity.

127. The evidence shows however, that it was the deceased who chased the Plaintiff away and upon her relocation to their Nakuru home, followed her and proceeded to evict her therefrom. PW8 Anthony Fundia Simbiri testified to this. He narrated that sometime in 2006, he was an accomplice in a scheme hatched by the deceased to rid himself of the Plaintiff by accusing her of fraud. That the deceased consequently evicted the Plaintiff out of his Nakuru home in 2006. This was the last time Anthony saw the Plaintiff.

128. On her part, Margaret Makungu testified that the deceased chased her away when he took her back to her parent's home and left her at her mother's shop. He never returned for her. On cross-examination Margaret stated that she had since moved on with life. She clarified that by moving on with life, she meant that she lived on her brother's land in Migori. She stated that the deceased had informed her of his illness and that she had once gone to visit him at the Nairobi Hospital but unfortunately did not find him. Margaret confirmed that she had not lived with the deceased since 1994 but asserted that their marriage was not dissolved as required by custom. It can nonetheless be stated that by taking Margaret back to her parent's home, the deceased intended to divorce her. This is especially so since it has not been demonstrated that the deceased made efforts to bring Margaret back to his home. It is therefore right to conclude that the deceased intended to divorce Margaret but did not in fact see this through.

129. The Defendant's testimony was that when the deceased took ill and was subsequently diagnosed with a brain tumor in 2004, the Plaintiff had already relocated to Nakuru. She travelled to Nakuru to inform her of the deceased's condition but the Plaintiff refused to return to Nairobi. It was the Defendant and one Sister Noel that would then take the deceased to hospital where he underwent an operation. After the operation, the deceased lived in Ngong' with a maid who tended to his needs while the Defendant lived in Karen with the deceased's children. The Defendant produced the deceased's medical records to chronicle his illness one of which was the clinical summary dated 28th August, 2004. This goes to show that it was the Defendant who walked with the deceased through what were likely the most difficult times

of his life even as he got frail and deteriorated in health.

130. Whereas it is my finding that the deceased had three wives, in my considered view, his body ought to be released to the Defendant for burial. It was she who lived with him through his illness and provided consortium in the last two decades of his life and walked with him till he breathed his last.

131. Despite the shortcomings of the marriages of the deceased to both Margaret and the Plaintiff, it is not lost on this court that Margaret is the biological mother of four (4) of the deceased's children whereas the Plaintiff is the mother of one of his children and who also raised the four children born of Margaret. Additionally, the deceased had himself seen it fit to inform Margaret of his illness, and the Defendant had, possibly with the blessing of the deceased, travelled to Nakuru to bring news of the deceased's illness to the Plaintiff. It is therefore evident that despite their separation and their not living with the deceased, the deceased still held a special place for both Margaret and the Plaintiff and wanted to keep them apprised of his health.

132. PW3 Knight Muhonja, the deceased's daughter, told the court that she and her siblings had not been allowed to participate in the burial arrangements because it was the church members who were handling all these issues. The deceased's mother Dimina also decried not being properly informed of her son's death or of the impending burial arrangements. She accused the Defendant of conspiring with people unknown to her to lock her out of her son's burial. She expressed her wish to participate in the burial preparations of the deceased and asked the court to so grant.

133. Evans Akalemba, his son, downplayed these claims, instead stating that after the deceased's death, he had called his sisters to the Karen home to make funeral arrangements. That they agreed to conduct family meetings and communicate via the WhatsApp Messaging platform and that his sister Rose was appointed secretary of the meetings. Neither his mother Margaret nor the Plaintiff were privy to these arrangements. His paternal grandmother Dimina also had no knowledge of the burial arrangements. He conceded that prior to this suit being filed, a date had been set for the deceased's burial and a grave dug to this effect, and urged that this had been agreed upon in the family Whatsapp group meeting.

134. According to Whiki Moshi, all of the deceased's children, his father and uncles were involved in the deceased's funeral arrangements. He however confirmed that his mother was not in attendance, urging that he did not know her and first saw her in court during these proceedings. He divulged that it was his grandmother who raised him. Additionally, neither of the deceased's former wives, Margaret and Gladys, were in attendance. He denied the claims that some of the deceased's relatives had been chased away from the Karen residence where the funeral arrangements were being made. He however admitted that his uncles were not consulted but attributed this omission to their ultimatum that they would not participate in the funeral arrangements unless the deceased was to be buried in Kitale.

135. On her part, the Defendant vehemently denied the allegations that she had sidelined the deceased's family from the burial plans stating that upon his demise, she had informed all his family members including his mother Dimina. Further that every member of the deceased's family was at liberty to view the body at Umash Funeral home where it was being preserved. She asked the court to release the deceased's body to her for burial urging that if so ordered, she would involve the entire family in the funeral arrangements.

136. What emerges is that there was a ploy to exempt some of the deceased's family members from the funeral arrangements despite claims to the contrary. However, during the conduct of the trial, it appeared that all the parties were in agreement that all of the deceased's family members should participate in his interment together with the members of the Bashirima clan and the deceased's church. I find guidance in **Article 45 of the Constitution** which is categorical that family is the natural and fundamental unit of society and the necessary basis for social order, and shall enjoy the recognition and protection of the State.

137. Evidence was led to the fact that when a member of the Bashirima clan dies, it is the clan that makes the funeral arrangements. The witnesses who testified took no issue with the involvement of the clan in the burial arrangements, only that their role should be restricted. It was urged that the deceased practically removed himself from custom, ascribed to Christianity, and consequently established a church of which he was the Archbishop at the date of his demise. Can it then be said that his burial should be conducted in a manner chosen solely by the clan? I think not, for to do so would violate his constitutionally enumerated rights. This is by dint of my finding that one can arrive at a conscious decision to take themselves out of the ambit of their tribal customary norms, and has the freedom to choose and ascribe to customs which are compatible with their conscience and protects their human dignity.

138. Throughout these proceedings, it appeared that all that the parties were seeking was to ensure that the deceased receives a dignified send-off. Accordingly, I find no reason why the deceased should not be interred in the presence of not only his wives and children, and the church which he founded and led as Arch-Bishop, but also his clan who constitute his extended family. Since the deceased's family is in agreement that everyone should participate in the deceased's interment, the order directing the Officer Commanding the nearest police station to ensure compliance of this order is not necessary.

d. Whether the orders for DNA extraction should issue.

139. Whereas this court is not sitting as a succession court, throughout these proceedings, the issue of paternity, though not relevant to the burial dispute, came to the fore. It is therefore more probable than not that the issue of paternity and DNA testing may arise in respect of probate and administration of the deceased's estate.

140. The Defendant in opposing the prayer for an order of DNA extraction argued that such an order would infringe upon the rights of the deceased's children who would be subjected to DNA testing. It should be noted however that the orders sought were not for DNA testing per se, but rather for extraction and preservation of the deceased's DNA samples before his interment for when, if ever, they are required at a future date. Additionally, such an order serves to ensure that once interred, the deceased's remains are not exhumed should it emerge that DNA testing against the deceased's DNA is necessary.

141. This court appreciates that from time immemorial, it has been the natural desire of most men that after their death, their bodies should

not only be decently and reverently interred, but should also remain in the grave undisturbed. (See - **Re Matheson (deceased) [1958] 1 All ER, 202** and **Hellen Cherono Kimurgor vs. Esther Jelagat Kosgei [2008] eKLR**).

142. This court also takes cognizance of the fact that this burial dispute has spanned a period of almost two years during which time the deceased’s remains lay at the Umash Funeral Home. PW5 in imploring the court to release the body for burial likened the continued preservation of the deceased’s body, and sadly so, to the carcass of a cow in the butchery. To disallow orders for DNA extraction only to have the deceased’s body exhumed at a later date, should the need arise, when it has not been shown that the extraction and preservation of the DNA samples will occasion any loss or inconvenience to the respective parties and the deceased’s family at large, will only occasion the deceased’s family added grief.

143. It is therefore my considered view that the orders of DNA extraction and preservation sought are not only merited but necessary in the circumstances of this case. This will ensure that once interred, the deceased’s body remains undisturbed and he can finally rest in peace.

e. Who should bear the cost of the suit.

144. From the narrative that unraveled in the conduct of these proceedings, it appears that the deceased is the author of all the misfortunes which gave rise to this burial dispute. There is no doubt that none of the parties hereto brought upon themselves the confusion that ensued after the deceased’s demise. In fact, it appears that all the Plaintiff sought to do was to set the record straight with respect to the deceased’s marital affairs and his resting place, and rightfully so. It did not help that the deceased’s marital affairs were not in order. It would therefore be unfair to burden either party with payment of costs for a fault not attributable to either of them.

145. It is trite that costs always follow the cause. In light of the circumstances of this case, I am inclined to find that the costs of this suit shall be borne by the Estate of the deceased.

Disposition

146. In the end, I direct as follows:

- a. The deceased’s body be and is hereby released to the Defendant for burial.
- b. The Defendant shall liaise with the deceased’s immediate family members to wit, his wives Margaret Makungu and Gladys Nekesa (the Plaintiff), his children and the deceased’s father and brother in making the funeral arrangements.
- c. Members of the deceased’s extended family, the deceased’s church and the Bashirima clan to which he belonged shall be at liberty to participate in the deceased’s funeral arrangements and interment, subject to the Government protocols on Covid-19.
- d. The deceased’s body shall be interred on his land in Gataka, Kajiado County where he built and established his home.
- e. The costs of the suit shall be borne by the Estate of the deceased.

It is so ordered.

DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 13TH DAY OF JULY, 2021.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Plaintiff/Applicant.

In the presence ofAdvocate for the Defendant/Respondent.