



REPUBLIC OF KENYA



KENYA LAW
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**Momanyi v Makori & 4 others (Civil Case E228 of 2025)
[2025] KEMC 136 (KLR) (10 June 2025) (Judgment)**

Neutral citation: [2025] KEMC 136 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CIVIL CASE E228 OF 2025
PA NDEGE, SPM
JUNE 10, 2025**

BETWEEN

JENNIFER KEMUMA MOMANYI PLAINTIFF

AND

LUKAS MAKORI 1ST DEFENDANT

KENNEDY MAKORI 2ND DEFENDANT

DAVID MAKORI 3RD DEFENDANT

JOSPHAT MAKORI 4TH DEFENDANT

JARED MAKORI 5TH DEFENDANT

JUDGMENT

1. On 18th March, 2025, the Plaintiff in this suit filed a Complaint dated 4th May, 2025 praying for judgment against the Defendants for:
 - i. An order compelling Nyangena Mortuary within Kisii County or wherever the body would be, to release the body of the deceased Benson Mpmanyi to the Plaintiff and a copy hereof be served upon the OCS of the nearest Police Station for effective compliance,
 - ii. An order be issued allowing the Plaintiff to collect the body from the Defendants and or wherever the body may be and a copy hereof be served upon the OCS nearest police station for effective compliance,
 - iii. An order of Mandatory injunction directing the Defendants and or Nyangena Mortuary and or wherever or whoever is the custodian of the deceased's body to release the body of Benson Momanyi to be laid to rest at his Matrimonial home in the parcel of Land known as Njoro/



Ngata Block 2/5080 (Kirobon 'A') within Nakuru County and a copy hereof be served upon the OCS Keroka Police Station for effective compliance.

- iv. Costs and interest of the suit
2. It is common ground herein that the plaintiff was the wife of the late Benson Momanyi (hereinafter referred to as the 'Deceased') who died on 05/03/2025 while undergoing treatment at Bloom Hospital within Nakuru County. During the treatment, the Plaintiff was the sole caregiver until her husband, the deceased, passed away. Upon his demise, a committee for his burial was formed within his matrimonial home in Ngata, Nakuru, where he had bought a parcel of land by the name Njoro/ Ngata Block 2/5080 (kirobon 'a'). Pw3, Thomas Madaga Imbwaga, And Pw4. Andrew Nyabuto Nyamwayi, are members of the committee.
 3. According to the plaintiff, the family of the deceased, including his nuclear family and brother, who are the defendants herein, met at his matrimonial home at Nakuru and also participated in the burial preparations and unanimously agreed that the deceased was to be interred at Nakuru.
 4. It was then decided that the body of the deceased be moved to another funeral home with better facilities and that in the process of the movement, the defendants unilaterally decide to transport the body to Nyangena Mortuary in Kisii, contrary to the wishes of the plaintiff, the deceased's nuclear family and the burial preparation already in place.
 5. Contrastingly, the defendants case and evidence is that the deceased had expressed to them their wish that he be interred at his home in Kisii where he had buried his 2 deceased's children. According to the 2nd Defendant, DW1, Kennedy Makori, the deceased's family has a designated grave yard at their Kisii ancestral home where the deceased's late children were buried. It was however unclear whether the deceased had a matrimonial home at Kisii or not.
 6. After the close of hearing, in which the plaintiff called 4 witnesses while the defendants called 2 witnesses, parties herein filed their written submissions - the plaintiff's submissions are dated 26st May, 2025 whilst the Defendants' submissions are dated 19th May, 2025. The Plaintiff was represented by the Law firm of Mongeri & Company Advocates whilst Defendants were represented by the Law Firm of Geoffrey Otieno & Company Advocates.
 7. The Plaintiff's counsel Mr. Mongeri submitted that the plaintiff, the wife to the deceased, took care of him when he was sick until the time he passed away and was therefore the closest relative to him. That she is therefore the rightful person to be granted the right of burying the deceased together with the burial committee as had been agreed that the deceased would be buried at his Ngata home. That the defendants only came to the deceased's new home when they heard that he had died and their conduct towards the deceased is therefore as bad in death as it was in life. That the plaintiff and the deceased were married under the Gusii customary laws and the union registered with the registrar of marriages on 02/11/1995. That being custodians of the Gusii customary laws, it is only fair that this court to take into consideration the customs of that community and the plaintiff be given the right of burying her late husband. Learned counsel relied on the case of Onderi Vrs Ontweka & 3 Others [2023] KEHC 19506 (KLR). Learned counsel further submitted that the deceased had wished that he be buried at Ngata when he dies and it is therefore imperative that his wishes be granted.
 8. Learned counsel for the defendants' on the other hand submitted that the plaintiff's rights to bury the deceased herein is not absolute. On this point, learned Counsel relied on the case of Oliver Bonareri



Omoi & 5 Others Vrs Joseph Basweti Orogo [2010] e KLR, where Maraga J. (as he then was) held as follows:

Under Kisii Customary Law, the widow or widower has a right to bury his or her deceased spouse. It follows that the respondent in this case has a right to bury the deceased. That right, is, however not absolute. The deceased's views as to where and who should bury his or her body as well as other circumstances do in most cases override that right.

9. Learned counsel for the defendants went ahead to submit that in this case, the special circumstances arise as since the deceased informed his brothers that he wanted to be buried in Kisii and that the deceased had previously buried his 2 children in Kisii. That the fact that the deceased had buried his 2 children at Kisii demonstrates, on a prima facie basis, his wish to also be buried in Kisii, his ancestral home. That as per Kisii Customary Law, the deceased ought to be buried in his ancestral home. That the deceased never divorced himself from his patrilineal Gusii traditions as he had also married the plaintiff under the Gusii customary law. That additionally, all the deceased's children have been named in the Gusii customary law. That the deceased therefore subscribed to the Gusii customary law which therefore applies in this case. That the question of where the deceased constructed his house is not relevant as he constructed in both Nakuru and Kisii.

Determination

10. I have carefully considered the evidence herein, and the parties' submissions. The first issue is on the right to bury the deceased. On this issue, as to who has the right to the body of the deceased, it is to be noted that all the parties in this case are relatives of the deceased and are therefore entitled to bury their deceased. There is no property in a dead body. However most African communities show respect to their loved ones by honoring their wishes. However as correctly submitted by the learned counsel for the defendants', the right to bury was not a serious or primary dispute before this court as all the parties agree that they are all related to the deceased and the plaintiff as a widow has a right to bury the deceased, same as the defendants who are brothers to the deceased. In short, none of the parties herein wants to exclude another from participating in the burial of the deceased. All are bereaved and none should claim more bereaved than the other. It is unafican to claim so.
11. I believe the main issue herein is where to bury the deceased? Whether at his newly constructed home at Ngata in Nakuru county, or at his ancestral place at Kisii. In light of the evidence presented before this court, the parties are claiming that the deceased expressed his wish to be buried in Nakuru and also in Kisii. I however do not find any piece of evidence showing the express statement of the deceased on the place where he preferred to be buried. Both sides claim that the deceased's expression was done orally.
12. In James Apeli & Enoke Olasi Vrs Priscilla Buluku [1985] KLR 777, it was held by the Court of Appeal that:

There can be no property in a dead body. A person cannot dispose of his body by will. After death the custody and possession of the body belong to the executors until it is buried... If the deceased had left directions as to the disposal of his body though these are not legally binding on his personal representative, effect should be given to his wishes as far as that is possible.

13. In Re Estate Of Evanson Mbugua Thong'ote (deceased) [2016] eKLR Judge Musyoka stated that: -

An oral will is made simply by the making of utterances orally relating to disposal of property. In assessing whether the deceased had made a valid oral will, it needs to be considered first whether there was an utterance of the will. The question being whether there



was an oral utterance of the terms of the will...The other consideration is that the utterance ought to be made in the presence of two or more persons.

14. The Plaintiff claims that the deceased expressed his desire to be buried in Ngata - Nakuru which he considered his home, while the Defendants claim that it was the deceased's desire to be buried in Kisii his ancestral home. From what the parties are saying about the deceased, he seemed to have been an esteemed member of the society who had almost everything figured out. It is highly unlikely that he would have been confused on his resting place; he seems to have been someone who would know that giving such contradictory statements would bring conflict to the family. In this regard I find that the deceased had not declared his wish as to his final resting place as no evidence has been provided by any of the parties to prove the same.
15. Where then should the deceased be buried? As earlier mentioned, the Defendant witnesses testified that the deceased practiced Gusii customary laws and traditions; that he even had his children named according to Gusii customary rites, his marriage was in accordance to Gusii customary laws, his children who died earlier on were also buried in Kisii ancestral land in accordance to Gusii customary rites. Those burials were however before he had constructed his retirement home at Ngata- Kisii as he was still in active service and therefore staying at a rental premises in Nairobi. Now that he had since retired, he decided to construct a retirement home at Ngata- Nakuru in which he lived with his nuclear family. There was however no evidence as to whether the Nakuru home was constructed in accordance with Gusii customary laws or whether it qualified to be called a home for an elderly retired Gusii man such as the deceased herein. I do believe that had it been built in accordance with the Gusii customs then there could have been an expression of where he wished to be buried since such a house has to have a front door and a back door as held in the case of ONDERI VRS ONTWEKA & 3 OTHERS, supra, where Ogola J. held as follows: ‘_according to the Gusii customs and traditions, when a house is built in that pattern, it means the deceased's corpse would have to be carried through from the front door to the back door so as to be rested.’
16. It is however also not clear whether there is a house belonging to the deceased at his ancestral home and whether the same might permit Gusii customary laws of burial. Evidence was however laid that there is grave yard at Kisii where the deceased would have also been buried, next to his deceased's children.
17. From the statements of the witnesses, the deceased was a person who knew how, and tried, to play balance. He was always raising his family in Nairobi while he was in service and also acknowledging his Gusii roots by involving his brothers in his affairs and plans. This can also be demonstrated by the fact that he had his 2 deceased's children buried in Kisii in his ancestral land and according to Abagusii customary rites of burial. When he retired, he build a retirement home for his family at Ngata in Nakuru, and he duly informed his brothers – the defendants herein – of the same. The people involved in this dispute - the plaintiff and the defendants can thus be termed to have been closest to the deceased - but they can't seem to agree on where the deceased should be buried.
18. In Dinah Odhiambo Oyier Vrs Hellen Achieng & 3 Others [2017] eKLR Cherere, J held that where the people who are legally closest to the deceased ‘have shown that they cannot now agree on that issue, it is desirable and, indeed imperative, in the circumstances of this case, for this court to intervene and direct as to the deceased's place of burial.’
19. Similarly in the famous Virginia Edith Wamboi Otieno Vrs Joash Ochieng Ougo & Another [1987] eKLR Bosire J. 9as he then was) held that:

It is my judgment and so declare that the 1st defendant and also the plaintiff have the right under Luo custom, to bury the deceased and to decide where the burial is to take



place. However, because the two have shown that they cannot now agree on that issue, it is desirable and, indeed imperative, in the circumstances of this case for this court to intervene and direct as to the deceased's place of burial.

20. As correctly submitted by the learned counsel for the defendant, customary law is one of the sources of Law in this country. Customary law is applied by dint of Section 3 (2) of the [Judicature Act](#) that provides that: -

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.

21. In *Dinah Odhiambo Oyier Vrs Hellen Achieng & 3 Others* (Supra), it was held that if African customary law is not caught up by the qualifications under section 3(2) of the [Judicature Act](#) then it must be given effect by the courts and must be applied in deciding cases before it but according to 'Substantial justice'.

22. In *Sakina Sote Kaittany & Ano. Vrs Mary Wamaitha* [1995] eKLR the Court of Appeal held that: -

The Parties in this case are Africans and therefore the court will take judicial notice of such African Customary Law as may be applicable but subject to the provisions of reg. 4 as set out above. The difficulty remains how are these customary laws to be established as facts before the court. In some cases the court will be able to take judicial notice of these customs without further proof as for instance in cases where the particular customary law has been the subject of previous judicial decision or where the Customary Law is set out in a book or document of reference as provided in sub-s. (2) above, but usually in the High Court or in a Magistrate's court, the relevant customary law will, as a matter of practice and of convenience, have to be provided by witnesses called by the party relying on the particular customary law in support of his case.

23. It follows that where a finding has been made by a court as to the existence of a particular customary law, that finding may be relied upon in subsequent cases. The Gusii Customary Law in this case has been codified in case law in *Oliver Bonareri Omoi & 5 Others Vrs Joseph Basweti Orog*, supra, where it was held that:

Does Kisii Customary Law provide for burial disputes like the one in this case? Yes it does. Under Kisii Customary Law, the widow or widower has a right to bury his or her deceased spouse. It follows that the respondent in this case has a right to bury the deceased. That right, is, however, not absolute. The deceased's views as to where and who should bury his or her body as well as other circumstances do in most cases override that right.

24. Maraga J (as he then was) proceeded to state in the *Bonareri* case (supra) that:

...it is common knowledge and I take judicial notice of the fact that a reasonable fraction of Kisiis have moved out of Gusii land and settled in other parts of the country. Except in cases of ownership disputes, nearly all of them are buried in their new acquired homes when they die. 'it is common knowledge and I take judicial notice of the fact that a reasonable fraction of Kisiis have moved out of Gusii land and settled in other parts of the country.'



25. Justice Ogola in *Onderi Vrs Ontweka & 3 Others*, supra, agreed with Maraga J’s decision and holding hereinabove and went on to state as follows: -

The Kisiis are believed to have originated from the Congo and moved through the Mt. Elgon region of Uganda and later settled at the Kisii and Nyamira Counties of Kenya. Over the years due to land constraints and also for the desire of diversity, business and job opportunities, a population of Kisiis have moved from the Kisii and Nyamira Counties into other counties such as Kajiado, Mombasa, Narok, Nakuru, Machakos to name but a few. Most of them have established homes away from their original counties.

It is therefore not new that Kisii people have been buried in the places where they have established homes. It does not mean that customs or traditions do not apply if one is buried away from Kisii or Nyamira.

26. In the instant case, the deceased being a servant in Nairobi spent his working years in Nairobi and built a retirement home in Ngata – Nakuru where he settled his family just before his demise. Whereas the existence of the home at Nakuru has not been disputed, it is not clear whether the deceased had a house at his ancestral home or not. The plaintiff insists that they do not have a home at Kisii, while some scant oral evidence of a house or houses at the ancestral home came from DW1. Still, there is no evidence that the deceased has a house built to contain the front and the backdoor where the burial rite of carrying the body from the front door through to the back door can be done.
27. In the case of *SAN V GW (2020) eKLR* the court of Appeal stated that:

The law only recognizes the persons who are closest to the deceased to have the right to bury the deceased. Those persons have been identified as the spouse, children, parents and siblings, in that order. The other consideration is that the person claiming the right to bury the deceased must be one who is demonstrated to have been close to him or her during his or her lifetime. Regarding this last limb, the Court of Appeal in *Samuel Onindo Wambi Vrs Coo & Another (2015) eKLR* expressed the following view:

“...A person’s conduct to a deceased person can extinguish the right of that person of burying the remains of the deceased. The appellant did not show any family closeness with the deceased when she was alive. Though he said that he used to visit the deceased and that he mobilized his siblings to build a house for her at Kibos there was no credible evidence to prove so. (sic). The fact that he was the deceased’s first-born son did not give him an automatic right to bury her even if Luo customary law dictates so. The court has to consider all the circumstances of the case and the justice of the case...In this case, besides the fact that given the father and his family’s treatment of the deceased he is not deserving of the right to bury the deceased’s remains”.

28. In the instant case, it is not disputed that the deceased married the Plaintiff under Gusii customary law, it is also not in dispute that the deceased had a home in Ngata - Nakuru. It has not been seriously argued whether the plaintiff is deserving of burying the deceased as the spouse. From the evidence before Court, it has been established that the Plaintiff has always been with the deceased. None of the defendants’ witnesses has said anything that would render the Plaintiff undeserving of the remains of her husband.



29. As held by Maraga J in the Bonareri case (supra), the customary law of the Gusii demands that the widow or the widower of the deceased had the right to bury his/her spouse. In that regard, and to settle the dispute herein, I find that the Plaintiff herein has the right to bury the deceased.
30. On whether the orders sought by the plaintiff should be granted, I find that Nyangena mortuary, against which some orders are being sought by the plaintiff, was, however not brought or joined as a party herein, and as such, no compelling order can be issued against it without it being heard, or any dispute or wrong attributed to it.

Disposition

31. To dispose of this matter, and in light of my analysis hereinabove, let me begin by reiterating that Article 45 of *the Constitution* recognizes the family unit and provides that ‘the family is the natural and fundamental unit of the Society and the necessary basis of social order and shall enjoy recognition and protection of the state.’ The nuclear family is the basic unit of the family which is recognized and protected by the state. The core and basic unit of a family is the nuclear family; this means that basic unit of the family has rights that should be recognized and upheld by the state.
32. In this case, the Plaintiff’s family being the basic unit and the nuclear family of the deceased, and in the absence of any unique or special or exceptional circumstances, has the right to bury their dead. With that in mind, I declare that the Plaintiff has the right to bury the deceased. Consequently, I order as follows:
 - i. The body of the deceased Benson Momanyi be released to the Plaintiff.
 - ii. The Plaintiff is hereby allowed to collect the body from the Defendants or wherever the body may be.
 - iii. A mandatory injunction be and is hereby issued directing the Defendants or whoever is the custodian of the deceased’s body to release the body of Benson Momanyi to be laid at his matrimonial home in the parcel known as NJORO/ NGATA BLOSK 2/ 5080 (KIROBON ‘A’) within Nakuru County and a copy hereof be served upon the OCS Keroka Police Station for effective compliance.
 - iv. Each party to bear own costs.

Orders accordingly

DATED, SIGNED AND DELIVERED AT NAKURU THIS...10TH ...DAY OF ...JUNE....., 2025.

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Plaintiff’s Counsel: Esand h/b Mongeri

Defendants’ Counsel: Temba

Plaintiff: n/a

1st Defendant: n/a

2nd Defendant: n/a

3rd Defendant: n/a



4th Defendant: n/a

5th Defendant: n/a

