



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 20 OF 2018

BETWEEN

M'IMANENE M'RUTERE.....APPELLANT

AND

LEWIS KIRIMI.....1ST RESPONDENT

DAPHIN KAIRUTHI KANANDA.....2ND RESPONDENT

KENNETH MUTHAURA KANANDA.....RESPONDENT

(Being an appeal from the Judgment and decree of

Hon. T. Madowo RM, made on 9th March, 2018

in Meru CMCC No. 16 of 2018)

JUDGMENT

1. By a Plaint dated 2nd February, 2018, the appellant stated that he was the father of the late **Senior Sergeant Samuel Kananda (hereinafter “the deceased”)**. He pleaded that the deceased was the father of the respondents and three other minor children. That the deceased had expressed his wish that his remains be interred next to the grave of his late brother at Naari Location. That the appellant, the respondents, the immediate and extended family together with the clan, kinsmen and neighbours had been holding meetings at the Naari home where they had resolved to inter the remains of the deceased.

2. He further pleaded that, despite as aforesaid, the respondents had ganged up with other persons with vested interests and had threatened to remove the remains of the deceased from the Meru Funeral Home where it is lying with the intention of interring the same at the deceased's commercial premises at Maili Saba area near Isiolo. Accordingly, the appellant prayed for an order of injunction to restrain the respondents from removing the body of the deceased and interring the same as aforesaid. In the alternative, the appellant prayed that he be allowed to inter the remains of the deceased at the Naari home while involving the respondents in the exercise.

3. The respondents filed a joint defence to the appellants claim. They denied the existence of any other children of the deceased apart from themselves; they also denied the existence of any family graveyard at Naari. They pleaded that the deceased had his home at Maili Saba where he resided and had brought up his children.

4. The respondents further averred that the appellant had received KShs. 30,000/- from Magereza Sacco but had sidelined them from the burial preparations whereby the respondents had decided to carry on with such preparations at Maili Saba. That the intention of the appellant was to grab the deceased's Maili Saba property and that in furtherance thereof, two of his children were already in occupation thereof.

5. After hearing the parties, the court dismissed the suit and ordered that the remains of the deceased be released to the respondents and one Purity Kanini for burial at the deceased's home in Maili Saba. The trial court further ordered that the mortuary and funeral expenses be met by all the parties and was to include the Kshs. 30,000/- received by the appellant from the Magereza Sacco. Aggrieved by that decision, the appellant has appealed to this court setting out nine grounds of appeal which can be collapsed into three as follows:-

a) that the trial court erred in finding that the deceased's home was in Maili Saba and not Naari and in ordering that his body be released to the respondents and Purity Kanini;

b) that the trial court erred in ordering the appellant to pay burial expenses yet the body was ordered to be released to the respondents and Purity Kanini;

c) that the trial court erred in refusing to consider and/or admit crucial documents and evidence.

6. This being a first appeal, this court is enjoined to revisit the evidence that was before the trial court afresh, analyze it, evaluate it and arrive at its own independent findings and conclusions, but always bearing in mind that the trial court had the benefit of seeing the witnesses, hearing them and observing their demeanour and giving allowance for that. See *Selle vs. Associated Motor Boat Company (1968) EA 123*.

7. **PW1** was the appellant. He told the court that he was the father of the deceased. That the deceased had expressed the wish to be buried next to the grave of his late brother Daniel Murithi Munene at the family grave yard at Naari. That the entire family and clan had agreed that the place of burial be at Naari but the respondents had ganged up with other persons and wanted to bury the deceased at Maili Saba.

8. In cross-examination, he admitted that the deceased had a home at Maili Saba; that he had sent his son and daughter to that home to secure it although there are workers in that home of the deceased at Maili Saba. That he had nothing to show that the deceased had agreed to be buried at Naari. He further admitted that there is no culture that required that the deceased's remains be interred at Naari.

9. **PW2 Silas Kiengo M'Mutungu** told the court that, the deceased had married Purity Kanini customarily but had also divorced her customarily. That he had passed on the customary divorce message to her elders at her home. However, he could not recall when he performed the said rite. He also did not know the respondents were the children of the deceased.

10. **PW3 Nathan Moses Kiara**, the secretary of the dispute resolution committee Naari Location told the court that a meeting had been called to resolve the issue of the burial place of the deceased after the respondents had complained to the area DC. That the matter was not resolved as the respondents stood their ground. He admitted in cross examination that once someone has established a home, he should be buried there. He did not know if the deceased had a home at Maili Saba. There had been a meeting at the deceased's Maili Saba although property regarding the burial of the deceased.

11. **PW4 Florence Kanja M'Ringer** testified that she had a child with the deceased in 2013; that the deceased did not have a dwelling house at Maili Saba. That he should be buried at his father's land at Naari. **PW5 FAITH KAGWIRIA KIOGORA** testified that she had a child with the deceased in 2002. That she wanted the deceased buried at the ancestral land at Naari. In cross-examination, she told the court that two of the appellant's children had been sent to Maili Saba to close the deceased's houses. She did not know if the deceased had a house at Naari.

12. The respondents testified and called 4 other witnesses. **DW1 Lewis Kirimi Kananda** testified that the co-respondents were his siblings and that he was not aware of any other children of the deceased. That they live at their father's home at Maili Saba. That their mother, Purity Kanini temporarily separated with their father but reunited in 2008. That she visits Maili Saba home during weekends. He told the Court that because the deceased was not given any land by the appellant at Naari, the deceased bought the Maili Saba property and constructed a home in 2002 where they have been living to-date. That the appellant had sidelined them from burial preparations of the deceased. He argued that since they are adults, they should be allowed to inter the remains of their father at their farm at Maili Saba. He denied there being any family graveyard at Naari as the appellant's elder son was buried in his own land next to his house.

13. In cross-examination, **PW1** told the court that the deceased had a home at Mili Saba where they have been living; **PW2 and PW3** adopted the evidence of **PW1**. In cross-examination, they told the court that they were chased from Naari when they went to attend burial preparations there; that the property at Maili Saba exceeds 3 acres and the deceased would be buried in the farm leaving aside the commercial portion. That the wife of the appellant's elder son was not buried next to her husband but far away. That their father neither had land nor a house at Naari and that they used to live with the deceased at Maili Saba during holidays.

14. **PW4 John Kimathi**, a cousin to the deceased, testified that he was the respondent's neighbour at Maili Saba where. That the deceased used to live with the respondents. That apart from the commercial buildings on the Maili Saba property, the deceased had a house thereon wherein he was living with the respondents on separate rooms. That when the deceased was away from work, he used to stay at Maili Saba. **PW5 Stephen Muthuri M'Buri**, the area manager of Maili Saba, told the court that he knew the deceased since 2002 when he settled at Maili Saba. That he knew Purity Kanini as the deceased's wife with whom the deceased had reconciled in 2008. In cross-examination, he stated that the respondents were living in a wooden house separate from the rental houses constructed by the deceased at his Maili Saba farm.

15. **PW6** was **Paul Murira**, the area Assistant Chief Maili Saba. He knew the deceased in 2002 when he settled at Maili Saba. That the 2nd and 3rd respondents were university students and the deceased used to take care of them. In cross-examination, he stated that under Meru culture, one cannot be buried in his father's land if he has a family and children. **PW7 Purity Kanini Inoti** told the court that she was the wife of the deceased. That the respondents used to live with the deceased at the deceased's home at Maili Saba. That she works at a Nanyuki Children's Home but she goes to Maili Saba home during the weekends.

16. In cross-examination, **PW7** told the court that she was married to the deceased in 1992 and bore the 1st and 2nd respondent. That they never divorced. That she last saw the deceased on 21st January, 2018 and he died two days later. That she allowed her son, the 1st respondent, to take the burial permit for her husband because she wanted to avoid commotion with the appellant.

17. The parties filed written submissions which Counsels ably hi-lighted. Ms Kaume Learned Counsel for the appellant combined all the grounds and argued them as one. She submitted that the issue of producing title for the Naari home should not have arisen as no one had disputed that the deceased had a home there. That since the respondents had not counterclaimed in their defence, the trial court should not have given the orders in their favour. That the court erred in granting judgment to Purity Kanini who was not a party to the proceedings.

18. Counsel further submitted that since the benevolent fund and personal belongings of the deceased were passed on to the appellant, he

should have been allowed to also inter his remains. That according to Kimeru custom, one is supposed to be buried in his ancestral home. The case of **Kandie & 2 Others v. Cherogony (2002) 2 KLR 613** was relied on for the proposition that on burial matters, it is the deceased's personal law that is to be applied.

19. On his part Mr. Carlpeters Mbaabu submitted that the appellant had failed to prove his case before the trial court; that there was no necessity for the respondents to counterclaim in the defence for the appellant's suit to fail in the lower court since the burden of proof fell on his shoulders. That the respondent's averments in the defence as to the home of the deceased had not been denied. Counsel submitted that the appellant and his witnesses had admitted that the deceased had a home at Maili Saba as had been established by the respondent's evidence.

20. As regards Purity Kanini, Counsel submitted that since she was a wife of the deceased and had testified, the trial court was right in including her as one of the persons to whom the body of the deceased was to be released. That since the evidence produced before court raised the issue of her status, the court was perfectly entitled to give judgment to her. Counsel relied on the cases of **JMK & Another v. DMK [2013] Eklr** and **Martha Wanjiru Kimata v. Dorcas Wanjiru & Anor [2015] Eklr** for the proposition that in matters burial, the wife of the deceased should take a central role. Counsel further referred to the cases of **Apeli v. Buluku [1980] eKLR** and **Samuel Mungai Mucheru & 3 Others v. Anne Nyathira [2014] Eklr** for the proposition that, the wishes of the deceased as to his burial should be respected. He urged the court to dismiss the appeal.

21. I have carefully considered the record and the able submission of learned counsel. The first ground is that the court erred in failing to consider or admit crucial evidence. This ground was not addressed substantively in the appellant's submissions. Counsel for the appellant indicated that the appellant had some documents in court at the hearing of his case but was barred from producing them. That those documents were crucial as they related to the title for the land at Naari whose absence had led the court to believe that the deceased had no home there.

22. The record shows that on 13th February, 2018, the appellant was granted leave to file, inter alia, a supplementary list of documents before 15th February, 2018 which he did. When he testified on 21st February, 2018, he produced his bundles of documents dated 2nd and 15th February, 2018 as PExh 4 & 5, respectively. He did not indicate to court that he had any other document that he needed to rely on in his case. The record will further show that the only reference to the alleged document is during cross-examination when he stated, ***"I have a title deed, on green card here in court for my land in Naari. I have brought the title today, it is not in my list"***.

23. Nowhere in the record was there any application for the court to allow the said documents to be produced evidence. Making a casual reference to documents in cross-examination cannot be said to be an intention to rely on such documents. Such an application should have been made before the appellant commenced his testimony. In any event, there was no basis laid as to why the appellant had not included the said documents in his first or even supplementary bundle of documents. Even if he had sought to produce the said documents at the hearing, which he did not, it would have been ambushing the respondents thereby raising an issue about fair trial. The trial Court would have been entitled to reject such production.

24. Indeed, at the hearing of this appeal, the appellant sought to introduce some documents by way of an application but for reasons on record, this court declined. Accordingly, I find that this ground has no basis and the same is dismissed.

25. As regards the second ground of appeal, I will break it into two, that is, first ***whether the trial court erred in granting relief to Purity Kanini who was not a party before it*** and secondly, ***whether the court erred in ordering the release of the body to the respondents for burial at Maili Saba.***

26. The plaint and the defence upon which this case was litigated before the trial court are dated 2nd and 8th February, 2018, respectively. The only parties that are disclosed therein are the appellant and the respondents. Purity Kanini was not a party but a witness (DW7). She did not submit any pleading to court in respect of which she made any claim for any relief whatsoever.

27. It was Mr. Mbaabu's submission that the evidence tendered before the trial court was overwhelming to the effect that Purity Kanini was the wife of the deceased and that the authorities before court showed that it is to the wife of a deceased that a body of a husband is to be released. For that reason, Mr. Mbaabu submitted, the court was entitled to make the orders in her favour. Mrs. Kaume submitted that Purity Kanini was a stranger to the proceedings and the court made a fundamental error in giving reliefs to such a stranger.

28. In **Kenya Airports Authority v. Mitu-Bell Welfare Society & 2 Others [2014] eKLR** the Court of Appeal held:-

"It is trite that a court is required to base its decision on the pleadings before it. The Malawi Supreme Court in Malawi Railways Ltd -vs- Nyasulu [1998] MWSC 3 quoting an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" published in (1960) Current Legal Problems, at page 174 stated:

'As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. The court itself is as bound by the pleadings of the parties as they are themselves. ... Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter into the realm of speculation.

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any other Business" in the sense that points other than those specific may be raised".

29. From the foregoing, suffice it to state that a court of law is firmly bound by the pleadings submitted to it by the parties. The court cannot

frame its own case or issue and render an answer thereto. Going outside the pleadings of the parties will be acting without jurisdiction. In an adversarial system, the court cannot grant any relief to someone who is not a party before it howsoever merited. Doing so will amount to determining an own case. It is no part of the court's duty to inquire into a case before it other than to adjudicate upon the specific matters in dispute as raised by the parties in their pleadings. Otherwise any of the parties might justifiably feel aggrieved for a decision made on a claim or defence not made by or against a party is equivalent not to hearing him at all thereby amounting to a denial of justice. In this regard, the court must strenuously resist any invitation by any party to undertake such a course.

30. Purity Kanini did not appear before the trial court as a party. She only appeared as a witness. She only stated in her witness statement that the body of the deceased should be released to the respondents and herself for burial at Maili Saba. That, in my view, did not amount to a prayer in a pleading properly so called on which the court could grant a relief.

31. It may well be that the long list of case law on the issue before the court pointed towards the fact that a body of a deceased husband should be interred by his wife. Further, it may as well have been that Purity Kanini established that she was the wife of the deceased and had not been formerly divorced and that she used to regularly visit the deceased's premises at Maili Saba. However, to the extent that she was never enjoined as a party to the proceedings and thereby deliver any pleading to court, she remained only as a witness in the case and not a party. A person who is not a party to a proceeding cannot claim and obtain a relief in a suit unless he is enjoined therein or the proceedings are brought on his behalf or for his/her favour. In this regard, to the extent that the trial court directed that the body of the deceased be released to, inter alia, Purity Kanini, the court fell into serious error.

32. The second part of the ground of appeal is ***whether the court erred in ordering that the body be released to the respondents for internment at his home in Maili Saba, LR. No. Kiirua/Nkando/4802.*** The suit by the appellant was that he was the father of the deceased. That the deceased had many children from different mothers and that the respondents should be restrained from collecting and disposing off the body of the deceased. The appellant further alleged that since he was the father of the deceased, he should be allowed to inter the remains of the deceased at the family graveyard at Naari.

33. Disputes on burial are not new in this country. Various courts have hitherto pronounced themselves on this issue. In the case of **G M I v. D M K [2013] Eklr**, Mutuku J held:-

“When it comes to burial disputes, it is personal law that comes into play. This is because there is no statute in Kenya that governs burials. ... In Njoroge v. Njoroge [2004] 1 KLR the court held that:

‘... the person who is first in line of duty in relation to the burial of the deceased person is the closest to the deceased in legal terms. Generally the marital union will be found to be the focus of the closest chain of relationship touching on the deceased.....’

In a case like the one before me, the marriage between the deceased and the respondent had been dissolved so the issue of spouse does not come in. Without a spouse, the first person(s) in the line of duty in relation to the burial of the deceased and the closest person(s) is her children followed by her parents and brother in that order”.

34. In **Martha Wanjiru Kimata & Anor v. Dorcas Wanjiru & Anor [2015] Eklr** Achode J held:-

“In the circumstances of this case, such a person would be the wife. I have gone through the record and I am satisfied that a marriage between the Defendant and the deceased was rightfully presumed by the trial court on the basis of a long cohabitation. The appellant on the other hand did not establish any custom, habit or repute that could accord her position legitimacy in relation to the family life of the deceased...

It is evident that the deceased set up his matrimonial home at Thogoto. The Respondent and her daughter led evidence that the deceased had wished to be cremated, and that the Respondent talked him out of it, and they settled for Langata Cemetery. This is the evidence the trial court found probable on a balance of probability, noting that the evidence itself was not conclusive. Having said so, the court was inclined to giving effect to the deceased's wish”.

35. In the cases of **Apeli v. Buluku [1980] Eklr** and **Samuel Mungai Mucheru & 3 Others v. Ann Nyathira [2014] Eklr**, the courts held that the wishes of a deceased person as to his place of burial should as far as possible be given effect to although not binding; such wishes must not be against custom or public policy; that the people under a duty to bury a deceased person are those closest to him/her during his or her lifetime, that is, a spouse, children of a deceased person, his/her parents and/or siblings in that order.

36. The place of burial of a person in Kenya is closely linked to three things; the person's wishes, though not absolutely binding on his personal representative, secondly, the duty imposed on those so closely related to the deceased during his lifetime (eg. spouse, his/her children and/ or parents) to bury the deceased and whether the person had established his own home. It will also be dependent on the custom to which the deceased is subject to.

37. In this regard, in Kenya, if a man has married and has established a home of his own, unless there is evidence to the contrary as to his express wishes, he is to be buried in his home and not in his father's homestead. This position also obtains to married women.

38. In the present case, both the appellant and the respondents as well as their respective witnesses alleged that the deceased had expressed his wish as to where he wished to be buried. After evaluating the evidence on record, this court is unable to find that any of the parties proved that fact. It is not usual in the African and/or Kenyan set up for one to talk about the place of his burial unless in contemplation of death. This usually occurs when someone is either too old or has been sick for some time or where one is making a will. None of the witnesses told the court the time, place and circumstances under which the deceased allegedly expressed the said wish. There was no evidence of any will

having been made by the deceased in this case.

39. The court takes judicial notice that the deceased died violently and suddenly in a road traffic accident. There may not have been any contemplation of death on the part of the deceased for him to have discussed or told anyone the place he wished to be buried. Accordingly, the court rejects the respective arguments and contentions that the deceased ever expressed the wish of where he wished to be buried.

40. It was the appellant's case that the deceased should be buried at Naari because it was their home; that there was a family graveyard and that the deceased was not married as he had a total of six children from different women. Of course the respondents could not hear any of that. According to them, the deceased should be buried at the Maili Saba property.

41. After evaluating the evidence, the trial court made a finding that there was no evidence to show that the deceased had a home at Naari. The court was of the view that, since there was no title to show that the deceased had land at Naari, his remains could not be interred thereon. In this court's view, that was a finding founded on evidence before that court. This court has reviewed the entire record. There was no evidence whatsoever to show that the deceased owned any land in Naari where his remains could be interred.

42. The record shows that despite the appellant testifying and calling 4 witnesses in support of his case, it was never established that the deceased had a home or had established any home at Naari. The evidence that was tendered by the defence which remained unchallenged and uncontroverted was that, the appellant refused to give land to the deceased at Naari because he had educated the deceased. That it was for that reason that the deceased moved away and established a home at Maili Saba. In this regard, the trial courts finding that there was no evidence of a home for the deceased at Naari was firmly founded on evidence and the trial court cannot be faulted on that finding.

43. As regards the alleged family grave yard at Naari, there was no evidence of any such fact. It was not established exactly where the so called family graveyard was situate, when it was established or who among the relatives of the appellant or the deceased had been buried thereon. The evidence tendered showed that only one person, Daniel Muriithi, the elder son of the appellant who had been buried at Naari. That in any event, the said Daniel Muriithi was buried in his own land given to him by the appellant. It also came out that when the wife of the aforesaid Daniel Muriithi died, the appellant refused her remains to be buried in that farm and as a result she was buried far away at Nkando.

44. Taking into consideration the foregoing, the trial court was right in finding that there was nothing like a family graveyard at Naari. The trial court cannot be faulted for that finding.

45. To the contrary, the court below found on a balance of probability that the deceased had a home at Maili Saba **L.R. No. Kiirua/Nkando/4802**. The testimonies of the respondents and their witnesses which remained consistent and unshaken throughout was that; the deceased had established a home at Maili Saba where he would stay with his children, the respondents, any time he was away from his place of work. Although he had constructed commercial premises thereon, that is where he used to retire to at any time he was on leave. **DW1, DW2 and DW3** were firm that, it is in Maili Saba that they lived with the deceased whenever they and the deceased were on holiday/leave. Indeed, the appellant and his witnesses agreed that the deceased had premises at Maili Saba where he stayed. This being the case, the trial court cannot be faulted for making a finding that the deceased had established a home at Maili Saba and that that is where his remains should be interred.

46. As regards to whom the body should be released, from the foregoing case law, it is the widow and the children. Since Purity was not a party to the proceedings, the only lawful persons to whom the body could be released to was the respondents as the adult children of the deceased. They are the only closest persons to the deceased in the circumstances.

47. The appellant complained that since the respondents had not made a counterclaim, the trial court should not have made the orders it made. It is not in dispute that it is the appellant who filed the suit. He had sought orders to restrain the respondents from taking possession of the deceased's body from Meru Funeral Home and interring it at Maili Saba. This is clear from paragraphs 11, 12 and 13 of the plaint as well as prayer number 1 of the plaint. Although the release of the body to the respondents and consequent internment at Maili Saba was not claimed, it is what the appellant had sought to prevent by his suit. Once the suit was dismissed, that eventuality remained the only logical consequence. It flows from paragraphs 11, 12, and 13 of the plaint as well as paragraph 10 of the defence.

48. In this regard, once the court dismissed the appellant's suit, it followed that the respondents were at liberty to carry on with their funeral plans, collect the body from the funeral home and consequently bury the body of the deceased as had been their intention. The making of the orders in the judgment therefore, I think was meant to clarify the position so as not to render the judgment ineffective. That was a natural consequence of the dismissal of the appellant's suit.

49. As regards the costs of the mortuary and the funeral, the order that the appellant do contribute was well founded. Although he had lost the suit, the deceased remained his son and, he had received a sum of Kshs.30,000/- from Magereza Sacco for the same purpose. The appellant cannot blow hot and cold at the same time. He cannot be heard to say that it is unfair to bind him to shoulder burial expenses yet he rushed to court to allegedly give his son a befitting send off, receive a whooping Kshs.30,000/= for the burial of the deceased now turn around that it is unfair to shoulder him with burial expenses. It is him who had caused the delay of the internment of the deceased's body.

50. Accordingly, I find the appeal to be partially merited to the extent held above about the position of Purity Kanini and the release of the body to her and is allowed to that extent. The rest of the appeal is dismissed. The costs of the appeal and the court below are allowed in favour of the respondents against the appellant. The orders made on 15th March, 2018 are hereby discharged.

It is so decreed.

DATED and **DELIVERED** at Meru this 5th day of April, 2018.

A. MABEYA

JUDGE