



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 11 OF 2020

AGNES NTHAMBI KASYOKA.....1ST PLAINTIFF

EVERLYN MWENDE KIAMBA.....2ND PLAINTIFF

BRIAN MUTINDA KIAMBA.....3RD PLAINTIFF

JULIET MUMBUA KIAMBA.....4TH PLAINTIFF

VERSUS

NAOMI MUMBUA MULI.....1ST DEFENDANT

WINROSE NDINDA KIAMBA.....2ND DEFENDANT

JUDGMENT

1. In the Plaint dated 7th February, 2020, the Plaintiffs averred that the 1st Plaintiff is the first wife of the late David Kiamba Muli (*deceased*); that the 1st Defendant is the biological mother of the deceased and that the 2nd Defendant is the second wife of the deceased.
2. The Plaintiffs averred that the deceased died while undergoing treatment at Nairobi Women's Hospital, Nairobi; that before being admitted to hospital, the deceased was living with the 1st Plaintiff and their children on plot number 1498, Myanyani village, Kangonde Location, Masinga Sub-County; that the two families have been united all along and that the deceased used to live in any of the homes during his lifetime.
3. The Plaintiffs further averred in the Plaint that the 1st Defendant lives on a piece of land at Kathangathini, Yatta Sub-County, while the 2nd Defendant lives in Munina Estate, Matuu Town and that under Kamba Customary Law, the deceased ought to be buried on the land where the deceased and the 1st Plaintiff had constructed their matrimonial house.
4. The Plaintiff's averred that the Defendants have colluded and sidelined the Plaintiffs; that they have decided to bury the deceased on Plot No.1125 located in Matuu Town where the deceased had constructed residential houses and leased the same to tenants and that as the first family, the Plaintiffs have the sole right to bury the deceased on plot number 1498, Myanyani village, Kangonde Location.
5. The Plaintiffs have sought for an order directing them to collect the body of the deceased from Yatta Funeral Home and inter it on Plot No. 1498 and for the Defendants to cater for the mortuary charges and the costs of the suit.
6. In their Defence, the Defendants averred that the deceased had all along been living on property known as Machakos/Matuu/1125 which is outside Matuu Town or Municipality with the 2nd Defendant as man and wife since July 2011; that the deceased formalized his marriage with the 2nd Defendant on 14th December, 2016 under the Kamba Customary Law and that the deceased established his matrimonial home on plot number Machakos/Matuu/1125 (*the Matuu property*).
7. The Defendants averred in their Defence that the Plaintiffs do not reside on Plot number 1498 as alleged; that the 1st Plaintiff resides on the property where she has built a school in Kangonde Kitangani; that the 2nd Plaintiff is married and lives with her husband in Matuu town where the deceased acquired a plot and developed it; that the 3rd Plaintiff resides with his wife at Ruiru in Nairobi and that the 4th Plaintiff is a student at Kenyatta University.
8. According to the 2nd Defendant, the deceased confided in her that he had disagreed with the 1st Plaintiff since 1990 and that the deceased had irreconcilable differences with the 1st Plaintiff which are evidenced by the pending Divorce case initiated by the deceased against the 1st

Plaintiff being Kithimani Divorce Case No. 8 of 2016.

9. The Defendants averred that both families of the deceased had agreed on the funeral arrangements and the burial site, which is the Matuu property; that at no point in his lifetime did the deceased indicate that he wished to be buried on plot number 1498 and that in any event, the deceased never lived with the Plaintiffs since the year 2012 as evidenced by the Divorce Petition.

10. The Defendants finally averred that the deceased demolished his house that he had built on Plot No.1498; that no one lives on the said property except the grounds man; that the deceased was clear during his lifetime that he wished to be buried in the Matuu property and that on 5th February, 2020, all the family members, including the Plaintiffs, had agreed that the deceased will be buried on plot number 1125, the Matuu property.

The Plaintiffs' case:

11. The 1st Plaintiff, PW1, informed the court that she is a Principal of a High School and a teacher by profession; that she was married to the late deceased in 1987 under the Kamba customary law and that after living with her parents in law shortly, they purchased land in 1988 and that the said land is known as Masinga/Kangonde/1498 (*Plot 1498*).

12. According to PW1, she lived well with the deceased on Plot No.1498 until the year 2016 when the deceased married the 2nd wife, who is the 2nd Defendant; that the deceased started living with the 2nd Defendant on a plot which they bought together, being a portion of Plot No.1125 (*the Matuu Plot*) and that the said Matuu property is a small portion of plot number 1125.

13. The evidence of PW1 was that the owner of parcel number 1125 died before transferring the portion they had bought to the deceased; that plot number 1125 had residential houses which the deceased has rented to tenants and that the 2nd Defendant is residing on the ground floor of the same house, while the rest of the rooms are occupied by tenants. PW1 stated that the entire family had agreed that the deceased be buried on Plot No. 1498 where his matrimonial is and that it is the Defendants who later on decided that he should be buried on the Matuu property.

14. PW1 denied that she had separated with the deceased. According to PW1, she only differed with the deceased when the deceased started living with the 2nd Defendant while she lived on Plot No.1498; that when she went to see the deceased on 22nd December, 2019, the deceased told her that he wished to be buried on Plot No. 1498 when he dies and that the deceased should be buried in a place where his children and grandchildren can visit his grave and not in Matuu Town.

15. On cross-examination, PW1 stated that she lives in her house situated in Plot No.1498; that there are two houses on the land; that one of the houses has a kitchen together with a room for the worker and that there is a bigger house which serves as the master house.

16. PW1 informed the court that she owns a school in Kangonde; that she has a house in the same compound where the school is situated; that she sleeps in the said house while on her supervision duties and that the 2nd Plaintiff is her daughter. According to PW1, the 2nd Plaintiff lives on a plot in Matuu which she (PW1) owns and that the plot is in her name.

17. PW 1 stated that the 3rd Plaintiff is her son; that he is not married and that although he lives in Nairobi, she also lives with him on Plot No. 1498. It was the evidence of PW1 that she has five children with the deceased and that the last time they were with the deceased on Plot No. 1498 was in March, 2019.

18. On the issue of the pending Divorce case, PW1 admitted that she had filed a Cross-Petition in which she accused the deceased of cruelty, adultery and desertion; that the deceased had sired many children outside the wedlock and that the Divorce case was never heard. According to the 1st Plaintiff, the funeral committee agreed to bury the deceased on Plot No. 1498 and that her daughter, the 2nd Plaintiff, was the Treasurer of the said committee.

19. PW1 stated that the burial of the deceased was slated for 7th February, 2020 and that she only learnt on the previous day that the burial site had been changed from Plot No. 1498 to Plot No. 1125 (*Matuu*) by the Defendants. PW1 stated that her daughter, the 2nd Plaintiff, handed to 2nd Defendant the Kshs. 45,000 that she had collected and that in addition, she (PW1) personally contributed Kshs. 20,000 towards the burial. PW1 informed the court that she lives on plot number 1498 with her children and that she only goes to the house where she has built a school while visiting.

20. The 1st Plaintiff's daughter, PW2, informed the court that she is a Secondary school teacher; that the deceased is her father and that she lives on plot number 1498. According to PW2, plot number 1498 has two houses, a kitchen, a chicken coop (*house*), the main house, a well, a shallow dam, a fence and a gate.

21. It was the evidence of PW2 that the house in Matuu (plot 1125) was constructed by her late father when she was still in High School; that they used to stay in the said house as a family and the house stands on a plot that was purchased by her mother and late father. According to PW2, the title to plot number 1125 has never been issued and that the owner of the said plot died before the titles could be issued to several purchasers.

22. PW2 informed the court that she was the Treasurer of the funeral committee in respect of her late father; that she gave to the 2nd Defendant, who is her late father's second wife, all the money that she had collected and that it was agreed by the funeral committee that the deceased will be buried on plot number 1498. It was the evidence of PW2 that although the funeral committee used to meet at the Matuu plot, some of the meetings in regard to the funeral took place on Plot No. 1498.

23. PW2 stated that she cohabits with a man, who is not her husband, in Matuu town; that she lives with the said man on a plot in Matuu town belonging to her mother and that other than the house in Matuu town, she also lives on Plot No. 1498. It was the evidence of PW2 that although the funeral committee had agreed to bury the deceased on plot number 1498 on 5th February, 2020, she only realized on 7th February, 2020 that the Defendants had done a grave on the Matuu property for the purpose of burying the deceased.

24. The 3rd Plaintiff, PW3, is the son of the 1st Plaintiff. PW3 informed the court that he lives on plot number 1498 and also in Nairobi and that they have two buildings on plot number 1498 together with a cattle shade, an underground water tank and a store, together with toilets. According to PW3, his late father developed plot number 1125 for leasing and that the building on plot number 1125 is occupied by four tenants.

25. PW3 stated that his father lived on plot numbers 1125 and 1498; that the 2nd Defendant lives on plot number 1125 and that he was very close to his father. PW3 stated that his father told him that he wished to be buried on plot number 1498 when he dies; that his mother and siblings all live on plot number 1498 and that they had a funeral committee when his father died in which he was a member.

26. The evidence of PW3 was that all the family members had agreed to have the deceased's body interred on plot number 1498 and that he was surprised when he saw on the WhatsApp group that the deceased would be buried on the Matuu property (*plot 1125*).

27. In cross-examination, PW3 stated that he is an engineer by profession having been trained at Kenyatta University; that he is not married although he was to wed the following weekend and that he fulfilled the cultural ceremony in respect to his marriage in August, 2013. According to PW3, the cultural ceremony was not conducted on plot number 1498 but on the land where his mother has put up a school and that her father attended the ceremony.

28. The 4th Plaintiff, PW4, is the 1st Plaintiff's daughter. According to PW4, she is a student at Kenyatta University; that she lives on plot number 1498 which has two houses, a chicken house, a cow shade and a well. It was the evidence of PW4 that plot number 1498 also has a gate and a good fence. On the other hand, it was the evidence of PW4 that the Matuu property is a commercial building with tenants and that the plot is on the periphery of Matuu town.

29. PW4 stated that she was a member of the funeral committee; that on 5th February, 2020, the committee agreed that the deceased should be buried on plot number 1498 and that the deceased should be buried on plot number 1498.

30. PW5 stated that he is the Senior Division Clan Chairman of the Aombe clan where the deceased belonged; that on 28th February, 2020, they met at the home of the deceased to negotiate where he should be buried and that since the 2nd Defendant decided not to attend the meeting, they decided that the deceased should be buried on plot number 1498. It was the evidence of PW5 that when a man has two wives, he should be buried at his first wife's home.

31. In cross-examination, PW5 stated that the meeting of 28th February, 2020 was at the Matuu home; that the deceased was living on plot number 1125 and that he used to visit him. PW5 stated that the deceased demolished his matrimonial home on plot number 1498 in December, 2019 and that the clan did not resolve the dispute on where the deceased should be buried because the matter was in court.

32. The Sub-County Chairman of the Aombe clan, PW6, stated that they met at the Matuu plot on 28th February, 2020; that the clan attempted to resolve the dispute between the two wives of the deceased and that when they learnt that the dispute was in court, they never resolved it. On cross-examination, PW6 stated that the deceased used to live on the Matuu property and that he (PW6) has a hotel in Matuu town.

Defence case:

33. The 2nd Defendant, DW1, informed the court that she is the second wife of the deceased; that she is a trained teacher at Kenyatta University although not working and that she graduated in the year 2016. It was the evidence of DW1 that she was married to the deceased in the year 2011 and formalized her marriage in the year 2016. DW1 stated that she has two issues with the deceased, one born in the year 2012 and the other one in 2018.

34. It was the evidence of DW1 that she was living with the deceased on a daily basis since the year 2011 on the Matuu Property (1125) until he died; that when the deceased fell ill in December, 2019, she is the one who took him to hospital; that he was discharged but re-admitted on 24th January, 2020 and died on 26th January, 2020.

35. DW1 informed the court that for the nine years she lived with the deceased before he died, he was admitted in hospital almost every year; that the deceased was diabetic and had wounds which she used to clean; that she used to inject him with *Insulin* on a daily basis and that she is the one who stood by him.

36. According to DW1, she was with the deceased on 26th January, 2020 when he died; that the burial permit was issued in her name by the hospital and that the 1st Plaintiff went to her Matuu home on 27th January, 2020 for the burial arrangement. According to DW1, in the meeting of 5th February, 2020 it was agreed that the deceased will be buried on plot number 1125 on 7th February, 2020 and that the 1st Plaintiff donated her contribution of Kshs. 20,000 to cater for the funeral expenses.

37. DW1 stated that the 1st Plaintiff's daughter, PW2, who was the Treasurer, gave her all the collections totaling Kshs. 74,000 on 5th February, 2020 and that she (DW1) is the one who took the body to church on 7th February, 2020. According to DW1, she was surprised when she was served with a court order while in church stopping the burial of the deceased on 7th February, 2020.

38. It was the evidence of DW1 that her husband told her that the 1st Plaintiff had mistreated him; that the 1st Plaintiff never took care of the deceased even though he was diabetic since 1998 and that the 1st Plaintiff had accused the deceased of having contracted HIV, which was not true. DW1 informed the court that the deceased told her that he would wish to be buried on the Matuu property where he had woken up every day to go to work.
39. DW1 stated that her late husband had established her first matrimonial home with the 1st Plaintiff on plot number 1498 before he married her (DW1); that he abandoned the matrimonial home on plot number 1498 and never slept there for nine years and that the 1st Plaintiff also moved out of plot number 1498 to another home in Kangonde, where she also runs a school. According to DW1, when she visited plot number 1498 in December, 2019, she found the deceased had demolished the matrimonial house.
40. It was the evidence of DW1 that the deceased told her that he had demolished the matrimonial house on plot number 1498 because he wanted to erase all memories to do with the 1st Plaintiff; that the Matuu Property is a big piece of land and that the said property is about 2km away from the Matuu town.
41. DW1 stated that she is the one who used to cultivate Plot No. 1498 and had a workman on the land; that she is the one who had the key to the main gate and that the land has a store where she used to keep her farm produce.
42. According to DW1, while this matter was going on, PW1 broke the padlock to the gate, accessed the compound and cleared the compound of Plot No. 1498 which was bushy. According to DW1, PW1 also cleaned up the store, put up old curtains on the windows of the store and spread an old bed which had been kept in the store by the deceased.
43. DW1 produced in evidence the photographs that were taken by the court appointed photographer of plot number 1498 and plot number 1125. According to DW1, the disused store on plot number 1498 was made up hurriedly by the Plaintiffs; that the said store is not connected to electricity and that the same has only one bed which was spread by the 1st Plaintiff. DW1 stated that she had farmed on plot number 1498 for five years and that the plot does not have a home.
44. DW1 stated that neither the 1st Plaintiff nor her children live on plot number 1498 as alleged; that she (DW1) never agreed that the deceased should be buried on plot number 1498 and that after taking the body from the church on the basis of the court order, PW3 called her for reconciliation.
45. The deceased uncle, DW2, informed the court that the deceased had two wives; that he was a close confidant of the deceased; that in October 2019, he went with the deceased to Makueni to pay dowry for his brother and that along the way back, the deceased, who was sickly, told him that he would wish to be buried on the Matuu property when he dies.
46. According to DW2, the 1st Plaintiff has built a home next to her school where she lives; that he attended the traditional marriage ceremony of PW3 at the 1st Plaintiff's home with the deceased and that they left the home after the ceremony. It was the evidence of DW2 that on 5th February, 2020, they all agreed to bury the deceased on his Matuu property and that the Treasurer of the funeral committee, PW2, handed to the 2nd Defendant the money she had collected to cater for the funeral expenses, including the Kshs. 20,000 that the 1st Plaintiff contributed.
47. DW2 stated that the Matuu property is outside Matuu Township; that he consulted the area Chief and the County Surveyor who informed him that the deceased can be buried on Plot No. 1125 and that they were surprised when on 7th February, 2020, they were stopped by way of a court order from burying the deceased on plot number 1125, the Matuu property.
48. DW2 stated that the deceased lived on the Matuu property; that he (DW2) went to the matrimonial home on plot 1498 only once and that the deceased demolished the said home. It was the evidence of DW2 that the only thing left on Plot No. 1498 is a small store, a chicken house and a place for the workman. It was the evidence of DW2 that when they went to take photographs as ordered by the court, they found that the Plaintiffs had tried to clear up the homestead and that he had gone to the home before the order of the court was given and found that no one lives on plot number 1498.
49. The mother to the deceased, who is the 1st Defendant, DW3, informed the court that the deceased is her third born son; that the deceased had two wives, the 1st Plaintiff and the 2nd Defendant and that she cannot agree to have her son being buried in the bush on plot number 1498.
50. According to DW3, the 1st Plaintiff never loved the deceased when he was alive; that she never even visited him when he was in hospital and that the deceased lived and spent most of his time on his Matuu property. According to DW3, it is long since she ever went to Plot No. 1498 and that she only went there when the 1st Plaintiff's children were young; that she never attended the marriage ceremony of PW3 and that she used to visit the deceased at his Matuu home.

Submissions

51. The Plaintiffs' counsel submitted that the evidence tendered by the Plaintiffs show that the Matuu property is not owned and registered in the name of the deceased since the owner had not given to the deceased a Title Deed before his death. Counsel submitted that there is a Succession Cause in respect of plot number 1125.
52. The Plaintiffs' counsel submitted that the commercial plot in Matuu (1125) has residential houses that have been leased out to various tenants; that the Matuu property is within Matuu Municipality and that the burial site of the deceased on the Matuu plot is situate near toilets

and a septic tank where all waste from the residential houses is channeled.

53. Counsel submitted that the law governing burial sites of a deceased person in Africa is the African Customary Law of the particular community where the deceased was born and bred; that the closeness of the 2nd Defendant to the deceased was physical closeness and not legal closeness as required by law.

54. The Plaintiffs' counsel submitted that it is now settled that where it is not clear as to whether the deceased made a Will regarding a preferred burial site, then the court should resort to the traditional customs of the deceased in order to resolve the burial dispute. Counsel submitted that according to the Kamba customs, the 1st Plaintiff should be allowed to bury the deceased as the 1st wife.

55. The Defendants' advocate submitted that the deceased's wish to be buried at his Matuu property's home is paramount; that the deceased expressed his wish to be buried at Matuu to his only surviving paternal uncle and that the Plaintiffs could not get that expression of an intention from the deceased because the 1st Plaintiff was estranged and did not live with the Plaintiffs for a long time.

56. Counsel submitted that plot number 1498 is not the deceased's ancestral home; that the conduct of the 1st Plaintiff can neither be supported under the Kamba Custom nor Statutory law; that the behaviour of the 1st Plaintiff smacks of insincerity and that the 1st Plaintiff and the deceased were estranged. Therefore, it was urged, the 1st Plaintiff does not have a right to bury the deceased whom she did not live with. Both counsels relied on several authorities, which I have considered.

Analysis and findings

57. It is not in dispute that David Kiamba Muli (*the deceased*) had two wives at the time of his death. The wives of the deceased are the 1st Plaintiff, whom he married in the year 1987/1988 under the Kamba customary law and the 2nd Defendant. According to the evidence of the 2nd Defendant, she started living with the deceased in the year 2011, and that they solemnized their marriage under the Kamba customary law in the year 2016. This narration by the 2nd Defendant was not disputed by the Plaintiffs.

58. The deceased had five issues with the 1st Plaintiff, some of them being the 2nd, 3rd and 4th Plaintiffs, who are all adults. According to the Plaintiffs' evidence, the 2nd Plaintiff is a Secondary school teacher; the 3rd Plaintiff is an engineer working in Nairobi while the 4th Plaintiff is a student at Kenyatta University. On the other hand, the 2nd Defendant has two issues who are minors. The 1st Defendant is the mother to the deceased.

59. The uncontroverted evidence of the 2nd Defendant was that the deceased was diabetic, and had been sickly even before he started living with her as a man and wife in the year 2011. It was the evidence of the 2nd Defendant that the deceased had been diabetic since the year 1998.

60. According to the 2nd Defendant, the deceased fell ill and was admitted in hospital on 10th December, 2019 and discharged on 26th December, 2019. However, he fell sick again and was admitted in hospital on 24th January, 2020 and passed on 26th January, 2020.

61. The other undisputed facts are that after his death on 26th January, 2020, the deceased's body was taken to the Morgue whereafter a burial committee comprising the two wives, and the adult children of the deceased, amongst other relatives, was formed. The Treasurer to the committee was the 2nd Plaintiff. The committee's final meeting was held on 5th February, 2020 at the deceased's home situated on plot number 1125 (*the Matuu Property*).

62. Although the Plaintiffs' case is that the funeral committee agreed to have the deceased interred at his property in Kangonde (*Plot No.1498*), the Defendants' case is that the committee agreed that the deceased should be buried on his Matuu property (*Plot No. 1125*).

63. The issue before this court is where the deceased should be buried. Is it at his Matuu property, where he lived with the 2nd Defendant, or on plot number 1498, where he had lived with the 1st Plaintiff before he married the 2nd Defendant.

64. Although the 1st Plaintiff informed the court that she bought parcel number Masinga/Kangonde/1498 together with the deceased and established a matrimonial home, the evidence that was exhibited before this court by way of photographs taken by a court appointed photographer shows that the three bedroomed matrimonial home where the deceased and the 1st Plaintiff lived was demolished by the deceased in December, 2019.

65. According to the 2nd Defendant, the deceased informed her that he had demolished the three bedroomed matrimonial home on plot number 1498 because he wanted to erase all memories pertaining to his marriage with the 1st Plaintiff. The evidence of demolishing the matrimonial home on plot 1498 was collaborated by PW5 and DW2. The photographs taken also show the debris of the demolished house.

66. The 1st Plaintiff admitted in evidence that indeed she was annoyed with the deceased when he started sleeping around with ladies and when he started cohabiting with the 2nd Defendant. The 1st Plaintiff further informed the court that her relationship with the deceased was so strained to the extent that the deceased filed Petition Divorce Case No. 8 of 2016 in the Principal Magistrate's Court at Kithimani. The Petition and the Cross-Petition were produced in evidence by the Defence.

67. I have perused the Petition that was filed in the lower court. In the said Petition, the deceased averred that he has been separated with the 1st Plaintiff since the year 2012 and that during their marriage, the 1st Plaintiff had treated him with cruelty. One of the incidences of cruelty

cited in the Petition is the 1st Plaintiff failing to take care of him during time of illness. In the said Petition, the Petitioner averred that their marriage had “*irretrievably broken down, is a sham devoid of any feelings, love and affection.*”

68. In response to the Petition, the 1st Plaintiff herein filed a Cross-Petition in which she accused the deceased of having subjected her to utmost cruelty, desertion and having committed adultery with both adult women and minors; that the deceased was a person of ungoverned temper and that the deceased had been terrorizing the children of the marriage.

69. In the said Cross-Petition, the 1st Plaintiff herein averred that the deceased “*left the matrimonial house in 2010 and went to live with his former student Angeline Mbithe*” (the 2nd Defendant). In her prayers, the 1st Plaintiff asked for the dissolution of the marriage and for the payment of the monthly maintenance of Kshs. 40,000 per month. The 1st Plaintiff also prayed for the sharing of all properties acquired during the subsistence of the marriage equally between the two of them.

70. The pleadings that were filed by both the deceased and the 1st Plaintiff confirms the evidence of DW1 that the deceased stopped living with the 1st Plaintiff in the year 2011 or thereabouts; that the marriage between the two had irretrievably broken down and that they were estranged. Indeed, the 1st Plaintiff did confirm in the Cross-Petition that the deceased had left the matrimonial home in the year 2010.

71. The deceased’s action of demolishing the matrimonial home on plot number 1498, where he had lived with the 1st Plaintiff, shows the disdain the deceased had for the 1st Plaintiff, and proves that he never lived on the said land since he started living with the 2nd Defendant in the year 2011.

72. The evidence that was produced in this court shows that the Plaintiffs lied to this court on oath when they stated that they all live on parcel number 1498. I say so because the photographs produced in this court shows a small disused structure with one room with uncovered ventilators, a single bed, an old small black and white television and without any connection to electricity.

73. The evidence of DW1 was that the small structure which the Plaintiffs purport to be their house, and where they purportedly all live, is actually a store where she used to store the farm produce, and is not the matrimonial house the Plaintiffs were alluding to.

74. The evidence by DW1 is credible considering that the small structure which, from the photographs, was quickly cleaned up and a bed set up. A single bed shown in the photographs that were produced in court could not have been used by all the Plaintiffs, who are adults and people of means, and who cannot all spent in one room. Indeed, the 1st Plaintiff’s assertion that she lives in the said house with all her adult children, two of them working, is not only a lie, but also demeaning and an embarrassment to her family.

75. I say so because, the 1st Plaintiff is not an ordinary lady leading a rural life in the village. She is a Principal of a High School, an author of books, and a proprietor of a school while the 2nd Plaintiff is a High School Teacher and the 3rd Plaintiff is an engineer. The four of them, including the 4th Plaintiff, lied to this court when they stated that they all live on Plot No. 1498 and shared the small structure which has only one bed.

76. The evidence of DW1 that the 1st Plaintiff abandoned the deceased when he was sick and never took care of him is evident in the deceased’s Petition for Divorce. From the evidence before me, the 1st Plaintiff never lived on plot number 1498 with the Plaintiffs since the year 2011 and there is no matrimonial home on plot number 1498. Indeed, from the 1st Plaintiff’s evidence she hated the deceased because of his adulterous life.

77. The evidence before me shows that the deceased has always lived on plot number 1125 (the Matuu property) since the year 2011 when he started living on the said property with the 2nd Defendant. On the other hand, the Plaintiffs have always lived on a property in Kangonde where the 1st Plaintiff has a school and her house. Indeed, that is where the 3rd Plaintiff held his negotiations for the dowry payment.

78. The evidence before me also shows that it is the 2nd Defendant who has always taken care of the deceased for the last nine years, and even cleaned his wounds which were as a result of his diabetic condition. Whenever, he was sick, it is the 2nd Defendant who took the deceased to hospital. The 1st Plaintiff never took care of the deceased when he was sick, and never visited the deceased in hospital, including the last time that the deceased was admitted and eventually passed on.

79. Although the Plaintiffs informed this court that they had agreed as a family to bury the deceased on plot number 1498, the circumstantial evidence shows otherwise. If indeed the deceased was to be buried on plot number 1498 as alleged, then why is it that the funeral committee never held its meetings on plot 1498? The answer is simple, there was no house on Plot No.1498 and the Plaintiffs were not living on the said plot.

80. Furthermore, the fact that the 2nd Plaintiff handed over to the 2nd Defendant all the contributions that she had collected, including the 1st Plaintiff’s contribution, to the 2nd Defendant while on the Matuu property confirms that it is the 2nd Defendant who was to be in charge of the burial on the property at Matuu, which is her matrimonial home. If indeed it is the 1st Plaintiff who had been mandated to bury the deceased on plot number 1498 as alleged, then she should have been given the contribution.

81. The wish of the deceased of where he wanted to be buried is critical. Indeed, the wish of the deceased could only have been to be buried by his second wife who had taken care of him when he was sick, and not by the 1st Plaintiff who had not only abandoned him as per the Petition, but who also hated him. The deceased expressed his disaffection in respect of the 1st Plaintiff, not only by filing a Divorce Petition, but by also demolishing the matrimonial home where he had lived with the 1st Plaintiff before they parted ways, albeit informally.

82. As stated by Eugene Contran, Casebook on Kenya Customary Law (*Professional Books Limited and Nairobi University Press*) 234, the wishes of the deceased, though not binding, must be given effect so far as is possible. In the case of **Lilian Waithera Mwangi vs. Salome Mukami Mugo (2011) eKLR**, the court held that a wife is a close person to a deceased husband and should be the one with priority to bury a deceased husband. In this case, the only wife who was close to the deceased was the 2nd Defendant. She is the one who can authoritatively tell the court what her husband's wishes were, and not the Plaintiffs.

83. Indeed, the scenario in this case is similar to the facts in the case of **Neema Mulwa vs. Joyce Mwangi (2015) eKLR** where the deceased had two wives, and each wife claimed to have the right to bury the deceased. The court held as follows:

“In my view, marriage or lack of marriage cannot be the only issue to be considered where burial is in issue. A married person who has been abandoned by a spouse, has a right to choose whom to cater and care for him or her and who to bury his or her body. There only needs to be evidence that he or she has made that choice... In my view, from the evidence or record, it is evident that it is not mandatory for a person from the Kamba community to be buried in his/her ancestral land”.

84. The court went further to state as follows:

“... the deceased bought land and put up a house and spent his later years exclusively on the land where the Appellant lived. He appeared to have had no interest in going to the land of the Respondent. Since she abandoned him, how does the Respondent become so close when the deceased died, while she had chosen to be so distant when he was alive and sick?” That kind of conduct in my view can neither be supported under Kamba Custom nor the statute law. The conduct of the Respondent in my view, smacks of insincerity”.

85. I am in Agreement with the above holding. The 1st Plaintiff never loved the deceased. The 1st Plaintiff admitted in her Cross-Petition in the lower court that she stopped living with the deceased in the year 2010, and that she hated him because of his adulterous life. The 1st Plaintiff depicted her hatred to the deceased by not even visiting him in hospital on the numerous occasions he was admitted. How can she then state that she wants to give the deceased a decent burial? That, in my view, is unacceptable, and an insult to the deceased.

86. The deceased having purchased land in Matuu and built a house where he has been living with the 2nd Defendant, and in the absence of evidence to show that the Matuu property is within the Municipality, then that is where the deceased should be buried. Indeed, the issue of whether the deceased had procured a Title Deed in respect of the Matuu property is neither here or there, more so when there is no objection from the seller of the land to the said burial.

87. The 2nd Defendant having taken care of the deceased while alive, and the 1st Plaintiff having abandoned the deceased during his time of need, it is the 2nd Defendant who has the final say on where the deceased should be buried, whether on plot number 1125 or 1498. Having chosen to bury the deceased on plot number 1125, then she should be allowed to do so without any interference from the Plaintiffs.

88. For those reasons, I make the following orders:

a) The Plaintiffs' Complaint dated 7th February, 2020 is dismissed.

b) The body of the late David Kiamba Muli to be released to the 2nd Defendant, Winrose Ndinda Kiamba, for burial on a portion of land known as Plot No. 1125, Matuu or on any other property that the 2nd Defendant may deem appropriate subject to compliance with the Public Health Act or any other applicable law or regulations.

c) The Plaintiffs to pay the mortuary charges which have accrued since 7th February, 2020 until the date of this Judgment.

d) The Plaintiffs to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24TH DAY OF APRIL, 2020.

O.A. ANGOTE

JUDGE