



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELCA CASE NO. 13 OF 2019**

**WYCLIFFE LUREMBE SHIKOTO.....APPELLANT**

**VERSUS**

**RONALD LIKHAYA SHIKOTO.....RESPONDENT**

**JUDGEMENT**

The appellant being dissatisfied by the order of the court made on 24<sup>th</sup> April 2019 by the trial court, he filed the memorandum of appeal listing six grounds of appeal as follows;

1. That the trial Chief Magistrate erred in law and facts when he gave a blanket ruling without considering that the respondent/appellant herein had filled pleadings with material facts that could challenge the plaintiff/applicant with overwhelming chances of success.
2. That the trial magistrate erred in law and facts when he failed to consider the fact that the appellant herein received the applicant's documents under protest as process server did not prove that he was a licensed process server and could meet the standards of service after staying with pleadings for a period of 20 days without service and later ambushed the appellant/respondent with a hearing date and during a burial process an act that was deliberate, malicious and frustrating the thinking of the appellant herein when indeed the deceased Henry Lubembe Shikoto died in the U.S.A in November, 2018 and ferried to Kenya on February 6<sup>th</sup>, 2019 and after having several funeral arrangement meetings adjacent to the applicant's home for all this period without serving court pleadings on time for immediate action.
3. That the trial Chief Magistrate over concentrated to the applicant's advocate's submissions when he made a ruling by just abating the application and the whole suit without considering both sides for a justifiable ruling as there was no concrete evidence on burial and site and there was no demonstration beyond reasonable doubt including permits for such exercise to warrant a burial.
4. That the trial magistrate erred in law and fact when he abated the case rather than dismissing as the whole case based on cheating the court when it demonstrated a deferent itinerary and burial date in the first place and upon a supplementary affidavit the trial magistrate failed to notice that the applicant's advocate never withdrew the main affidavit which had errors but was maintained as a court record with such errors.
5. That the trial magistrate erred in law and facts when he ignored the fact that the subject land parcel No. Isukha/Shirere/5952 was a pending subject of Kakamega High Court Land and Environment Case No. 205 of 2013 by originating summons between the appellant herein and the respondent an issue that amounts to sub judice yet the plaintiff thereof stated in a verifying affidavit that there was no suit pending between the plaintiff and the defendant in any court within the Republic of Kenya.
6. That the trial magistrate erred in law and fact when he believed that the appellant herein was the cause of the delay and a waste of courts time when indeed it was the contrary when the applicants advocate caused various delays when he was unable to move the court.

He prays that the appeal herein be allowed with costs and the deceased wishes be obeyed.

The respondent submitted that the appellant has not disclosed any reasons to invoke the powers of this court to interfere with the order of the trial court issued on 24<sup>th</sup> April 2019. The appeal is a wild appeal that goes beyond the order of the trial court and therefore this court is called upon to perform that which is beyond its mandate. Grounds of appeal must arise from the order or decision that a party is aggrieved with not just from everywhere. They submit that on 25<sup>th</sup> January 2019, the trial court issued temporary orders of injunction restraining the appellant herein from burying the body of his late father Henry Lubembe Shikoto on the plaintiff's suit land Isukha/Shirere/5952. Interpartes hearing of the application was on 8<sup>th</sup> February 2019. The appellant buried the deceased on 9<sup>th</sup> February 2019. On 24<sup>th</sup> April 2019, the appellant was present in court in person. The respondent through his advocate on record, informed the court that the appellant had complied with the order of the court such that the appellant had already buried the body of his deceased father on a separate land parcel before the hearing. The trial court on its motion ruled that, the matter had been overtaken by events as the deceased had already been buried. The matter was then marked as having abated. The appellant herein buried the deceased on 9<sup>th</sup> February 2019 just the following day after appearing in court on 8<sup>th</sup> February 2019. The burial took place on a separate parcel of land being Isukha/Shirere/6623 where the deceased has established his permanent matrimonial residence.

This court has considered the appeal and the submissions therein. In the trial court the plaintiff/respondent sought interim orders restraining the appellant from burying the deceased on the respondent's suit land Isukha/Shirere/5952. The same orders granted on interim basis are the

same orders sought in the plaint on permanent basis. I find that the appellant buried the deceased on 9<sup>th</sup> February 2019 on a different parcel of land other than the respondent's suit land Isukha/Shirere/5952, this means the dispute as to the place of burial had been settled. The trial court was thus right to find that the matter had been overtaken by events since the deceased had been buried before the hearing. On perusal of the court records I find that the appellant was present in court on 24<sup>th</sup> April 2019 and did not dispute the fact that he had already buried the deceased on 9<sup>th</sup> February 2019 before the trial court made the order. By burying the deceased on 9<sup>th</sup> February 2019, before the hearing and determination of the application and the main suit, the appellant complied with the court order and nothing was left for further hearing. I find that the court has no suit to hear and determine as the cause of action is overtaken by events.

In the case of *Mwanasokoni v Kenya Bus Service* (1982 - 88) 1 KAR 870, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision by the Trial Magistrate was judiciously arrived at. I find this appeal is not merited and I dismiss it with no orders as to costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 24<sup>TH</sup> DAY OF JUNE 2020.**

**N.A. MATHEKA**

**JUDGE**