REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELCLA NO. 029 0F 2025

CATHERINE BAGENI GETAMA.....1ST APPELLANT

THOMAS ROSWE GETAMA.....2nd APPELLANT

VERSUS

PETER MAROA (Suing as the legal representative of the Estate of BABERE IKWABE).....RESPONDENT

RULING

1. Before me is an application brought by way of a Notice of Motion dated 18th September 2025. It is brought under Order 40 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law. It seeks the following orders.:

1. **…Spent**
2. **…Spent**
3. **The injunctive orders issued on 2nd September 2025 restraining the burial of the deceased, Joseph Joseph Ketama Roswe on land parcel number**

Bwirege/Bukihenche/990 (formerly No. 227) be set aside and or discharged forthwith.

4. **The costs of this application we provided for.**

2. The Application was based on a number of grounds which were stated on the face of the application, and the depositions in the Supporting Affidavit of Thomas Roswe Ketama. The grounds were that the deceased Joseph Ketama Roswe was the registered proprietor or land parcel number Bwiregi/Bukihenche/990 (formerly 227). The deceased, Babere Ikwabe Nyamosi, challenged in the title of Joseph Ketama Roswe in Land Disputes Tribunal case number 1 of 2005. The injunctive orders barring his burial on the suit land were issued on the strength of a decree passed in 2006, which decree has since been overtaken by events hence no longer enforceable in law. That in any event, the decree adopted only awarded the Respondent 8 acres of the parcel of land and the deceased Joseph Ketama was to retain the rest of the 12 acres.

3. Further, the decree did not extinguish the deceased's right of ownership over the suit property. It could not be relied upon to curtail the right of an owner of land to be interred in his own

property. Unless the orders were set aside, the family of the deceased shall suffer irreparable harm, indignity and hardship contrary to the African customs and public policy which recognize burial should be within one's home state. It is in the interest of justice and fairness that the injunctive orders be vacated and the family be allowed to proceed with the burial arrangements. This court is clothed with inherent jurisdiction to set aside the orders, as justice demands.

4. The affidavit sworn by Thomas Roswe Ketama on the 18th of September 2025 contained depositions that the deceased was the registered owner of the suit land. He annexed and attached a copy of the green card for parcel number Bwiregi/Bukihenche 227. He marked it as TRG 1. He also attached to the Affidavit a copy of the decision of the Land Tribunal which by which one Babere Ikwabe Nyamosi challenged the title of Joseph Roswe the deceased and by which the Land Disputes Tribunal awarded him 8 acres while the rest of the parcel measuring approximately 12 acres was to be retained by the deceased Joseph Ketama Roswe. He annexed and attached as TRG 2 a

copy of the decision. He emphasized that the decision was never executed for a period of 20 years.

5. He added that upon the demise of Joseph Roswe, his family sought to inter his remains on a portion of the said parcel of land. The Respondent then sought injunctive orders to stop the burial on the land. The trial court, on 2nd September, 2025 issued the injunction impugned. It restrained the interment of the body the body of the deceased on the suit land. He attached a copy of the ruling of the court and marked it as TRG3.

6. He deposed that the decree of the Court had been overtaken by events. Further, Section 4 (4) of the Limitation of Actions Act bars execution of decrees past 12 years. He added that the decree did not divest the deceased of his property in the suit land. He added that the orders as they were currently caused great suffering to the family of the deceased who were unable to accord the deceased a decent burial. He added that if the orders were not set aside, it would condemn the family to bury the remains of the deceased elsewhere against his wishes and

the cultural traditions. That it was just and equitable to set aside the orders.

7. In his Replying Affidavit sworn on 22nd September 2025, Peter Maroa Ikwabe, deponed that the deceased, Joseph Getama Roswe, was fraudulently registered as proprietor of the suit land when he was the Chairman of the Timaru Land Adjudication Tribunal. The said 8 acres of land in issue or claimed by the Applicant were the ancestral land of the deponent's grandfather, Babere Ikwabe Nyamosi, who has since died. It was on the said portion of the ancestral land where the Applicants want to bury the deceased. Further, it was on the said portion of land where the Applicants had dug a pit which they had already cemented in preparation for burial.

8. He deposed further that the Applicants were at liberty to bury the deceased on their portion of 12 acres which is not the ancestral land in issue. That the finding of the Tribunal and the Appeals Committee remained in force. He annexed a copy of the ELC Petition No. 9 of 2010 and marked it PMI-1 to support his deposition. He added that the decree was still valid and could be executed under Order 22 Rule 18 of the Civil

Procedure Rules by issuing a Notice to Show Cause why execution should not be issued. Further that Section 4(4) of the Limitation of Actions Act was not couched in mandatory terms. He added that the intended burial of the deceased on the suit land was unacceptable and amounted to theft of their ancestral land as was found by the Land Disputes Tribunal, the Appeals Committee and the ELC in the Petition. He added that the Appeal herein was an abuse of the process when this matter was still pending before a competent Magistrate Court at Kehancha.

9. During the *inter partes* hearing this Court directed that the Area Chief of the Location where the suit land lay does attend Court to give neutral testimony on the true position on the ground. The Chief, one Ayub Magenywa Manga, testified orally that he became the Area Chief in 2009. He knew both parties. He also knew well the suit land which was within his jurisdiction. Initially, it was parcel No. 227 and later became parcel No. 990. He added that the family that lives on the land is that of the deceased Joseph Getama Roswe. It had been on the land even before he became the Area Chief. Further, the

Respondent had never resided on the parcel of land. It was on the said parcel of land that the Appellants wanted to bury the deceased, within their compound.

10. On cross examination he added that he did not know the history of the suit land. But he knew that Peter Maroa was claiming the right side of the land. He could not tell the size of the land. It was that right side which was disputed by the parties. The land had not been subdivided by the deceased Joseph Getama Roswe. Further, regarding the actual occupation of the right side, it had a remaining part of about 3 acres unoccupied. Th lower part of the land was occupied by the eldest wife of the deceased.

11. The Court sought clarification from the witness regarding the actual situation on the land. The witness stated that the compound where the appellants wanted to bury the deceased was fenced with a live fence of kay apples. It was within that compound that the appellants wanted to bury the deceased and that was where they had dug a grave.

12. The parties submitted orally. The appellants' counsel argued that the deceased was the registered owner of the suit land.

Further, it was true that the Respondent was awarded 8 acres of the whole parcel of land by the Land Disputes Tribunal even though the Tribunal did not have jurisdiction to make such an award. He stated that the appellants had since come to this Court for an order that they be permitted to bury the deceased on the 12 acres of the remainder while the issue of the ownership of the 8 acres remains in court for determination. The appellants only wanted to bury the deceased in his homestead. The hearing of the matter regarding the 8 acres was due in November 2025.

13. On his part, learned counsel for the Respondent argued that the appellants' case was that they wanted to bury the deceased on the part of the land in issue. It was that specific part of the land which was ancestral land of which the Respondent claimed 8 acres. The entire parcel was 20 acres in size.

ISSUE, ANALYSIS AND DETERMINATION

14. This court has considered the application, the Supporting Affidavit and the Replying Affidavit thereto, the law and submissions of both counsel for the parties. It is of the view

that there are only two issues for determination. The first one is whether the application is merited, and the second one is who to bear the costs of this application.

15. This being an application made at the interlocutory stage of this appeal, it is important to consider the effect of granting the prayers sought on the entire appeal, to wit, would it dispose of the appeal and therefore render it an academic exercise or failure to grant it, would also render the appeal nugatory?

16. Before delving into the It is worthy of note that the appeal herein arises from an order made by the trial court in its exercise of discretion at the interlocutory stage of the trial. At that stage, the Court aimed at preserving the subject matter pending the hearing and determination of the suit. Be that as it may, this Court, in considering whether to set aside the orders of the trial court or not, it view it equally important to consider whether the trial court exercised its discretion judiciously, whether it considered all the factors that it ought to have considered, or did not take into account any factors that it ought to have taken into account or whether its conclusion was plainly wrong. All these considerations are matters which can

only be determined at the meritorious determination of the appeal filed herein.

17. Ultimately, the role of this court as an Appellate Court remains as was stated by the Court of Appeal in the case of **Gitobu Imanyara & 2 others Vs Attorney General [2016] eKLR**. In it the Court held;

> **"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect."**

18. Also, in **Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR** the same Court held as follows;

> **"This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the**

record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

19. Therefore, the words of Sir Charles Newbold, P. expressed in this often-cited **Mbogo & Another V. Shah [1968] EA 98** will be vital at the hearing of this appeal, and any decision made at the interlocutory stage should not go against the grain of the ultimate consideration this Court as an appellate one shall make. In the **Mbogo v Shah** case (supra) his Lordship stated thus:

> **".....a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."**

20. Similarly, in **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] KECA 606 (KLR)** the Court of Appeal held:

> **"This *dictum* underlines what is well settled in our laws that as an appellate court this Court has a limited function in an appeal from the grant or refusal of an order of injunction issued by the court below. It has no jurisdiction to exercise an independent original discretion of its own. It must defer to the exercise of discretion by the Judge in the court below and must not interfere with it merely upon the ground that the members of this Court would have exercised the discretion differently."**

21. Additionally, in Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] KECA 394 (KLR), it was held,

"In **Edward Sargent -v- Chhotabhai Jhaverbhat Patel [1949] 16 EACA 63**, it was held that an appeal does lie to an appellate court against an order made in the exercise of judicial discretion,

but the appeal court will interfere only if it be shown that the discretion has not been exercised judicially."

22. All the decisions above point to the enduring legal principle that when the discretion of the trial court comes to scrutiny at the appellate stage, there are clear guidelines on how the appellate court proceeds. Further, these are the ultimate questions for the Court to handle when it will have to determine the appeal. It means that as of now if the Court were to consider setting aside the orders granted by the trial court, it would be determining the appeal prematurely.

23. This now turns me now to the merits or otherwise of the instant application. The applicant prays for an order that this Court sets aside or discharges the injunctive orders issued on 2nd September 2025 by the Honourable trial court which restrained the burial of the deceased, Joseph Ketama Roswe on the suit land. The argument in the application is that the deceased was the registered owner of the suit land, and that the Defendants challenged the ownership of only 8 acres out of the twenty that he owned. While the prayer would have been merited, the effect of discharging the order of the trial court

has the impact of permitting the burial to take place on any part of the parcel of land. The prayers sought in the application and the reliefs sought in the appeal are one and the same. The trial court considered the application which was before it in the interlocutory stage. The Court issued the injunction pending the hearing and determination of the suit. The Court is asked to discharge the injunction. Then if the prayers herein are the same as the reliefs sought in the main appeal what would become of the Appeal? It means the Court would have determined the appeal indirectly. Since the application is intended to determine the appeal prematurely it would be contrary to the rules of natural justice and render the appeal nugatory. The appeal would be an academic exercise because the court would have determined the merits or otherwise of the setting aside of the orders granted by the lower court.

24. The upshot is that the application is declined. The costs of the application would be in the course.

25. This court now directs that because there is a body that is lying in the mortuary pending the determination of the appeal herein the Appellant has three days to confirm whether the

proceedings shall have been typed, and the Record of the Appeal filed. If the proceedings shall not have been filed, then the Appellant should liaise with the deputy Registrar of this Court in order to have the proceedings and decree filed not later than Friday this week.

26. Secondly, this Appeal shall be mentioned on **6th October 2025** to confirm both the Record of Appeal, and the entire file shall have been placed before this Court for hearing and determination.

27. Orders accordingly.

RULING Dated Signed and **DELIVERED** via the Teams Platform this **29th** day of **September, 2025**

HON. DR. *IUR* NYAGAKA

JUDGE

In the presence of,

Court Assistant: Ms Lola

Singei Advocate for Abisai Advocate for the Appellants

Agade Advocate for Awino Advocate for the Respondent