



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

MISCELLANEOUS CIVIL APPLICATION NO. 26 OF 2020

IN THE MATTER OF THE EXHUMATION OF THE BODY OF LILY TIMINA BUNYALI

LYDIA BUNYALI.....APPLICANT

-VERSUS-

MEDICAL OFFICER OF HEALTH TRANSNZOIA COUNTY.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

The Applicant moved this Court by way of Motion on Notice. The Application, which is dated **23rd November 2020**, seeks the following reliefs:

- 1. That the remains of LILY TIMINA BUNYALI be exhumed from its place of burial on land parcel L.R 2050/1(I.R 3700/01) in Trans Nzoia County and be immediately re-interred in front of her original matrimonial house on the same land parcel L.R 2050/1(I.R 3700/01) Trans Nzoia County next to the grave of her husband in accordance with Maragoli Customary Law.**
- 2. That the Officer Commanding Kitale Police Station be ordered to provide security and control undesirable persons or unnecessary crowds at the exhumation site, and at the homestead and re-burial site to ensure compliance with the ministry of health directive and protocol on Covid 19.**
- 3. Costs of the Application be provided for.**

The Application is supported by the grounds on the face of it and by an Affidavit in Support of **Lydia Bunyali** the Applicant herein. The Applicant contends that she is the biological daughter of Lily Timina Bunyali (deceased) who died of natural causes on the 9th day of June 2010.

She asserts that the deceased was wrongfully interred contrary to Maragoli customary law and burial rites in front of the former farm manager's house on **L.R 2050/1(I.R 3700/01)**. She further asserts that the intended exhumation and re-burial of the remains of the deceased in front of her matrimonial house next to the grave of her husband shall make it possible and easier to perform the required post burial Maragoli Customary ceremonies.

She avers that she is desirous of according the deceased a dignified burial according to the Maragoli customary law, to let her rest in front of her original matrimonial house beside her father who died on the 21st day of January 2018 and was buried in front of the original matrimonial house.

The Applicant further contends that the intended exhumation and reburial shall give full effect to the wishes of the deceased to peacefully rest in her rightful place beside her husband. She further contends that the custom of burial in front of the house of the deceased and beside their deceased spouse is a very special cultural practice according to customs of the Maragoli ethnic community and any departure from it is undesirable.

The Application is opposed. In their grounds of opposition, the 1st and 2nd Respondents contend that the application is fatally defective, incompetent, malapropism and untenable both in substance and form and contrary to the provisions under which it is brought thus proper for dismissal.

They contend that the application is devoid of any merit as the Applicant has failed to demonstrate *locus standi* to institute these proceedings. They further contend that the notice of motion application is an afterthought, non-starter, for failing to demonstrate that the deceased was a member of the Maragoli community and had subjected herself to the tenets of the Maragoli customary law. Further, it is averred that the Applicant failed to tender any evidence to show that the application was filed with the consent of the deceased's family and it is without basis as there is no evidence tendered to validate the Applicant's claim that the deceased was a member of the Maragoli community and had subjected herself to the customs of the tribe. It is urged that the application is misconceived, without merit and an abuse of the court process and should be dismissed.

Parties were directed to dispose of the Application by way of written submissions. The Court has considered the Application, the Supporting Affidavit and the grounds of opposition. The court has also considered the Applicant's submissions. The 1st and 2nd Respondents did not file any submissions.

The prayer is for exhumation of the remains of LILY TIMINA BUNYALI from its place of burial on land parcel L.R 2050/1(I.R 3700/01) in Trans Nzoia County and re-interment in front of her original matrimonial house on the same land parcel L.R 2050/1(I.R 3700/01) Trans Nzoia County next to the grave of her husband in accordance with Maragoli Customary Law.

From the material placed before this court, it can be discerned that the deceased passed away on 9th June, 2010 and was thereafter buried on **L.R No. 2050/1(I.R 3700/01)** in Trans Nzoia County. It is clear that the place of burial constitutes the main issue for determination in this matter. Before delving into the main issue for determination, this court must address itself on the subject of *locus standi*. The Respondents in their grounds of opposition have disputed the Applicant's capacity to institute these proceedings.

Section 146 of the **Public Health Act** provides *inter alia* as follows:

“(1) Subject to the provisions of section 147, it shall not be lawful to exhume any body or the remains of any body which may have been interred in any authorized cemetery or in any other cemetery, burial ground or other place without a permit granted in a manner hereinafter provided.

(2) Such permit shall be granted only to the legal personal representative or next of kin of the person buried, or to his or their duly authorized agent.”

(3) such permit shall be granted by the minister in respect of any body or the remains of any body interred in any cemetery or burial ground or any other place”

In determining the subject of *locus standi*, this court has perused the Applicant's application and the documents annexed thereto. The Applicant claims to be the deceased's biological daughter. She has however not any evidence to confirm her relationship with the deceased availed or authority to act as the legal representative of the deceased or next of kin. She has neither obtained any consent nor authorization from the other beneficiaries to swear the affidavit in support of the application. She had not annexed any proof that she has obtained letters of administration intestate to be the legal representative of her deceased mother.

This court therefore finds that it has not been demonstrated that the Applicant is a personal representative or a beneficiary and under what authority she has brought the application. It is therefore clear that the Applicant has failed to prove that she has the requisite *locus standi* to bring these proceedings. (**See Benard Ndungu Ngigi vs. Attorney General & Another (2019) eKLR**)

As regards the prayer to exhume the remains of LILY TIMINA BUNYALI from its place of burial on land parcel L.R 2050/1(I.R 3700/01) in Trans Nzoia County for interment on the same land parcel L.R 2050/1(I.R 3700/01) next to the grave of her husband in accordance with Maragoli Customary Law, the Respondents contend that the Applicant did not demonstrate that the deceased was a member of the Maragoli community and had subjected herself to the customs of that tribe.

Customary law has to be proved and the burden of proof is on the Applicant to persuade the court that the deceased was bound by the Maragoli customary law to entitle her to bury the deceased in accordance with the Maragoli customary burial rites.

To prove custom, by dint of **Section 51** of the **Evidence Act**, evidence of its existence must be called to provide the juridical and philosophical basis. That was the *ratio decidendi* in **Nyariba Nyankomba vs. Mary Bonareri Munge** [2010] eKLR where the High Court held that:

“Time and again, it has been stated that in cases resting purely on customary law it is absolutely necessary that experts versed in the customs be summoned to testify so as to assist the court reach a fair verdict since the court itself is not well versed in those customs and traditions”.

There is no codified statute and/or Act of Parliament to guide on burial disputes. Most of the disputes relating to burials in Kenya are decided based on case law and custom of the deceased as was held in **Virginia Edith Wambui Otieno –Vs- Joash Ochieng & Anor (1987) eKLR**. This position exemplified by **Section 3 (2)** of the **Judicature Act** which conferred upon the court discretion to apply customary law in considering burial disputes.

In Eliud Maina Mwangi vs. Margaret Wanjiru Gachangi [2013] eKLR the court considered with approval the decision of **Kimani vs. Gikanga [1965] EA 735** at page 739, where Duffus JA expressed himself as follows on proof of customary law;

“As a matter of necessity, the customary law must be accurately and definitely established. The court has a wide discretion

as to how this should be done but the onus to do so must be in the party who puts forward the customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view especially of the apparent lack in Kenya of authoritative textbooks on the subject, or of any relevant case law, this would in practice usually mean that the party propounding the customary law would have to call evidence to prove that customary law, as he would prove the relevant facts of his case.”

The Applicant’s evidence on the Maragoli customary burial rites is based on averments made in her supporting affidavit. This only amounts to allegations there being no evidence adduced as to the existence and conduct of the said custom. This does not mean that the affidavit evidence filed is not good or proper evidence. It is however not sufficient for the court to have a proper appreciation of the customs relating to the specific burial rites. There was need for expert evidence to be called to that effect, for the court to effectively interrogate the issues before it. Furthermore, as earlier held the Applicant failed to establish that she has the requisite locus standi to file the present suit.

In the premises, the Motion is found to be without merit. It is dismissed but with no orders as to costs.

DATED, at KITALE this 22nd day of September 2021.

L. KIMARU

JUDGE