REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 112 OF 2019

JOHN NDUVA WAMBUA.....1ST APPELLANT

SAMMY B. KING'OLA.....2ND APPELLANT

-VERSUS-

KIOKO MAKAYA.....RESPONDENT

(Being an Appeal from the ruling of the Principal Magistrate

Hon. A.W. Nyoike delivered on 19th August 2019 at the Chief Magistrate's Court at Machakos CMCC No. 422 of 2019)

BETWEEN

JOHN NDUVA WAMBUA.....1ST PLAINTIFF

SAMMY B. KING'OLA.....2ND PLAINTIFF

-VERSUS-

KIOKO MAKAYA.....DEFENDANT

JUDGEMENT

1. By a plaint dated 6th August, 2019, the Appellants herein instituted a suit against the Respondent herein in which they sought a permanent injunction against the Respondent from burying her mother, **Beatrice Nthenya Makaya** on the Appellants' ancestral land situated at Kamuthanga Village, Ngelani Location, Mutituni Subcounty, Machakos County.

2. According to the Appellant's. the 1st Appellant is the brother to the late **Wambua Kiema Ngwili** while the 2nd Appellant is the son of the said **Wambua Kiema Ngwili** who died on 10th December, 1985. The Respondent, on the other hand is the son of **Beatrice Nthenya Makaya**, the deceased herein who died on 1st August, 2019.

3. According to the Appellants the said deceased was once married to **Wambua Kiema Ngwili** under Kamba Customary marriage but the two separated in 1968 and the family of the deceased returned dowry to the family of **Wambua** hence the two became officially divorced according to the said customs. By the time of the said separation/divorce the two had no children.

4. It was pleaded that the deceased remarried to one **Makaya** with whom they lived together and started a family and gave birth to the Respondent herein. However, when the said **Wambua** passed away and after a long time, the deceased returned and tried to settle on the land belonging to the family of her ex-husband which family tried to evict her and her son, the Respondent amicably before the elders, clan and members of both families. Before a solution could be reached the deceased became sickly and succumbed on 1st August, 2019 and the Respondent commenced burial preparations for her burial on the said family land.

5. It was the Appellants' case that it was contrary to Kamba Customs to bury the deceased, a stranger, in their ancestral land, an unregistered

land belonging to the father of the 1st appellant.

6. Together with the plaint, the appellants filed an application dated 6th August, 2019, seeking to restrain the Respondent from burying the deceased on t said parcel of land pending the hearing of the suit. Apart from reiterating the contents of the plaint, the Appellants averred that it is not allowed in Kamba customs to bury divorcees and ex-wives on ex-husbands ancestral land as to do so is a taboo.

7. In opposing the application, the Respondent denied the averments made by the Appellants. According to the Respondent, the land in question does not belong to the Appellants but is an ancestral land belonging to his deceased grandfather. He denied that the deceased had divorced or separated from the said **Wambua**, his father and further denied that the deceased remarried to one **Makaya**. It was his deposition that the Appellants have tried to evict him for no valid reason but have been restrained by the Government.

8. According to the Respondent, his late father had two wives, **Grace Kalekye**, the 1st wife and the 1st Appellant's mother and the deceased, his mother who also had three daughters. He further deposed that his father had constructed a home for each wife and he was living with his mother, the deceased hence is a beneficiary to the estate of his late grandfather since the land in dispute is an ancestral land. Accordingly, he has the right to bury the deceased at her home where he buried his son.

9. In her ruling the learned trial magistrate found that the subject land was in the name of **Wambua Kiema** who died in 1985 but whereupon the deceased had a home and resided together with her son, the Respondent. According to the learned trial magistrate, it had not been shown that the Respondent is not a son of the said **Wambua Kiema**. She failed to understand why no effort was made to evict the deceased and no report was made to the police. She further found that there was no evidence that the deceased was divorced or had remarried. She proceeded to dismiss the application on those grounds.

10. In their submissions, the Appellants, quite inappropriately attempted to adduce evidence by the backdoor. They referred to the Court of Appeal decision in Civil Appeal No. 323 of 2017 at Nairobi between **Thomas Mumo Maingey & Others –vs- Sarah Nyiva Hulman & Others** and **American Cyanamid Co. (No.1) vs Ethicon Ltd 91975) UKHL1.**

11. It was therefore submitted that the trial court erred in denying to grant the temporary injunction orders at this stage. By so doing, it exposed the appellants to irreparable damages which cannot be replaced by money. By allowing the body to be buried, it rendered the whole case useless.

12. According to the Appellants, the issues of burial is about culture, customs, taboos and rights which go deep to the hearts of Kamba people. Once they are violated, there is no adequate remedy, especially by damages. It is a taboo and to cure it, it will cause a lot of hassle and rites to appease the ancestors. The appellants contended that all that the trial court needed to do was to allow the application by granting the said temporary orders. On the issue of balance of convenience, the court should have ordered the appellants to cater for mortuary fee. It is not a taboo in Kamba or any African culture to keep a body in the morgue for an extended period. But it is such a great deal to bury someone where they are not supposed to be buried. This is what the balance of convenience entails who will suffer greater harm if orders are granted or denied.

13. In this case, the trial court's ground for denying the orders were that the applicants had not proved that there was a divorce. This can only be proved during the trial stage. All what the court required to do was to consider the 3 elements found in the ***Giella –vs- Cassman Brown Case***. It did not. It did not even say that the case had no chance of success.

14. It was further submitted that the trial court denied to grant the orders of temporary injunction on the ground that the appellants had not proved that there was a divorce between **Beatrice Nthenya Makaya** and **Wambua Kiema,** yet the trial court has no business to go to evidence and merit at this stage. Secondly, even if the court was to use that evidence to weigh on the chances of success, the court erred in failing in analysing the evidence properly. The issue of return of a goat as a symbol of divorce was raised and proved but the court did not consider it in its ruling.

15. In opposing the appeal, it was submitted on behalf of the Respondent that the Learned Trial Magistrate exercised her discretion properly and her decision to decline the application for injunction was based on findings and facts which were not contested. First of all, the parcel of land in question Mitaboni/Ngelani/870 is registered in the name of **Wambua Kiema** who is deceased. It is not contested that the deceased is a wife to the said **Wambua Kiema** and the deceased Beatrice had a home on the parcel where she resided with the Defendant her son during the life time of the deceased the deceased had resided on the land for more than 30 years. From the date of the demise of her husband she remained on the land until her demise and apart from constructing her matrimonial home on the land she even used to cultivate on the land and had planted trees which are mature. The court had made an order to visit the home but the appellants admitted all the aforementioned facts. During the hearing of the application the appellant did not prove and or establish prima facie case. In an interlocutory injunction application, the Appellants had to establish his case only at a prima facie level, demonstrate irreparable injury if a temporary injunction is not granted and allay any doubts as to (b) by showing that the balance of convenience is in his favour. However, the appellant did not establish the same and therefore the trial court exercised its discretion in rejecting the injunction correctly.

16. It was submitted that such discretion cannot be interfered with by the Appellate court unless it is shown that the discretion was clearly wrong because the trial court misdirected herself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in so doing arrived at a wrong decision the appellant has not demonstrated the aforesaid and therefore the discretion of the court of declining the injunction ought not be interfered with.

17. It was submitted that even if the appellant had established a prima facie case which they failed to do as they never even submitted on the same that alone is not sufficient basis to grant an interlocutory injunction. The appellants were also supposed to satisfy the court that the injury they will suffer in the event the injunction is not granted will be irreparable this also the appellants did not submit on it or satisfy the trial court as required and therefore the application was rejected correctly. In other words the appellants did not even satisfy the court that if damages recoverable in law is an adequate remedy the respondent is capable of paying no interlocutory order of injunction should normally

be granted.

18. It was submitted that the second factor the applicant ought to prove and establish was that they might otherwise suffer irreparable injury which cannot be adequately remedied by damage in the absence of an injunction. The threshold requirement and the burden is on the Appellant to demonstrate prima facie the nature and extent of the injury as speculative injury will not do this the appellant also failed and therefore the trial magistrate did not error in rejecting the application. There must be more than an unfounded fear or apprehension on the part of the applicant.

19. According to the Respondent, the equitable remedy of temporary injunction is issued solely to prevent abuse and irreparable injury that injury is actual, substantial and demonstrable injury that cannot be compensated by an award of damages the appellant did not also demonstrate the above and therefore the Learned Magistrate did not err. The appellant did not demonstrate that the injury was irreparable such that there is no standard by which that amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation of whatever amount will never be adequate remedy.

20. According to the Respondent, the trial court arrived at the conclusion after forming the view borne out by the documents placed before her. In support of his submissions, the Respondent relied on the case of **Said Almed vs. Mannasseh Benga & Another [2019] eKLR.**

21. It was submitted that it is not disputed that the late Beatrice is the wife of the registered owner of the parcel one **Wambua Kiema** and also it is not in dispute that the late Beatrice has a home on that parcel where she has been residing with the Defendant. The appellants admitted the above facts and they made the court not to visit the home after their admission. There is no evidence of the allegations the appellants are basing their case on that the late **Beatrice** had divorced and remarried, and the court could not rely on allegations without evidence. According to the Respondent, there was nothing that prevented the Plaintiffs who are children of the first wife of the late **Wambua Kiema** from requesting the deceased to relocate during his lifetime and the suit and the application are an afterthought and the Honourable Court did not error in rejecting the application for injunction.

22. It was submitted that the deceased had a beneficial interest on the land since no succession has been determined in the estate of **Wambua Kiema**. It was further submitted that the said **Wambua Kiema** is holding the land in trust then it follows since the late Beatrice was his wife then the said land is also being held in trust for the Defendant as well as they are the children of second wife of **Wambua Kiema** and the Plaintiffs who are beneficiaries like the Defendant are not entitled to exclude the children of the late Beatrice from the use of the portions of the land they have occupied and have been using.

23. In support of his submissions, the Respondent relied on the case of **Jerusa Basweti Ogeisia –vs- Jeniffer Nyamoita Achoki & Another (2018) eKLR** where the court held that:

> **"In the instant suit, I am not called upon to determine land rights respecting the plaintiff's family members. Such a time would arise if the suit related to succession and/or if any of the parties had sued claiming an interest and/or right of entitlement over the land to the exclusion of some other person…In the present case, Samson Achoki (deceased) was married and had a house on land parcel 323 in which he had resided with his wife, the 1st Defendant for over 35 years. It would, in my view, be a travesty of justice to require that he be relocated in his death from his parents' land where he had established a home and had resided all his life. Through the Plaintiff is the registered owner of land parcel 323 as well as land parcel 970, it is my finding that the deceased had a beneficial interest in land parcel 323 and a right of use over land parcel 970. The Plaintiff has no basis to demand that the deceased be buried on land parcel 970 while all along the deceased had resided on land parcel 323 where he had established his home. The Plaintiff holds the two parcels of land in trust for herself and her children and is not entitled to exclude the children from the use of the portions of land they have occupied and have been using…Having held and found that the deceased had a beneficial interest over parcel 323,...For the avoidance of doubt, by determining the burial place of the deceased, I have not determined any ownership rights respecting the parcels of land 323 and 970 presently registered in the plaintiff's name. That would have to await appropriate proceedings in that regard in another forum...This suit involves one family. Indeed the mother and her children. The suit no doubt was brought in an attempt to settle what otherwise is a lingering succession/ownership dispute where the mother sought to settle the ownership and/or distribution of land through a burial dispute. Ownership of land/or distribution of land cannot be done in the guise of a burial dispute. The considerations are totally different in determining ownership of land and determining a burial site. In this case, I have determined the burial site for the deceased which necessarily does not confer any ownership rights over the subject parcel of land. See page 9-10 from paragraph 30 of the Respondents Bundle of authorities."**

24. According to the Respondent, the appellant having failed to prove the requirements of injunction the trial court did not error in dismissing the application the court did not error as well finding that the defendant is also entitled and has a beneficial interest and no prima facie case has been established.

25. It was submitted that the learned magistrate in her ruling appreciated that section 3 (2) of the judicature act is the guiding factor where customary law is applicable in matter of burial dispute as there is no statute based on section 3(2) of the ***Judicature Act***. According to the Respondent, the trial magistrate did not error as in burial dispute the question of disposal of material assets and related claims and things are no factors for consideration in burial dispute. The issue for consideration in a burial dispute is whether the deceased is to be buried at her home or not and who is entitled or not to the subject land is not a factor for consideration. This submission was based on the case of **Jacinta Nduku Masai vs. Leonida Mueni Mutua & 4 Others [2018] eKLR.**

26. It was therefore submitted that the learned trial magistrate was not entitled to determine the land rights entitled to either party as alleged and therefore she did not error.

27. According to the Respondent, a look at the ruling and proceedings reveals the trial court considered the application and all the affidavits that were availed. Further there was no written submission by the appellant as alleged the application proceeded through oral submissions and were considered.

28. It was therefore the Respondent's view that the appellant having failed to satisfy and submit on the requirements of injunction this appeal has no merit should be dismissed with costs.

Determination

29. I have considered the issues raised in this appeal. This being an interlocutory appeal, care must be taken to obviate expressing a conclusive view of the matter as the appellants' suit is still pending before the Magistrate's Court. The practice is and has always been that at interlocutory stage the court may only express its views in the matters in controversy on a *prima facie* basis. Otherwise a concluded view is likely to tie the hands of the Magistrate who would eventually hear the case, and is likely to embarrass him. See **Mansur Said & Others vs. Najma Surur Rizik Surur Civil Appeal No. 186 of 2005** and **Niazons (K) Limited vs. China Road & Bridge Corporation (Kenya) Civil Appeal No. 157 of 2000 [2001] KLR 12; [2001] 2 EA 502.**

30. That is my understanding of the holding in the case of **Said Almed vs. Mannasseh Benga & Another [2019] eKLR** where the court of appeal held that:

> **"As appreciated by the parties, this is an interlocutory appeal, and so, like the trial court, this Court cannot make conclusive finding of fact as that would prejudice the proceedings in the main trial which is still pending. Our task is to determine whether the trial court properly exercised its discretion in granting the order for a temporary injunction. It is common ground that such discretion cannot be interfered with lightly by an appellate court unless it is shown that the discretion was clearly wrong because the judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. Those principles were stated in the ageless case of Mbogo & Another vs Shah (1968) EA 93. In the subsequent case of United India Insurance Co. Ltd & 2 Others vs East African Underwritters (Kenya) Ltd (1985) KLR 898 Madan, JA stated thus:**
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> **"The Court of Appeal is only entitled to interefere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."**

The locus classicus case for consideration of injunction is the Giella case (supra). The principles set therein were re-examined and restated by this Court in Nguruman Limited vs jan Bonde Nielsen & 2 Other [2014]eKLR as follows:

> **"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;**
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> **(a) Establish his case only at a prima facie level,**
>
> **(b) Demonstrate irreparable injury if a temporary injunction is not granted, and**
>
> **(c) Allay any doubts as to (b) by showing that the balance of convenience is in his favour.**
>
> **These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd vs Afraha Education Society (2001) Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at the stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between…It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the questions of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted…On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never the adequate remedy."**

….We are in no doubt that the trial court was aware of those principles and indeed expressly referred to them in the Giella case. The court found that a prima facie case with a probability of success had been established. A prima facie

> **"…is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter….[it] is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."**

See Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others (2003) KLR 125 at pages 137 and 138.

This Court, in the Nguruman case (supra) further expounded on the same issue thus:-

> **"We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."**

The trial court arrived that conclusion principally after forming the view, borne out by the documents placed before it, that the …. we would say with this court in the case of Paul Tirimba Machogu vs Rachel Moraa Mochama [2015]eKLR, that:

> **"..the learned judge properly appreciated the gravity of the matter before him and directed his mind to the conditions for the grant of both a temporary prohibitory and a temporary mandatory injunctions and came to the conclusion, in our view, properly that the respondent deserved both orders at the interlocutory stage. Issues of which of the titles claimed by either party was superior; unstamped or unregistered documents and unsubstantiated or unproved allegations could not be conclusively determined at the interlocutory stage on contested affidavit evidence. The learned Judge of the lower court may have expressed himself strongly in some of his findings but the fact remains that those findings were only prima facie findings which will not bind the trial Judge. The learned Judge was considering an interlocutory application at the nascent stage of the suit long before the opportunity to emend was closed, directions taken or discovery given."**

…It is also strongly argued that damages were a sufficiently remedy even if a prima facie case was found to exist. The underlying principles require that the issue of damages be examined where a prima facie case with a probability of success is established. It is, of course, not in every case that damages would be an adequate remedy. Irreparable injury, that is 'where there is no standard by which the amount can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation, of whatever amount, will never be adequate remedy'- is exempted. So too, "where, going by the material placed before it at an inter-parte hearing of an application for injunction, it appears to the court that the plaintiff has a strong case, like where it is clear that the defendant's act complained of is or may very well be unlawful, the issue of whether or not damages can be an adequate remedy for the plaintiff does not fall for consideration. A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it. Support for this view is to be found in the Court of Appeal decision in the case of Aikman vs Muchoki (1984) KLR 353.' See the case of Joseph Mbugua Gichanga vs Co-operative of Kenya Ltd (2005)eKLR per Maraga, J.

….All in all, we have formed the view that there was no misdirection of fact or law and that on the basis of the material placed before it, the trial court exercised its discretion in a judicious manner. We are unable to say that the decision was plainly wrong. See page 4-5 of the Respondents Bundle of authorities."

31. This appeal arises from a decision made on an application for interlocutory injunction. It is therefore important to revisit the principles guiding the grant of such relief in order to determine whether the learned trial magistrate did consider the same.

32. The principles guiding the grant of interlocutory injunctions are now well settled. Those principles were set out in **East African Industries vs. Trufoods [1972] EA 420** and **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358. In Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR** the Court restated the law as follows:

> **"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;**
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> **(a) establish his case only at a *prima facie* level,**
>
> **(b) demonstrate irreparable injury if a temporary injunction is not granted, and**
>
> **(c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.**

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit "*leap-frogging*" by the applicant to injunction directly without crossing the other hurdles in between.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted."

33. While reiterating the said principles, **Ringera, J** (as he then was) in **Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani) HCCC No. 1234 of 2002** stated that in an interlocutory application the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application for injunction although the Court cannot find conclusively who is to be believed or not, the Court is not excluded from expressing a *prima facie* view of the matter and the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true, for example, when he denies being served with the statutory notices and considering the already exposed untruth of the applicant with regard to service of statutory notices one is not inspired to have much confidence in the truth of her deposition that she did not appear before an advocate to execute the charge and have the effects of the pertinent provisions of law explained to her.

34. It was therefore held by **Ringera, J** (as he then was) in **Dr. Simon Waiharo Chege vs. Paramount Bank of Kenya Ltd. Nairobi (Milimani) HCCC No. 360 of 2001**:

> "The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show he has a prima facie case with a probability of success at the trial. If the Court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the Courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as appertains to the subject matter of the suit does not meet the approval of the eye of equity."

35. It was therefore held in **Esso Kenya Limited. vs. Mark Makwata Okiya Civil Appeal No. 69 of 1991** by the Court of Appeal stated as follows:

> "The principles underlining the granting or refusal of injunction are well settled in several decisions of the court. Where an injunction is granted, it will preserve or maintain the status quo of the subject matter pending the determination of the main issue before the court. The merits or demerits of granting injunction orders deserve greater consideration. The court should avoid granting orders which have not been asked for in the application before it or determine issues in the suit before the actual hearing. In cases where an award of damages could be adequate compensation, an injunction should not be granted. On an application for an injunction in aid of a plaintiff's alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course...The court ought to look at the allegations in the affidavits by the plaintiff and the defendant and weigh them whether there is a possibility of the plaintiff succeeding or whether there is a possibility of quantifying damages. Only in cases of doubt court will proceed on the basis of the balance of convenience while being aware that formal evidence will be adduced at the hearing...The principle underlying injunctions is that the status quo should be maintained so that if at the hearing the applicant obtains judgement in his favour the respondent will have been prevented in the meantime from dealing with the property in such a way as to make the judgement nugatory…As it is settled law that where the remedy sought can be compensated by an award of damages then the equitable relief of injunction is not available."

36. Therefore, though at an interlocutory stage the Court is not required and indeed forbidden to purport to decide with finality the various relevant "facts" urged by the parties, the remedy being an equitable one, the Court will decline to exercise its discretion if the supplicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity. Injunction being an equitable remedy, the court is enjoined to look at the conduct of the supplicant for the injunctive orders, the surrounding circumstances whether the orders sought are likely to affect the interests of non-parties to the suit, the issue whether an undertaking as to damages has been given as well as the conduct of the Respondent whether or not he has acted with impunity. The Court is also, by virtue of section 1A(2) of the ***Civil Procedure Act***, enjoined to give effect to the overriding objective as provided under section 1A(1) of the said Act in exercising the powers conferred upon it under the ***Civil Procedure Act*** or in the interpretation of any of its provisions. One of the aims of the said objective as interpreted by the Court of Appeal is the need to ensure equality of arms, the principle of proportionality and the need to treat all the parties coming to court on equal footing.

37. What then constitutes prima facie case? In the case of **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125,** the Court of Appeal held as follows:

> "The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience...A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms "prima facie" case, and "genuine and arguable" case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words "prima facie" are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in

the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant's interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two...In civil cases a prima facie case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

38. While adopting the same position the Court of Appeal in **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR** added that:

> **"The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The applicant need not establish title it is enough if he can show that he has a fair and *bona fide* question to raise as to the existence of the right which he alleges. The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."**

39. In this case, the learned trial magistrate's decision as set out at the beginning of this judgement was that the subject land was in the name of **Wambua Kiema** who died in 1985 but whereupon the deceased had a home and resided together with her son, the Respondent. According to the learned trial magistrate, it had not been shown that the Respondent is not a son of the said **Wambua Kiema**. That was clearly an error since at that stage the determination whether the Respondent was the son of **Wambua Kiema** could not have been finally determined based on the conflicting affidavit evidence. The Appellants claimed that the Respondent was the son of one **Makaya** whom the deceased got married to after she left **Wambua Kiema**. In his replying affidavit the Respondent confirmed that his name is **Kioko Makaya**. The Court further failed to understand why no effort was made to evict the deceased and no report was made to the police. It was however contended by the Appellants that while the process of amicable eviction of the deceased was ongoing, the deceased fell sick and succumbed. She further found that there was no evidence that the deceased was divorced or had remarried. Again these were not issues that could be conclusively determined based on the state of pleadings as they were before the learned trial magistrate.

40. With due respect the learned trial magistrate seems to have approached the application as if she was determining the main case. She prematurely arrived at determinations which could only have been made after the hearing of the main suit. In so doing she fell into error by applying a standard that was not applicable at that stage of the proceedings.

41. This court has the power under section 78(1) of the ***Civil Procedure Act*** to determine a case finally. I have considered the case that was placed before the learned trial magistrate. It was contended that under the Kamba Customary Law, the deceased had divorced from the said **Wambua** and had in fact remarried. She could not therefore be buried in the land belonging to **Wambua's** family as that would have been a taboo. That in my view constituted a *prima facie* case for the purposes of an injunction. Whereas, the mere fact that one has been buried does not bar the said body being exhumed, it is my view that this is a matter which ought to be determined on the balance of convenience. It is my view that considering untidiness of the process of exhumation, it is more convenient that the body of the deceased remain where it is so that once a determination is made as to her correct place on internment, she will not be disturbed and will peacefully rest. As was held by the Court of Appeal in **James Apeli & Enoka Olasi vs. Priscilla Buluku Civil Appeal No. 12 of 1979 [1985] KLR 777:**

> **"The primary function of the court is to keep faith with the dead. When a man nears his end and contemplates Christian burial, he may reasonably hope that his remains will be undisturbed, and the court should ensure that, if reasonably possible, this assumed wish will be respected. In all these cases the court must and will have regard to the supposed wishes of the deceased. These are supposed wishes because it can rarely, if ever, happen that circumstances giving rise to the application can have been contemplated, still less discussed, in the lifetime of the deceased…The powers to order exhumation of a body are contained in section 146 of the Public Health Act (Cap 242) and sections 388(3) and 387(2) of the Criminal Procedure Code. Apart from those cases no dead body wherever interred in Kenya can be exhumed without permit granted by the Minister for the time being responsible for matters relating to health. Therefore the learned Judge had jurisdiction, but his order should have been made conditional upon the grant of the essential permit but that is a matter, which can be corrected in the order made in the present appeal. The discretion to order the removal of the remains from one place to another is not general or absolute but must be subject to the Minister granting a permit. To give effect to this it is ordered that the decree be amended by adding at the end thereof the words 'conditional upon a permit to this effect being granted by the Minister under section 146 of the Public Health Act'."**

42. In **Ougo & Another vs. Otieno [1987] KLR 364,** the Court of Appeal held that:

> **"Given the nature of the case, it can hardly be said that justice can be done without hearing both sides. Actually there are very few cases where justice can be done without hearing both parties."**

43. It is therefore my view and I hold that had the learned trial magistrate applied the correct principles to the matter before her, she would have found that the Appellants had satisfied the principles guiding the grant of interlocutory injunction. The learned trial magistrate ought to have been guided by the holding in the case of **American Cyanamid Co. (No.1) vs Ethicon Ltd 91975) UKHL1** where **Lord Diplock** held that:

> **"it is not part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed agreement and mature considerations. These are matters to be dealt with at the trial."**

44. Accordingly, this appeal succeeds, the ruling made on 19th August, 2019 in Machakos CMCC No. 422 of 2019 is hereby set aside. In its place is substituted, an order of injunction restraining the Defendant/Respondent by himself, his agents, servants or any persons acting on their behalf from burying one **Beatrice Nthenya** on the disputed parcel of land being land parcel no. Mitaboni/Ngelani/870 registered in the name of **Wambua Kiema** situated at Kamuthanga Village, Ngelani Location, Mutituni Subcounty in Machakos County pending the hearing and determination of the main suit. The said suit is to be heard and determined on a priority basis in the usual manner.

45. Considering the relationship between the parties herein, there will be no order as to costs of this appeal. In other words, each party will bear own costs.

46. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 9th day of September, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Mr Mwendwa for the Appellants

Mr Mutinda Kimeu for the Respondent

CA Geoffrey