**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**CIVIL SUIT NO. 25 OF 2013**

**SAMUEL MUNGAI MUCHERU……..1ST PLAINTIFF**

**DIANA GATHONI MUCHERU……2ND PLAINTIFF**

**OBADIAH MBURU MUCHERU……..3RD PLAINTIFF**

**DAVID NJUGUNA MUCHERU……...4TH PLAINTIFF**

**-VERSUS-**

**ANNE NYATHIRA……...……..DEFENDANT**

**JUDGMENT**

1. By a plaint dated 16th September, 2013, the Plaintiffs pray for judgment against the Defendant for an injunction to restrain the Defendant from singularly planning or burying/interring the remains of Ibrahim Mucheru Wahothi and for an order for an independent post-mortem to be conducted on the remains of Ibrahim Mucheru Wahothi in presence of all parties to the suit and their representatives.
2. The plaintiffs who are sons and daughter to IBRAHIM MUCHERU WAHOTHI (deceased) aver that the Defendant who is the 5th wife to the deceased arranged/planned to bury/inter the deceased on 18th September, 2013 without involving the plaintiffs or the other family members. That at the time preceding his death, the deceased was not compose mentis for he suffered from dementia a condition established by his Doctor. That before his death the plaintiffs had instituted **HCC No. 18 of 2013** against the Respondent seeking orders for appointment as a guardian *ad litem* owing to the deceased's mental status and illegal dealings involving the deceased's vast estate. That the deceased's left a written will which the Defendant has kept to herself by virtue of having been close to the deceased before he died and the family wishes that the will be read before the deceased is buried. That the cause of death is unknown and the family wishes that a post-mortem examination be carried out before burial, a position the Defendant has refused. That the plaintiffs claim against the Defendant is an order for permanent injunction restraining the Defendant, her servants and/or agents from burying /interring the remains of IBRAHIM MUCHERU WAHOTHI (deceased) before reading of the will and the conducting of post-mortem examination and involvement of all family members. Finally, that the deceased left behind a vast estate which risks going to waste and/or bona fide beneficiaries risks being disinherited hence this suit.
3. The 1st plaintiff Samuel Mungai Mucheru swore a verifying affidavit on 16th September, 2013 on behalf of his co-plaintiffs.

4. Upon being served with the plaint, the Defendant filed in her defence dated 28th October, 2013. In her statement of defence, the Defendant among others denies having planned to singularly, bury the deceased on 18th September, 2013 or any other date and puts the plaintiffs to strict proof thereof. In response to paragraph 7 of the plaintiff, the Defendant avers that the deceased had single handedly acquired the estate to the exclusion of the plaintiffs who have always been at liberty to acquire their own instead of muzzling the deceased over the control of his estate. The Defendant admits that the deceased left a will as averred in paragraph 7 of the plaint which among others spelt out where he wanted his remains to be laid to rest. She further avers that the will was on 18th October, 2013 partly read before Waweru J by Mr. Leo Masore Nyangau Advocate who has it in his custody and the Defendant denies being in custody of the same and craves to rely on the admission by Mr. Masore Nyangau Advocate. Further, the Defendant denies that the deceased's cause of death is unknown and in response will crave to rely on the Autopsy Report by Dr. Josephine N. Muthami and Dr. Oduor Johansen which state his cause of death as Asphyxia due to food aspiration pending histology. She states that she has never denied involving all the family members in the burial arrangement of the deceased. She denies the plaintiffs' claim *in toto*, and prays that the plaintiffs' suit be dismissed with costs.

5. The plaintiffs further filed reply to defence on 6th November, 2013 where they aver that the suit herein is not spent in anyway and that the Defendant has at all material times hereto continued to display arrogance, highhandedness and haughtiness with the single purpose of burying the deceased to the exclusion of the other family members, that the defendant had even gone ahead to single handedly dig a grave for burial to the exclusion of the four houses. It is their averment that the purported will read by Leo Masore Nyangau advocate is a forgery and there is a criminal matter pending police investigations.

6. Further, the plaintiffs aver that during his lifetime the deceased had specifically pointed out his interment /burial site to his first wife Esther Wanjiru Mucheru this being his ancestral home at Ndarugu/Gakoe/87. And finally that the said Leo Masore Nyangau is the personal lawyer of the Defendant and any reliance on any 'wish' expressed in the purported 'will' ought short of being disregarded, to be treated with the greatest of circumspection.

7. The parties testified to give voice to their respective positions. Three witnesses testified for the plaintiffs, while the three gave evidence for the defence.

8. The first plaintiff testified as PW1. He informed the court that the deceased had five wives, but one is dead. He begat twenty-three children with the said five wives. The three household live at different places within the country. PW1's mother resides at Munyu, the second wife at Nakuru; the household of the third wife who is deceased resided within Thika town at a place called Ngoingwa, the fourth wife lives in Kitale, while the last wife, the defendant herein, lives at Gatukuyu. The deceased lived at Gatukuyu with the second wife. He further stated that after his father died the four houses held at meeting where four of the houses agreed to inter the remains of the deceased at the ancestral land at Gakoe registered as Ndarugu/Gakoe/87. The fifth house, represented by the defendant was the only house to resist this. He conceded that the plaint does not indicate that the deceased wished to be buried at Gakoe, and further that nobody lives at the ancestral home at Gakoe.

9. PW2, Esther Wanjiru Mucheru, is the first widow of the deceased. Her evidence was that he in 1970 expressed his wish to be buried at the ancestral home at Gakoe. She stated that according to Kikuyu customary law a married man ought to be buried at his ancestral home. She also asserted that as the first wife of the deceased she had a prior right over the fifth wife to decide where the remains of her late husband ought to be interred.

10. The third witness was a police officer, Chief Inspector Alex Mwongera, a document examiner. His evidence dwelt on the authenticity of the signature of the deceased on the alleged will. His opinion was that the disputed signature was not that of the deceased.

11. DW1 was Mr. Leo Masore Nyang'au, an advocate of this court and the person who prepared the disputed will. His evidence was that he had known the deceased for some time as the latter had been his client for many years. He also confirmed receiving instructions from the deceased to prepare the disputed will, and testified that the same was executed by the deceased in his office in the presence of the two attesting witnesses. He affirmed that the signature presented in court and purported to be that of the deceased was in deed the deceased's signature. DW2, John Warui Kagwathi, was one of the attesting witnesses to the alleged will. He testified that he was present when the deceased executed the will, and confirmed that the alleged signature of the deceased was indeed his. The defendant testified as DW3. She told the court that she did not stop the rest of the family from participating in the funeral arrangements; neither did she intend to bury him without involving them. Her only desire was to bury him at Gatukuyu in accordance with his wishes as expressed in the will. She denied having a hand in the making of the will.

12. At the conclusion of the hearing, counsel for both sides gave their oral submissions. Mr. Kahonge for the plaintiffs argued that the defendant was seeking to singularly bury the remains of the deceased to the exclusion of the rest of the family. He cited several decisions of the High Court and the Court of Appeal to buttress his case that the final resting place of the deceased ought to be determined in accordance with Kikuyu customary law. He cited a paragraph in an affidavit sworn by the deceased on 20th May 1998 in **HCCC No. 1194 of 1998,** where the deceased stated that he wished to be buried in Ndarugu/Gakoe/580.

13. Mr. Makumi for the defendant argued that it was not pleaded in the plaint that the deceased wished to be buried at either Gatukuyu or Gakoe. He stated that if the deceased had asserted in his 1998 affidavit that he wished to be interred at Gakoe that decision had been reversed by the revocation clause, Clause 9, in the will of the deceased.

14. Having considered the plaint, the statement of defence, witness statements, the oral testimony of the witnesses and the rival submissions of the parties, I hold that the main issue for consideration relates to the interment of the remains of Ibrahim Mucheru Wahothi, specifically where the site where he should be buried. I say so because the issue of post-mortem to establish the cause of death has been sufficiently dealt with, and autopsy report dated 30th September 2013 has been availed to this court. In that report I note that an autopsy was conducted on 27th September, 2013 by Dr. Oduor Johansen a Consultant Pathologist who found the cause of death of the deceased to be Asphyxia due to food aspiration pending histology. I need not say anymore on the post-mortem.

15. It is the plaintiffs' case that the deceased had expressed his wish as to where he had wanted to be buried. This was orally communicated to his first wife Esther Wanjiru Mucheru sometime in 1970 and the place for this would be his ancestral home at Ndarugu/Gakoe/87. On the other hand, it is the Defendant's position that the deceased left a will in which he spelt out where he wanted his remains to be laid to rest. This Court observes that the Defendant in her submissions has submitted that it is possible that the deceased might have in the 1970s indicated that he wanted to be buried at Gakoe for as late as in 1998 he had sworn an affidavit confirming as such. Further, the Defendant has submitted that the deceased thereafter changed his mind on being buried at Gakoe to Gatukuyu when he completed his house and revoked all other will, codicils and testamentary dispositions.

16. A copy of the said Will reads in part –

> 'I HEREBY state categorically that when I die I should be buried within my compound at Gatukuyu which comprised of Plot Nos. T.328, Ngenda/Gatukuyu T.329 and Ngenda/Gatukuyu T.332 next to my house.'

Further, a letter addressed to the Funeral Committee for Ibrahim Mucheru Wahothi by the said Masore Nyang'au Advocates concerning the place of burial for the deceased reads at paragraph 3 –

> 'In the meantime, we wish to inform you that the said Ibrahim Mucheru Wahothi had

specifically indicated in the Will that his remains should be interred at Gatukuyu within the compound of the house where he lived and which comprises of plot Nos. T.328, Ngenda/Gatukuyu T.329 and Ngenda/Gatukuyu T.332.'

The said letter is dated 11th September, 2013. As has been noted above the plaintiffs have expressed their doubts as to the existence of the said will and have said that the same is a forgery which is subject to police investigations.

17. It has been long held by the courts that the wishes of a deceased person, although not binding, must as far as possible be given effect to. In ***Apeli vs. Buluku*** **[2008] 1 KLR (G&F) 873** the Court of Appeal was dealing with a burial dispute under customary law when it held as follows:

> ***"In cases such as this, the most important rule is that the wishes of the deceased person, though not binding, must, so far as possible, be given effect to."***

**In** *Jacob Blasto Okumu and four others vs. Claris Auma* [2014] eKLR, Muchelule J. observed thus:

> 'The only time that a court will not enforce the wishes of the deceased is where such wishes are clearly offensive, illegal or unenforceable. The trial court refused to rely on the document by the deceased because it did not amount to a will. However, as was stated by the Court of Appeal in the decision above, there is no property in a dead body that can be the subject of succession proceedings. It is in such proceedings that a will can be an issue.'

18. ***Section 3 (2)*** of The Judicature Act, Cap 8 Laws of Kenya, provides as follows:

> *"The High Court, the Court of Appeal, and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay."*

19. In *Virginia Wamboi Otieno vs. Ochieng Ougo and Omolo Siranga* [1982 - 88]1KAR 1049, the Court held that, subject to the qualifications stated in ***section3 (2)*** above, a court may only not apply customary law if there are circumstances pertaining to a case to which African Customary Law does not apply, in which event then the court should feel free to apply common or statutory law. The court stated as follows:

> *"The word 'guided' which is not an altogether easy term to understand in our judgment means led by something and so courts must have in mind as the guiding light, as the principal law, African Customary Law. If, however, there are circumstances pertaining to a case to which African Customary Law does not apply, a court should feel free to apply common or statutory law. The court having been guided by African Customary law and having been satisfied about the other elements of the sub-section is mandated: - 'to decide such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.' That is a pointer to the necessity to be 'guided' substantially by African Customary Law."*

20. The Court in the *Apeli Case* cited above further stated-

> 'We share the same view. If African Customary Law is not caught up by the qualifications under S.3 (2), above, then it must be given effect by the courts and must be applied in deciding cases before it but according to "substantial justice." We are, also, of the view that the manner in which S.3(2), of The Judicature Act, is worded gives flexibility to the administration of justice, as courts are thus

empowered to weigh all the circumstances of a case before coming to a decision, without whittling down the place of customary law in the administration of justice in Kenya. So the discretion the courts have is not whether to apply customary law or not, but the discretion is to consider whether to enforce a right, which under that law vests in a particular person, or not.'

21. The parties in this suit have disagreed on the site where the deceased should be buried. Both the plaintiffs and the Defendant agree that the deceased had one time expressed his wish to be buried at his ancestral home at Ndarugu/Gakoe/87. But the Defendant maintains that position changed when the deceased wrote a will where he expressed his wish to be buried at Gatukuyu within the compound of the house where he lived and which comprises of plot Nos. T.328, Ngenda/Gatukuyu T.329 and Ngenda/Gatukuyu T.332.

22. In *Sarafina Wanjiku Kinyanjui and five others vs. Elizaphason Kinyanjui Mukora* [2013] eKLR Onyancha J had this to say: "*It was stated by the lower court and this court reasserts it, that it would have been commendable if the Appellants and the Respondent would have struck an agreement as to where the deceased should be buried. Unfortunately that did not happen*". Further, in ***John Omondi Oleng and another vs. Sueflan Radal*** **(2012) eKLR Mabeya J held thus:** *"…When it comes to the disposal of the body of a married man or woman the spouse should play a leading role. It would be better if the relatives of the deceased can sit down and agree on how to give their loved one a dignified exit. When they fail to agree and approach the Court for solution, the court has no option but to step in..."*

23. The plaintiffs have also alleged that the Defendant has attempted to singlehandedly bury the remains of the deceased. Who then in the instant case has the responsibility to bury the deceased? In the abovementioned case, Mabeya J, further held as follows: - *"There has to be somebody to bury a deceased person. In my view a surviving spouse is the person with the greatest responsibility for laying to rest the remains of the deceased spouse. That is the only way marriage can have meaningful purpose. Even if the deceased had not said anything about the disposal of (the) remains, the Defendant (spouse) would still have carried the day."*

24. As far as the Defendant is concerned, the deceased left a will giving direction as to where he should be buried. What is interesting though is that the content of the said will is unknown save for the part that deals with his burial. In his letter dated 11th September, 2013 the Advocate who drew the purported will says at paragraph 2 second last line. *"We will open and disclose the content of the said will to all his wives and children when the mourning period is over."* It would it have been useful if all the contents of the will were disclosed, especially with regard to the identity of the Executor of the will as it is the duty of the executor to bury the deceased. ***Section 83*** of the Law of Succession Act provides as follows-

'Personal representatives shall have the following duties-

a. To provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him.'

25. However, it has been stated that there is no property in a dead body to be disposed of by the testator at will. Whatever wishes the testator expresses in his will are not binding on the family. This position was stated by Law JA in ***Apeli vs. Buluku*** **[2008] 1 KLR (G&F) 873, where he said that there cannot be property in a dead body and a person cannot dispose of his body by will. The wishes of the deceased , though not binding must be, so far as practicable be given effect, so long as the same is not contrary to custom nor contrary to the general law or policy.** Kwach JA made similar remarks in in *Pauline Ndete Kinyota Maingi vs. Rael Kinyota Maingi* Nairobi Court of Appeal civil appeal number 66 of 1984, where he held that an executor's duty is to give effect to the deceased's wishes in relation to the disposition of his corpse as far as practicable. He is not bound effect to those wishes if they are either impracticable or in conflict with the personal law.

26. Kikuyu custom on who should bury and where the deceased should be buried is notorious. It is the responsibility of the clan or the brothers and adult sons of the deceased to bury him. His remains should be interred at his ancestral home or at the compound of his first wife.

27. In the end I will make the following orders –

a) that the deceased shall be buried at the ancestral home at Gakoe;

b) that all the members of the family of the deceased shall participate in the funeral arrangements;

c) that the funeral expenses, including mortuary charges, shall be borne by the family; and

d) That each party shall bear their own costs.

**W. MUSYOKA**

**JUDGE**

**Judgment is delivered dated and signed in in open court on the1st day of April 2014 in the presence of –**

**Mr. Omari for Mr. Kahonge for the plaintiffs**

**Mr. Makumi for the defendant**