



**Silas & another v Kathambi & 2 others (Family Cause
008 of 2024) [2024] KEMC 5 (KLR) (28 March 2024) (Judgment)**

Neutral citation: [2024] KEMC 5 (KLR)

**REPUBLIC OF KENYA
IN THE MILIMANI COMMERCIAL CHIEF MAGISTRATE'S COURTS
FAMILY CAUSE 008 OF 2024
GM GITONGA, PM
MARCH 28, 2024**

BETWEEN

GRACE RIGIRI SILAS 1ST PLAINTIFF

MATHEW KOBIA IGWETA 2ND PLAINTIFF

AND

SARAH KATHAMBI 1ST RESPONDENT

PURITY KINYA 2ND RESPONDENT

MIRIAM MAKENA 3RD RESPONDENT

JUDGMENT

1. As I seek to render a determination on the sole but the all important question of who between the two factions of the same family has the right to bury the deceased and at which place, the words of Justice M. Gachoka, JA in the case *Joseph Ontweka and 3 others v Ziporrah Masese Ondiek*, Civil Appeal No E692 of 2023 are pre-eminently etched in mind. The learned Judge expressed himself in the following terms;

“Burial disputes are emotive and whatever the outcome,
some will be left in tears.”

2. I however seek a consolation from the words of Doyle, CJ in the case of *Dodd v Jones* [1999] SASC 458(36) In which he articulated the difficult task of determining burial disputes in the following words:

“...(T)he problem before me is really insoluble.. it is impossible ... to weigh the competing claims and arrive at what one would truly call a legal Judgment. I understand and respect the wishes and beliefs of (the parties). There is no solution.....that will satisfy each side. I can only make a decision and indicate my regret that it will cause pain to the unsuccessful party.”



3. Turning to the substance of the dispute before me, the plaintiffs moved this court by way of a plaint dated 21st February, 2024 seeking the following reliefs as against the defendants.
 - a. A declaration that the plaintiffs are the legitimate widow and son to the deceased respectively.
 - b. The deceased's body to be released to the plaintiffs and their family for burial and that the burial permit in respect of the remains of the deceased be issued to the plaintiffs.
 - c. The final rites and resting place of the deceased be determined in accordance with Meru customary law failure to which the plaintiffs be granted the right to determine the date and place of burial.
 - d. The officer commanding the nearest police station to ensure that there is law, peace and order during compliance of these orders.
 - e. Costs.
4. The plaintiffs averred in the said plaint that the 1st plaintiff was the legal wife of the deceased Silas Kamuta Igweta having solemnized their union on 27th July, 1959 at the Methodist church Kianjai and a certificate of marriage duly issued.
5. The plaintiffs further contended that the 1st defendant had an affair with the deceased and that through coercion, she forced the deceased to move in with her at undisclosed location and locked out the 1st plaintiff and her children from accessing him (deceased).
6. The plaintiffs finally argued that the deceased was a Meru by tribe and used to practice Meru customary law and as such, the said customary law is applicable bestowing the right to bury the deceased upon the 1st plaintiff as his wife.
7. The defendants filed a joint statement of defence and counterclaim in which they stated that the deceased and the 1st plaintiff have lived separate lives for 40 years which separation they attributed to the 1st plaintiff's cruelty towards the deceased.
8. The defendants further stated that it was highly unlikely that the deceased would want to be interred at a home he never stayed and by people with whom he has not had a bond for about 40 years, yet the family that cared for him is ready and willing to give him a befitting burial.
9. In the counterclaim, the defendants urged the court to allow them to bury the deceased at Lariangi Muimui. The defendants equally sought a refund of medical bills expenditure of 5,563,527.35 as well as maintenance of 971,953.35 which claims were later abandoned.
10. Directions were taken for the matter to proceed to hearing on a priority basis. At the said hearing, the plaintiffs led the evidence of 5 witness in support of their case.
11. PW1 Grace Rigiri Silas told the court that the deceased is her husband and that together, they had 9 children. She further adopted as her testimony, her witness statement dated 1/3/2024. PW1 further told the court that she knew the defendant Sarah Kathembi. That she got married to the deceased when she (PW1) had 5 children. The witness further told the court that in Meru culture when a man who has two or more wives dies, he is buried by the first wife.
12. On cross- examination by the advocates for the defendants, the witness stated that the 1st defendant is her co-wife. She equally stated that the deceased left her home when she was sick with covid-19 and went to live with the 1st defendant.



13. PW1 maintained that they lived together with the deceased and that he would leave her home to live with the 1st defendant. She was taken to task to produce photos of herself and the deceased at her home which she did not produce. The witness equally maintained that the 2nd plaintiff Mathew Kobia was the biological son of the deceased.
14. PW1 further stated that the deceased did not get any inheritance from his parents whom he did not see alive. She expressed her wish to have the deceased buried in accordance with Meru culture.
15. PW2 Daniel Julius M'Limbere equally adopted his witness statement dated 1st March, 2023, as his evidence in chief. He further stated that the 1st plaintiff is the deceased's first wife while the 1st defendant is the deceased second wife. PW2 further told the court that according to Meru culture, the deceased should be buried by his first wife.
16. On cross – examination by counsel for the defendants, PW2 said that the deceased used to visit his Nairiri home. That he used to visit both homes but he could not remember when the deceased left the Nairiri home to stay with the 1st defendant, PW2 further denied the allegation that the deceased left his Nairiri home and 1st wife 40 years ago.
17. PW3 Domiciano Maingi testified that he has known the deceased since 1956 even though he was much younger than him. He equally adopted his witness statement dated 1/3/2024 as his evidence in chief. On cross examination, PW3 told the court that he did not know when the deceased left the 1st Plaintiff's house. He equally admitted that he did not know where the deceased was born but he suspected it could be in Kianjai.
18. PW3 further stated that the land in which the 1st wife (1st plaintiff) resides as well as where the 2nd wife (1st defendant) resides were both bought by the deceased.
19. PW4 Godfrey Mugambi Silas testified that the deceased his father. He too adopted his witness statement dated 1/3/2024. When asked about the deceased will, the witness stated that he did not know of any such will.
20. When asked about the last time he met the deceased, he said it was in 2022. That he saw him in his second wife's house in 2022/2023. PW4 further stated that the deceased bought the land where their mother is staying.
21. PW5 Mathew Kobia Igweta told the court that the deceased is his father and that he was his first-born child and son. PW5 further stated that his mother, the 1st plaintiff stays in the ancestral land which the deceased got from the clan (Mwiriga). That he subdivided the same and was only left with 1 acre for himself and his wife. That he indicated that, it is where he would be buried. PW5 further stated that he knew the 1st defendant as the second wife of the deceased. And that she lives in his father's land which is not ancestral even though it was registered in the deceased name.
22. When asked when he last met the deceased, PW5 said it was in 2023 in Nakuru with the 1st defendant's children. That the deceased had been in Nakuru since 2018 staying with the 1st defendant herein. The witness further told the court that the deceased did not tell him that he should be buried in the one-acre piece of land he had set for himself in the event of his death.
23. On their part the defendant's led the evidence of two witnesses. DW1 Mercy Kaimuri Igweta adopted her witness statement dated 1/3/2023 as her evidence in chief and testimony. She equally adopted the defendant's list and bundle of documents as exhibits in the case



24. On cross examination by Mr. Ayisi for the Plaintiffs, DW1 testified that the 1st defendant used to live in Meru and later Nakuru. She equally stated that she knows her step mother's home in Nairiri, Kianjai, Meru. She conceded that she had not produced any evidence to show that the 1st plaintiff was cruel to the deceased neither did she have any evidence that the deceased and the 1st plaintiff had been separated for 40 years. Equally, DW 1 admitted that she did not have any evidence to show that the children of the first family were cruel to the deceased. DW1 maintained that no other person provided more social support than the 1st defendant and nurse.
25. DW2 Sarah Kathambi equally adopted her witness statement dated 15/3/2024 as her evidence in chief and testimony. In Cross Examination by Mr. Ayisi for the plaintiffs the witness stated that she was the deceased second wife and that the 1st plaintiff was the deceased first wife. DW2 further stated that she met the deceased so many years ago but she could not remember the exact year.
26. DW2 further admitted that the two wives lived in Nairiri, Kianjai in the same house but they did not get along well. That she had to move out. The witness further told the court that the deceased and the 1st plaintiff (wife) had differences. That she is the one who was taking care of the deceased and should therefore be allowed to bury his remains.
27. On being asked whether the deceased had divorced his first wife the 1st plaintiff herein, the witness stated that she was not aware of any such divorce. On re-examination, the witness denied allegations that she forced the deceased to live with her. She reiterated that they loved each other and that the deceased did not go back to live with the first wife when he started staying with her.
28. Thereafter parties filed their respective submissions. On behalf of the plaintiffs Mr. Ayisi learned counsel raised three(3) issues for determination:
- i. Who has the right to bury the deceased.
 - ii. Where should the deceased be buried.
 - iii. Who should bear the costs of this suit.
29. The learned counsel linked the first two issues above and cited the case of [Re-Burial of Musa Magodo Keya \(Deceased\)](#)[2021] eKLR in which the court stated as follows:-
- “ the place of burial of a person is closely linked to three things; the person's wishes, the duty imposed on those closely related to the deceased during his lifetime to bury him and whether the deceased had established a home. Additionally, the custom to which the deceased is subject comes into play (see *M'Imanene M'Rutere V Lewis Kirimi & 2 others*, Civil Appeal No. 20 of 2018 [2018] eKLR.”
30. Counsel, therefore, submitted that from the totality of the evidence on record, the deceased was born a Meru into the Thing'amburi clan. That among the Ameru Community, it is the 1st wife who has the right to bury the deceased at the home established by both of them.
31. Mr. Ayisi, thus invited the court to find that the 1st plaintiff is the right person to bury the remains of the deceased and that the place of burial is the deceased 1st wife's home situated at Nairiri, Kianjai, land parcel known as Kianjai/Kianjai/2585.
32. On the issue of costs, counsel for the plaintiff's submitted that costs follow the event. That it is the defendants who caused these proceedings and should therefore bear the costs thereof.



33. On the other hand, Mr. Omari and his team for the defendants relied on the court of Appeal case of *Ontweka & 3 others v Ondieki* (Civil Appeal No. E692 of 2023[2024] KECA 11 (KLR) in which the superior court set out 3 parameters for consideration in dealing with burial disputes, to wit;
 - a. The interests of the parties claiming to have a right to inter the remains of the deceased.
 - b. The religious and cultural practices of a deceased.
 - c. The wishes of the deceased.
34. On the first parameter above, counsel relied further on the decision in the case of *SAN V GW* [2020] eKLR for the proposition that the law only recognises the persons who are closest to the deceased to have the right to bury the deceased. That those persons have been identified as the spouse, children, parents and siblings, in that order.
35. Mr. Omari further submitted that 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 lifetime. Counsel invited the court to consider the case of *Samuel Onindo Wambi v C.O.O & Another*, Kisumu Civil Appeal No. 13 of 2011[2015] eKLR for this proposition.
36. The learned counsel urged that the plaintiffs were not close to the deceased during his lifetime as was demonstrated by their inconsistent evidence on the whereabouts of deceased in 2021 when they gave conflicting evidence as to where the deceased was staying at the time.
37. Counsel further submitted that it is the 1st defendant who was close to the deceased for the better part of his life and urged the court to allow her to bury the remains of the deceased at their Lariangi home.
38. I have carefully considered the evidence before me by both set of parties, I have equally considered the applicable law as well as the submissions by both counsel. I am particularly grateful for the judicial authorities cited by counsel notwithstanding the constraints of time.
39. I have approached this dispute with great anxiety. Anxiety because it is a burial dispute which pits two families with a shared blood line. Anxiety because burial disputes in their very nature are far from simplistic. To capture the complexity of burial disputes, this is how the learned Justice M. Gachoka, JA wrote in the introductory part of his Judgment in the case of *Joseph Ontweka & 3 others v Zipporal Masese Ondieki* Civil Appeal No. 692 of 2023[2024] KECA 11(KLR):

“Despite no one having personal experience with death, we all know that one day we will all meet our end at some point but how and by whom our corporal remains will be disposed remains unknown to us. In Christian theology, we are told that Jesus of Nazareth, predicted his death, but he did not at any point prophesy that Joseph of Arimathea would inter his body at Golgotha. Fortunately, no burial dispute ensued.”
40. Turning to the matter before me, the plaintiffs in this case, who are mother and son respectively have asked the court to make an order for the release of the body of the deceased to them for burial at the 1st plaintiff's home in Nairiri, Kianjai Meru on land parcel No. Kianjai/Kianjai/2585. The 1st plaintiff who introduced, herself as the first wife of the deceased having contracted a Christian marriage with him on the 27th July, 1957 at the Methodist Church, Kianjai urged the court to apply the customs of the Ameru community which dictate that when a man who had more than one wife dies, his remains are to be interred by the first (1st) wife.
41. On the other hand, the defendants who are the 2nd wife and daughters of the deceased respectively have invited the court to find that they were closer to the deceased during his lifetime and that they are



the proper persons to bury him at the place he felt more at home with while he lived, being Lariangi, Muimui, Meru.

42. It is instructive to note that even though the 1st plaintiff Grace Rigiri Silas had been married to the deceased in a church ceremony on 27/6/1957, making it a monogamous marriage, the deceased went ahead to marry the 1st defendant Sarah Kathambi and had children together.
43. It is equally instructive to note that every single witness who appeared before me to testify on behalf of the plaintiffs identified the 1st defendant as the deceased second wife and her children as the children of the deceased. I will, therefore, proceed in this Judgment on the premise that the 1st plaintiff as well as the 1st defendant were wives of the deceased, ranking as first and second wife respectively.
44. Further I wish to make it clear in this judgment that even though the defendants had initially sought to adduce the evidence of a will allegedly written by the deceased through Mr. Riungu Raiji Advocate, the said will does not form part of the documents that this court has relied on to address the question of where and by whom the remains of the deceased are to be interred.
45. This court declined to have Mr. Raiji testify on the said will as it deemed it to be an ambush to the plaintiffs. In declining to hear about and consider the alleged will as evidence in his case; the court was equally guided by the reasoning that this is not a succession cause. That the parties shall have a chance to canvass the question of the deceased will in other proceedings of a succession nature.
46. This court was equally guided by the case of *Apel v Buluku* [1980] eKLR in which the court observed as follows:

“It is trite law that there cannot be property in a dead body and a person cannot dispose his body by will, but it should be noted that courts have long held that the wishes of the deceased, though not binding must so far as practicable be given effect, so long as the same is not contrary to the general law or policy.”
47. Turning now to the evidence before me, PW1, and PW5 projected the deceased land in Nairiri, Kianjai as the deceased ancestral land and hence, the reason his remains should be buried there. However in cross examination by Mr. Wambui S, for the defendants, PW5 stated that the ancestral land was sold contrary to their culture.
48. *Black’s Law Dictionary*, 10th Edition at page 1411 describes ancestral property (read land) as “property especially immovable property that the present owner’s has acquired from forebears, especially when the owners family has held the property for several generations at least”
49. It is not disputed that the deceased parents passed on when he was a small child. Much of the properties he acquired cannot, in the strict sense of the word be deemed to be ancestral land. Going by the above definition, of what constitutes ancestral property and land, and given the evidence on record I find and hold that neither the Nairiri, Kianjai land nor the Lariangi Muimui land are the deceased ancestral land. The deceased did not inherit either from his parents. It follows that the question of where the deceased would be buried does not turn on the issue of ancestral land.
50. Having dealt with the issue of ancestral land as a culture consideration under the Ameru community for burial, and I hold the view that despite all the sophistication of the deceased, he was still a man subject to Meru culture, the only issue left for determination is who between the 1st plaintiff as the deceased 1st wife and the 1st defendant as the deceased second wife has the right as spouses to inter the body of the deceased.



51. It was not disputed at the hearing or by way of evidence herein, that the 1st plaintiff is the deceased first wife. On this issue, both Meru customary law and case law are on all fours that holding other factors the same, it is the 1st wife, who has the right to bury the deceased who lived in a polygamous setting. In the case of *Ruth Wanjiru Njoroge v Jeremah Njeri Njoroge & Another* [2004] eKLR the court while addressing the interests of the parties from their legal proximity stated as follows:

“ ... the person who is first in line of duty in relation to the burial of any deceased person is the one who is closest to the deceased in legal terms and as the marital union is the closest chain of relationship touching on the deceased therefore, it is only natural that the one who can prove this fundamental proximity to the deceased, has the right of burial ahead of any other claimant.....”

52. Further if this court were to stretch legal imagination much more, the two wives of the deceased rank equally but it is undeniable that the 1st wife comes first in equity as one of the equity maxims goes that where there are two equities, the first in time prevails.

53. That being said, a determination of who has the right to bury the deceased is not a straight Jacket question. Courts have always been invited to look at the quality of the relationship between the deceased and those seeking to bury his/her remains. In the case of *George Ouko Okoth v Edith Apiyo Ochieng* [2021] eKLR the court stated that the fact that the deceased was the appellants son is not in dispute but that in itself does not give the appellant an automatic right to bury him even if Luo customary law dictates so. This is a case where the appellant had abandoned the deceased child. From the foregoing, it is clear that a person seeking to bury the remains of the deceased must demonstrate that they were close and in good relations during the deceased life time.

54. Further in the case of *Samule Onindo Wambi V C.O.O & Another*, Kisumu Civil Appeal No. 13 of 13 of 2011 [2015] eKLR the court of Appeal while addressing the same issue stated as follows:-

“ ... A persons conduct to a deceased 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.....”

55. Turning to the evidence before me, the DW2 Sarah Kathambi, the deceased second wife testified that the deceased had left his first wife Grace Rigiri complaining of mistreatment by the 1st plaintiff and her children. However, the witness when challenged by Mr. Ayisi to produce evidence of such mistreatment or cruelty conceded that she did not have any.

56. Even though no such evidence was led what cannot be ignored is the fact that the deceased was in most cases during his last years on earth in the company of his second wife. Even at the point of death, the deceased was in the company of his second family. PW5 is on record during cross examination conceding that it is true that since 2018 the deceased was living variously with his (PW5's) step mother.

57. The totality of the evidence on record is that the deceased was closer to the 2nd wife and her children. It is the second wife who took care of him when he fell ill. Indeed, PW1, the 1st wife, PW4 and PW5 both of whom were sons of the deceased admitted before this court that they were not aware that the deceased was sick. This court is not about to take away the remains of the deceased from the hands of the people in whose company he perhaps felt more comfortable. The status quo prior to the deceased death dictates that he be interred by the very persons who were closer to him in life.

58. Whereas I recognize that the loss of the deceased is felt by both families in equal measure and that all should unite in giving the family's patriarch a befitting send off, I determine that the rights of the 1st



plaintiff as the deceased first wife to bury him under Meru customs are extinguished by their lack of closeness during the life of the deceased.

59. The corollary to that is that I make an order that the remains of the deceased shall be released to the 1st defendant Sarah Kathambi for the final rites and burial.
60. I further determine that the said remains of the deceased shall be interred at the Lariangi, Muimui Land. Both families shall put their differences aside to give the deceased a final farewell and to release his spirit to rest well in peace.
61. The two families are at liberty to collaborate and make funeral arrangements together for the said send off and shall be placed in the eulogy books and everyone an opportunity to speak at the funeral.
62. The deceased final rites shall be performed in accordance with his Christian faith under the guidance of the local Methodist Church and in accordance with Meru Customs where applicable.
63. The OCS nearest Police Station shall be served with the court order herein for purposes of law and order on the date of the deceased burial.
64. I make no orders as to costs this being a family matter. Each party shall bear its own costs.
65. I make no findings on the refunds initially sought by the defendant as that part of counterclaim was abandoned and is moot.

Orders accordingly.

SIGNED, DATED AND DELIVERED IN VIRTUAL COURT THIS 28TH DAY OF MARCH, 2024.

HON. G.M. GITONGA – PM

In the presence of Mr. Ayisi for plaintiff

Mr. Wambui, Ms Nekesa Mr. Kinyanjui alongside Mr. Omari for Defendants.

C/Ass Mukapa

HON. G.M. GITONGA – PM

28/3/2024

Mr. Ayisi:

I seek stay of execution of 30 days as we seek to appeal the decision. We also apply for a copy of the court's Judgment.

Mr. Wambui:

We are grateful for the court's determination. We object to application for stay of these orders by this court. Firstly, the court has dismissed the plaint. The court has given a negative order on the reliefs sought by the plaintiffs. There is therefore nothing to stay. The court cannot stay a negative order. We urge the court to decline to grant an order of stay. Further, the defendants in this case should be allowed to enjoy the fruits of the Judgment by burying the deceased without any further delays. It would be against Public Policy for this court to continue causing the withholding of the deceased body.

Mr. Ayisi:

Order 42 Rule 6 allows this court to make an order of stay. It is well within this court's powers to grant stay. Two, the court has allowed a counterclaim in respect of which we seek appeal. If the court were to decline to issue stay the enactive appeal would be defeated considering that the burial would be conducted. We persuade the court to grant stay.



Court

The court has considered the application for stay of execution of the courts orders by Mr.Ayisi for the Plaintiff and the objections thereto by Mr. Wambui and Ms. Wekesa for the defendant.

As I have remarked in the opening paragraph of my Judgment that whatever the outcome, one side will still feel aggrieved, the court cannot feign surprise about the application for stay pending appeal. The intention of this court cannot be to deny the party which is not satisfied with the court's determination of an opportunity to appeal the decision of this court. To order so would be to argue that this court is infallible which is far from the truth. The only concern the court has is on the number of days the plaintiffs are seeking for stay.

In my reckoning, this still remains a delicate and emotional matter. It is the reason why the advocates and the court prioritised its hearing. To seek 30 days stay of execution would defeat the very effort the parties made in prosecuting the same. I am thus inclined to grant stay of execution for 14 days. The said stay shall run from the 2nd of April, 2024 to regard being had to the Easter holiday which runs from tomorrow. Any other stay can be had at the superior court. It is so ordered.

HON. G.M. GITONGA (Mr)

PRINCIPAL MAGISTRATE

28/3/2024

