



**Wambua v Mutave & another (Civil Case E038 of 2024)
[2024] KEMC 7 (KLR) (2 April 2024) (Judgment)**

Neutral citation: [2024] KEMC 7 (KLR)

**REPUBLIC OF KENYA
IN THE MACHAKOS LAW COURTS
CIVIL CASE E038 OF 2024
CN ONDIEKI, PM
APRIL 2, 2024**

BETWEEN

ESTHER WAMBUA PLAINTIFF

AND

DORCAS MUTAVE 1ST DEFENDANT

MACHAKOS FUNERAL HOME 2ND DEFENDANT

JUDGMENT

Part I: Introduction

1. The setting¹ is the fictional Umuofia village. “When Unoka² died he had taken no title at all and he was heavily in debt. Any wonder then that his son Okonkwo was ashamed of him? Fortunately, among these people a man was judged according to his worth and not according to the worth of his father.”³ Quite unlike his late father, Unoka, who was only a local wrestling champion, Okonkwo was a successful yam farmer. The Umuofia values and shame, mirrors the values of our current society. When a man dies in extreme want - without leaving a venerable legacy or patrimony, and to rub salt into a wound, riddled with debt – even the closest blood relations scrunch in disgrace, shame and disillusionment. In such circumstances - this Court posits - a burial dispute of this proportion is highly unlikely to emerge, let alone being imagined. In my judicial life, I have never determined or heard or read about a burial dispute over deceased persons, the ilk of Unoka and in my hypothesis, I least anticipate it, in the near or distant future. So that it does not suffer possible infirmity of a skewed story, this phenomenon, perhaps, should constitute a research topic in sociology.

¹ The setting of the Novel, Things Fall Apart, by Chinua Achebe.

² In the Novel, Things Fall Apart by Chinua Achebe, Unoka was Okonkwo’s father.

³ Chapter 3, Things Fall Apart, Chinua Achebe.



2. Determination of a burial dispute turns on the fulcrum of either burial customs of the subject community/clan, or the deceased's ascertainable burial wish (provided it is not impractical or impossible or that it does not offend the said customs or general law or public policy or safety) or the doctrine of legal proximity.
3. Since the historic *SM Otieno case*⁴, the Courts have witnessed restlessness, tension, and antipathy between burial customs of a particular community or clan on one hand and the doctrine of legal proximity and/or burial wishes of the deceased, on the other hand. However, proceeding on the footing that a judicial precedent is an authority for the question it determined, this Court observes that with an exception of the very recent decision in *Ontweka & 3 others vs. Ondieki* (Civil Appeal E692 of 2023) [2024] KECA 11 (KLR) (25 January 2024) (Judgment), there is a paucity of precedents which have boldly framed the question in such a way as to address the disharmony and interplay between burial customs on one hand and the doctrine of legal proximity and/or a burial wish of the deceased, on the other hand.
4. Further, the situation has not been made better owing to the plurality of laws governing the issue at hand and the ever-raging clash of customs, which have also served to compound the situation. For instance, in *SAN vs. GW* [2020] eKLR, Ouko, JA (as he then was), Gatembu & Murgor, JJA took a view that it will not possible to attain certainty since each case will be decided on its own circumstances. Their Lordships said as follows: "But since customary law exists in almost all ethnic groups in Kenya with a homogeneous value system and the customs vary from one ethnic group to another means that the resolution of burial disputes will depend largely on the peculiar circumstances of each case. Difficulties are bound to arise where, like this one, the deceased and the parties claiming the right to bury are governed by different customs, with the question being, which custom should be preferred. The SM case is also partially a manifestation of this cultural clash or conflict. But the clash is not confined to Kenya." Interestingly, as was observed in *SAN vs. GW* [2020] eKLR, supra, this state of affairs is not exclusive to Kenya. It also confronts other jurisdictions like Australia as was the case in *Jones vs. Dodd* [1999] 73 SASR 328, where the shove between culture and modernity also reared its ugly head; and *Calma vs. Sesar* 1992 106 FLR 446, supra.

Part II: The Plaintiff's Case

5. Vide a Complaint dated 22nd February 2024 and filed on even date, the Plaintiff brought this action against the Defendants seeking Judgment for: (a) An order of permanent injunction restraining the 1st Defendants or their agents, family members and/or any or all persons claiming under them or through them from collecting the remains of Roman Ngali Wambua from Machakos Funeral Home or any other mortuary/hospital he may be preserved and burying the body of the late Roman Ngati Wambua. (b) An order of permanent injunction restraining the 2nd Defendant and/or their agents and employees from releasing the body of Roman Ngali Wambua to anyone for burial. (c) An order compelling the 2nd Defendant to release the remains of Roman Ngali Wambua to the Plaintiff or her appointed agents. (d) An Order do issue compelling the 1st Defendant to release the deceased's Identity Card to the Plaintiff and in default the registrar of births and deaths do issue the deceased death certificate to the Plaintiff notwithstanding. (e) Costs of this suit. (f) Interest for (e) at Court rates. (g) Any other relief the Court may deem fit to grant.

⁴ *Virginia Edith Wamboi Otieno vs. Joash Ochieng Ougo & Another* [1987] eKLR, per Bosire, J. (at the High Court level); and *Virginia Edith Wamboi Otieno vs. Joash Ochieng Ougo & another* [1987] eKLR, per Nyarangi, Gachuhi & Platt, JJA. (at the Court of Appeal level).



6. The Plaintiff avers that at all material times to this suit, she was the lawful wife of the late Roman Ngali Wambua (hereinafter “the deceased”) until his demise on 15th February 2024. The Plaintiff claims that they solemnized a Christian Marriage with the deceased, on 8th May 1971 and they have never divorced. The Plaintiff alleges that that on or about 1999, the deceased got romantically involved with the 1st Defendant and that they subsequently married under the Kamba customary law. The Plaintiff avers that on or about 2011, the 1st Defendant with the intention to end the union with the deceased, returned of a goat back to the deceased’s home to symbolize the complete dissolution of the marriage union as per the Kamba customs and that the deceased accepted the demand by the 1st Defendant to dissolve the union and subsequently demanded the refund of the dowry paid for the marriage to the 1st Defendant. It is averred that after negotiations with the family of the 1st Defendant, the terms of the return of the dowry were agreed upon by the 1st Defendant’s family and a promise to have the same refunded made. The Plaintiff claims that after the dissolution of the marriage between the deceased and the 1st Defendant, the 1st Defendant subsequently remarried one Mr. Nyamweya and her new union was blessed with one issue.
7. The Plaintiff claims that upon the demise of the deceased, his remains were preserved by the 2nd Defendant and that the family started burial arrangements and the 1st Defendant requested to participate in the arrangements for the benefit of her children with the deceased and the deceased’s family agreed solely for that reason. The Plaintiff avers that, the 1st Defendant fraudulently and without any colour of right, took advantage of the short absence of the Plaintiff’s appointed agent and submitted her names as a wife to the deceased to Machakos Level 5 Hospital where she was issued with a notification of death. The Plaintiff claims that upon issuance of the said notification of death in the names of the 1st Defendant, the 2nd Defendant issued a burial permit in the names of the 1st Defendant as per the notification of death. The Plaintiff claims that the actions by the 1st Defendant amount to fraud and illegality.
8. At the hearing of the Plaintiff’s case, PW1, Musembi Mutia Kung’u, told this Court that he is an expert witness in Kamba customs. He adopted his witness statement dated 4th March 2024 and filed on 5th March 2024 as his evidence-in-chief. In his said statement, he states that he was born in 1927 and that he joined the Mau Mau freedom fighters association at the age of 15 years in 1946 where he had an opportunity to participate in the fight for independence. He further states that he is the current chairperson of the Mau Mau freedom fighters association in the entire Ukambani region representing Mau Mau freedom fighters’ rights and also their beneficiaries. He claims that he is a holder of a medal of honour for the liberation struggle from the national heroes council. He states that he is a Kamba elder within the Ukambani region and proficient in all the Kamba customs including matrimonial, divorce and burial customs. PW1 states that Kamba customs dictate that when a man desires to marry, the first order of business is that the man and his family brings three goats to the family of the intended wife, two of which are female and one male. He continues to state that the male goat is slaughtered and partaken by the two families to symbolize their union and that one limb of the male goat may be cut and given to the grandmother of the son-in-law. He calls this ceremony ntheo. He states that after the ntheo ceremony, another day is appointed for another ceremony known as mithoko which is the ceremony for dowry payment and dowry in this regard entails 40 goats, 8 bags of maize, two bags of beans, 3 jerricans of honey, 20 bunches of bananas (ilute), 1 bull and 2 cows, two 20 litres jerrican of kalovo/tembo (AKamba’s local brew), 2 Blankets and two shukas (shawls). He states that the bull is slaughtered and half of it is shared between the participants of the ceremony and that the other half is retained by the father of the bride to give to whoever he wishes. He states that this symbolizes a complete marriage under the Kamba customs. He continues to state that under the Kamba customs, upon three goats being received and one slaughtered is the said Ntheo ceremony, a marriage is recognized



to have taken place and that all the other subsequent requirements can be spread out depending on the financial capabilities of the groom's family. He states that the Kamba customs recognize divorce and the dissolution of marriage and that this is effected in its completeness, when the wife returns one of the goats received as dowry to her in-laws and that upon the return of the said goat, the father to the bride is obligated to automatically refund the dowry paid and the children of the divorcing couple are recognized to have left with their mother upon the dissolution of the marriage. He states that in the Kamba customs, the first wife is the one recognized as the person who has the right to bury the husband upon his demise, if the deceased was polygamous. He states that taking an alternative is an abomination tantamount to Courting for a curse for any person to attempt to alienate the deceased's fist wife from burying her husband.

9. In cross-examination, he stated that he does not have personal knowledge of the parties to this case. He stated that once a goat is returned by the wife, that marks the end of that marriage whether the dowry has been returned or not. He stated that if a burial wish was left by the deceased, his body should be buried at the house of the first wife since Kamba customs do not allow a married to be buried elsewhere. He stated that if a man has not stayed with a wife for more than ten years that cannot count as a wife.
10. The Plaintiff, hereinafter PW2, adopted her witness statement dated 22nd February 2023 and filed together with the Plaint as her evidence-in-chief. In her said statement, the Plaintiff entirely rehashes the facts in the Plaint. This Court thus finds it unnecessary to reproduce it.
11. In buttressing her claim, the Plaintiff exhibited the following documents: (i) a certificate of marriage between the Plaintiff and the deceased as the Plaintiff's Exhibit 1; (ii) a certified copy of the burial permit in the names of the 1st Defendant as the Plaintiff's Exhibit 2; (iii) a copy of title of the parcel of land known as Kathiani/Ithaeni/659 as the Plaintiff's Exhibit 3; (iv) the deceased's donor certificate Med. 294 as the Plaintiff's Exhibit 4; (v) the deceased's handwritten letter dated 25th June 1967 as the Plaintiff's Exhibit 5; (vi) the deceased's handwritten letter dated 2nd February 1975 as the Plaintiff's Exhibit 6; (vii) the deceased's welfare association card for Muungano Welfare Association as the Plaintiff's Exhibit 7; (viii) identity card of Musembi Mutia as the Plaintiff's Exhibit 8; (ix) Medal of Honour for Musembi Mutia as the Plaintiff's Exhibit 9; (x) a photo of the deceased and the Plaintiff as the Plaintiff's Exhibit 10; and (xi) a funeral programme as the Plaintiff's Exhibit 11.
12. In cross-examination, PW2 stated that she was not attending to the deceased during his time of illness because she was nursing injuries she had sustained in an accident. She stated that she had no knowledge that the deceased had a house in Imilini. She stated that while the deceased was sick, she was living in the Nairobi house and the deceased in Machakos house.
13. PW3, Augustine Kitavi Wambua, adopted his witness statement dated 4th March 2024 and filed on 5th March 2024 his evidence-in-chief. In his said statement, PW3 states that the deceased was his brother. He states that Plaintiff and the deceased were married through the Christian marriage in 1971 and they lived as such until his demise. He states further that the deceased subsequently entered into a romantic relationship with the 1st Defendant and married her through the Kamba customs and that the deceased and the 1st Defendant sired three children out of the said relationship. He finally states that in 2011, one of the 1st Defendant's brothers, named Patrick Kinyanjui, accompanied by another man, returned a goat to the deceased parent's homestead and informed them that they had been sent by the 1st Defendant to deliver the goat to symbolize dissolution of her union with the deceased as per the Kamba customs. He states that he reached the deceased on phone and the deceased acceded. He states that the 1st Defendant and deceased thus divorced in 2011 and that subsequently, the 1st Defendant married one Mr. Nyamweya. He states that the dowry has not been refunded although there was a promise to refund the dowry. He states that after the demise of the deceased, they acceded to the request



- by the 1st Defendant to participate in the funeral arrangements for the benefit of the children and that when the 1st Defendant accompanied him to Machakos General Hospital, he handed over his Identity Card to the employee at the offices and stepped out briefly to consult but the 1st Defendant seized the opportunity of his absence and misrepresented herself as the deceased's wife leading to issuance of the notification of death in her name and later, she used the same to secure a burial permit. He states that the family of the deceased was in the course of making plans to inter the deceased in the parcel of land known as Kathiani/Ithaeni/659, which plans have now stalled owing to the 1st Defendant's actions.
14. During cross-examination, PW3 stated that Serah is the deceased's daughter. He stated that the photo exhibited by the 1st Defendant was taken at Serah's home in Ithaeni. He stated that the 1st Defendant returned a goat to signify divorce. He stated that dowry has not been returned.
 15. In her written Submissions dated 18th March, learned Counsel Ms. Thiong'o instructed by the Firm of Messieurs Ann Thiong'o & Company Advocates representing the Plaintiff, submits that the Plaintiff has proved her case as against the 1st Defendant on a balance of probabilities.
 16. For the Plaintiff, it is submitted that the claim is anchored on the fact that the 1st Defendant perpetrated fraud which resulted in her issuance of a notification of death and burial permit since she is not the deceased's wife, having divorced the deceased in 2011 by return of a goat to the deceased's parents. It is submitted that the 1st Defendant admitted in cross-examination that she is not the deceased's wife.
 17. It is submitted that the Plaintiff produced a marriage certificate as proof of her marriage to the deceased and that the Plaintiff's evidence in this regard was corroborated by the evidence of PW3 and even DW3 who also admitted that her step-mother was married through Christian marriage. It is submitted that a Christian marriage is dissolved through a divorce order issued by the Court and no decree of any nature or judicial separation notice was produced by the 1st Defendant to prove a divorce or separation between the Plaintiff and the deceased.
 18. Relating to the burial wishes asserted by the 1st Defendant, it is submitted that section 76 (2) of the Evidence Act empowers this Court to compare signatures and handwriting, when furnished with documentation and evidence in that regard. In this regard, it is submitted that the Plaintiff has furnished the deceased's donor certificate signed by the deceased way back in 1969 (exhibit 7) and that this same signature is shown in the handwritten letter by the deceased dated 25/6/1967 (exhibit 8). It is submitted that Exhibits 7, 8 and 9 are all evidence of the deceased's hand writings and signature and that the alleged note (defence exhibit 5) does not come close to the deceased's handwriting or signature. Further, it is submitted that the deceased was battling stage three cancer, with a catheter and pampers because his excretory system was compromised could no longer walk because he was weak, but allegedly sat down to write a lengthy note which was only shared to his 27-year-old daughter, and an employee employed for four months old. This Court is urged to find this unbelievable.
 19. It is submitted that in determination of burial disputes, this Court derives its power from section 3(2) of the Judicature Act and that both the Plaintiff and the 1st Defendant come from the Kamba community hence subject to the Kamba customs. It is submitted that it is an undisputed fact that the Plaintiff is the deceased's first wife married through Christian marriage and that it is also an admitted fact by DW2 and DW3 that the 1st Defendant divorced from the deceased. In this connection, this Court is urged to find that the Plaintiff is the only wife who was legally married to the deceased by the time of his death. Reliance is placed upon *Munyao Ndolo & 3 Others vs. Mary Nduku Mutisya* [2018] eKLR, where the Court held that "There is also no doubt in my mind that where a marriage has been performed and one of the parties to a marriage dies, the right to bury the deceased is with the surviving spouse. In case of a polygamous set up and the husband dies, he is to be buried at the home of the 1st wife."



20. Further reliance is placed upon Dr. Christopher Muthini Mbatha -Vs- Dr. Florence Mukii Mukita – High Court At Nairobi (Nairobi Law Courts) Civil Case No.525 Of 2008 as quoted in the case of Helen Wairimu Mathu vs. Moses Mwangi Mathu (2014) eKLR, where the Court stated “It is now well established that matters of burial are subject to the deceased’s and the parties personal law and that the personal law of Kenyan is in the first instance customary laws. See the case of Otieno -vs- Ougo & another (No.2) (2008) 1KLR (GF) 948.”
21. Relating to the expert testimony, it is submitted that it was not contradicted. In this connection, the Plaintiff relies on John Omondi Oleng & Another vs. Sueflan Radal (2012) eKLR as quoted in Sarafina Wanjiku Kinyanjui & 5 Others v. Elizaphason Kinyanjui Mukora [2013] eKLR, where the Court stated that “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.”
22. This Court is urged to find that the Plaintiff is the only legally recognized surviving spouse to the deceased and that the Plaintiff has proved her case on a balance of probabilities.

Part III: The 1st Defendant’s Case

23. In her Statement of Defence dated 28th February 2024 and filed on 27th February 2024, the 1st Defendant denied all material facts averred by the Plaintiff. In particular, the 1st Defendant denied that the Plaintiff is the only lawful wife of the deceased. The 1st Defendant further denied that she divorced the deceased. In this connection, the 1st Defendant seeks Judgment that: (a) The body of the late Roman Ng’ati Wambua be released from Machakos Funeral Home for the purpose of burying the late Roman Ng’ati Wambua. (b) The body of the late Roman Ng’ati Wambua be released for burial at the deceased farm house in Imilini Area where he lived before he died. (c) The Plaintiff’s suit against her be dismissed with costs. (d) Any other relief this Honourable Court deem fit to grant.
24. At the hearing of the 1st Defendant’s case, DW1, Jeremiah Wambua Makau, told this Court that he the chief in charge of Kaewa Location Area and he was in Court to produce a letter he authored dated 27th February 2024 in which he gave directions according to the burial wishes of the deceased as expressed by his family. The letter was exhibited as the 1st Defendant’s Exhibit 1.
25. In cross-examination, DW1 stated that a complaint was first lodged with the Assistant Chief and it was escalated to his office. He stated that he summoned family members but some, including the Plaintiff, did not attend. He stated that he gave directions for burial at Imilini in accordance with the burial wishes of the deceased. He stated that he did not know that the Plaintiff was married under church and that they have never divorced. He stated that he was not aware that the 1st Defendant divorced the deceased.
26. The 1st Defendant, DW2, adopted her witness statement dated 28th February 2024 and filed together with the Statement of Defence, as her evidence-in-chief. In her said statement, the DW2 rehashes the Statement of Defence. In addition, DW2 states that she married the deceased in 1999 under the Kamba Customary Law and that dowry was duly paid. DW2 states that the deceased separated with the Plaintiff in 2004 and he moved to Imilini farm where he lived with his daughter, Serah Mwelu Ng’ati who took care of him until his demise. DW2 states that before his death, the deceased expressed a burial wish to the said Serah Mwelu Ng’ati that if he dies, he should be buried at his Imilini home. She stated that the deceased should be buried at Imilini in accordance with his wishes.



27. In support of her position, the 1st Defendant exhibited following documents: (i) a certified copy of the birth certificate of the said Serah Mwelu Ng'ati as the 1st Defendant's Exhibit 2; (ii) a copy of a funeral programme as the 1st Defendant's Exhibit 3; and (iii) a copy of the burial permit as the 1st Defendant's Exhibit 4.
28. During cross-examination of DW2, she stated that she did not return a he-goat to the deceased's parents. She denied that she has a fourth child with another man. She stated that she does not agree with the chief that she is not a wife of the deceased. She stated that she concurs with the statement of Serah Mwelu (DW3) that by the time of his demise, she was not the deceased's wife simply because DW2 was not staying with the deceased. She stated that the deceased was not under her care while ailing. She stated that she did not visit the deceased but her daughter used to give her updates. She stated that the deceased expressed a burial wish to be buried at Imilini. She stated that she did not sign the wishes since the note was handed over to Serah Mwelu.
29. DW3, Serah Mwelu Ng'ati, adopted her witness statement dated 28th February 2024 and filed together with the Defence as her evidence-in-chief. In her said statement, DW3 states that she is a daughter of both the 1st Defendant and the deceased. DW3 states that she was the one taking care of the deceased. She states that the deceased separated with the Plaintiff in 2004 and left the Plaintiff's house and moved to his Imilini Farm, where he build a home where DW3 has been living with the deceased. She states that on or about January 2023, the deceased was taken ill and after a long period of treatment, he died. He states that she enjoyed a very close relationship with the deceased and on several occasions kept reminding her that upon his death, his desire was to be buried at his Imilini home since he was no longer married to any of his two wives, nor was he living with them and none of them took care of him before and after his illness. She states that the deceased had a personal note book where he wrote down his personal notes and more specifically, that he had noted down that he would love to be buried at his Imilini home. She states that after his death, a meeting was organised by the area Chief and his Assistant to address two issues namely succession of the Estate and the burial place of the late and that the Plaintiff and the 1st Defendant were invited to the meeting but none of them showed up. She states that the meeting however proceeded with attendance of the Chief, Assistant chief, two village elders, the deceased's elder brother and DW3 and that they all agreed to have the body of the deceased buried at his Imilini home and that this information was passed to the entire family members. DW3 exhibited a copy of written notes which were allegedly written by the deceased as the 1st Defendant's Exhibit 5; the deceased's ID card, ATM, treatment notes, and photo as the 1st Defendant's Exhibits 6, 7 and 8 respectively.
30. During cross-examination of DW3, she stated that the burial wish was written on 20th September 2023 and that it was signed by Mukulu, DW3 and Wambua. She stated that Wambua and Mukulu are not witnesses in this case. She stated that she did not share the note with anyone. She agreed that at the time, the deceased was critically ill and he could not walk. DW3 stated that she was aware that the deceased divorced her mother, the 1st Defendant.
31. DW4, William Muteti Mutiso, adopted his witness statement dated 12th March 2024 and filed on even date as his evidence-in-chief. In his said statement, DW4 states that in or about 2023, he was employed by the deceased's daughter, Serah Mwelu Ng'ati, to be a caregiver of the deceased due to his illness at his Imilini home. He states that while working at the deceased house, the Plaintiff never visited the deceased. He states that Mr. Augustine Kitavi, the brother to the deceased, visited the deceased at his Imilini house only once in the company of Serah Mwelu Ng'ati and other family members. He states that the deceased once mentioned to him that upon his demise, his wish was to be buried at his Imilini home since he was no longer living/married to any of his wives.



32. During cross-examination of DW4, he stated that the deceased told him his burial wish.
33. In his written Submissions dated 20th March 2024 and filed on even date, learned Counsel Mr. Ng'ang'a instructed by the Firm of Messieurs Kariah & Company Advocates representing the 1st Defendant, submits that the Plaintiff has failed to prove that she is entitled to inter the remains of the deceased but the 1st Defendant has proposed four issues for determination as follows: (i) Whether there are exceptions in Kamba culture as to the place of a burial of a polygamous man. (ii) What were the wishes of the deceased concerning his burial place? (iii) Whether the children of the deceased has a right to participate in the burial ceremony and final rites to bury their late dad as per his wishes. (iv) To whom should be the deceased body be released, and who should conduct the burial ceremony and final rites. (v) Who should bear the costs of the suit?
34. Concerning the question whether there are exceptions in Kamba culture as to the place of a divorcee polygamous man, it is answered in the affirmative. It is submitted that the African cultural traditions and practices are a source of Law in Kenyan legal state, as revealed by Articles 2(4) of *the Constitution* of Kenya as read together with section 3(2) of the *Judicature Act* and that most Courts have stated that burial disputes are governed by African cultural laws in so far as the said laws are not repugnant to justice. It is further submitted that similarly, the law that should be applied is the Kamba Customs and traditions, as guided by *the Constitution* and Statute cited above. It is submitted that it is not in dispute that both the deceased and his wives subscribed to Kamba cultural practises. It is submitted that PW3 testified on cross-examination, that there are indeed exceptions as to the Kamba customs to the burial of a deceased polygamous man who did not live with his wives and that he recounted those instances as when the man himself expressed wishes to be buried otherwise, and confirmed that such wishes meant that his marriage with the first wife was not one in which he was happy about. It is submitted that PW3 was at logger heads to explain what happens when the dowry is not returned as prescribed by the Kamba Customs in regards to divorce. It is submitted that considering the life of the deceased, it is true that his life with his first wife was not one that he was proud of since the deceased migrated from the Ithaeni house where he lived with the first wife and moved with the second wife and their children to Machakos sometimes in the year 2005, after he had complained about the first wife harassing the second wife, since the first wife could not bare children. It is submitted that the deceased's dissatisfaction with the first marriage may be inferred by the way the deceased left his Ithaeni home and did not return at any time. In this connection, it is urged that having dislodged the assertion that a married polygamous man who was not living with any of his wives, must be buried at his first wife's home, this Court is urged to consider the exceptions of that rule with regard to this case and be guided by the wishes of the deceased in these circumstances. It is submitted that Articles 44 (1) of *the Constitution* provides that every person has a right to participate in the cultural life of their choices, placing reliance upon *Johnstone Kassim Mumbo & 2 Others v. Mwinzi Muumbo & Another*, where the Court held that "Custom is not mandatory where the wishes of the deceased are clear."
35. Relating to the question whether there were the wishes of the deceased concerning his burial place, it is submitted that the wishes of the deceased, although not paramount, should be given priority in so far as it is practically possible, relying on the holding in *Jacinta Nduku Masai v. Leonida Mueni Mutua & 4 Others* [2018] eKLR, where it was held that "The wishes of the deceased if established to have been expressed during his lifetime would take precedence over consideration...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 the same is not contrary to the general law or policy." see . Law JA in *Apeli -vs- Buluku* {2008} 1 KLR (G&F) 873. Similarly, William Musyoka 'Law of Succession' *Law Africa* (2006) at page 36 opines that the wishes of a deceased person as to the disposal of his body should be given



effect to the furthest possible extent.” In this connection, it is submitted that DW3’s evidence that she had a very close relationship with the late dad, who was his close friend and trusted confidante and that her father wrote the wish in his notebook, was not controverted. It is submitted that increasingly, Courts have decided that the wishes of the deceased, although not paramount should be given priority in so far as it is practically possible, citing the holding in *Apeli vs. Buluku* [1980] e KLR and *Samuel Mungai Mucheru & 3 Others vs. Ann Nyathira* [2014] eKLR.

36. Concerning the question whether the children of the deceased has a right to participate in the burial ceremony and final rites to bury the late dad as per his wishes, it is answered in the affirmative.
37. Relating to the question on the party entitled to release of the body and conducting the burial ceremony, it is submitted that the body should be released to the 1st Defendant and her children to conduct the final burial rite of the deceased at his Imilini home as per his wishes. It is submitted that it is not in dispute that the Plaintiff and the 1st Defendant were married to the deceased, and that although PW1 claimed that the 1st Defendant was later married to one Nyamweya, no marriage certificate or any documentation was produced by the Plaintiff to evidence the same. It is submitted that DW1 the chief from Kaewa Location, produced a letter he wrote indicating the decision reached in a family dispute meeting in regards to where the deceased was to be buried, in attendance of the meeting was an elder brother to the deceased, the daughter (DW3), a village elder, niece to the deceased and the area Assistant Chief and that it was agreed that the deceased be buried where he lived at his Imilini home as he was not living with any of his wives. It is submitted that the 1st Defendant is not contesting to bury the deceased at her home but praying that this Court respects the wishes of his late husband to be buried at Imilini and for the sake of her children who were very close to the deceased and call Imilini a home. Reliance is placed upon *Samuel Onindo Wambi vs. COO & Another Kisumu Civil App. No. 13 of 2011 (2015) eKLR*, where the Court 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.”
38. Concerning costs of this suit, it is submitted that the suit should be dismissed and the Plaintiff be condemned to bear the costs of the suit.
39. Finally, this Court is urged to dismiss the Plaintiff’s claim and grant the 1st Defendant’s prayers.

Part IV: The 2nd Defendant’s Case

40. The 2nd Defendant failed to enter appearance and file any defence.

Part V: Points For Determination

41. Gleaning from the Plaintiff; the Statement of Defence; and the rival written Submissions, this Court has distilled three questions for determination as follows:
 - i. First, between the Plaintiff and the 1st Defendant, on preponderance of probabilities, who has established that she is reposed with the right to take the lead role in interment of the remains of Roman Ngali Wambua (hereinafter “the deceased”)?



- ii. Second, where should the remains of the deceased be interred?
- iii. Third, which party should bear the costs of this suit?

Part VI: Analysis Of The Law; Examination Of Facts; Evaluation Of Evidence And Determination

- 42. The principal duty of this Court is to examine facts, evaluate evidence, subject the proven facts to the law and render a decision on a balance of probabilities. This Court now embarks on analysis, interrogation, assessment and evaluation of each of the three questions, in turn.
- 43. Regarding the case against the 2nd Defendant, having failed to both enter appearance and defend, this Court finds that the Plaintiff's evidence against the 2nd Defendant uncontroverted. It follows that the case against the 2nd Defendant is successful.
- 44. This Court will now turn to analyze the evidence presented against the 1st Defendant only.

(i) Between the Plaintiff and the 1st Defendant, on preponderance of probabilities, who has established that she is reposed with the right to take the lead role in interment of the remains of Roman Ngali Wambua (hereinafter “the deceased”)?

- 45. This Court will first discuss the general principles around this question.
- 46. What is the sphere of a Court's jurisdiction in relation to burial disputes? Where parties to a burial dispute have demonstrated that they cannot agree on who is to play the lead role in interment and the place of interment, then the role of the Court is to determine the party who will take the lead role and also determine the place of burial. See Dinah Odhiambo Oyier vs. Hellen Achieng & 3 Others [2017] eKLR, where Cherere, J. reasoned that 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.” See also Virginia Edith Wamboi Otieno vs. Joash Ochieng Ougo & Another [1987] eKLR where Bosire, J. (as he then was) expressed a similar view and stated 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.” In Calma vs. Sesar 1992 106 FLR 446 at page 452, supra, the Court had this to say about the role of the Court: “The conscience of the community would regard fights over the disposal of human remains such as this as unseemly. It requires that the Court resolves the argument in a practical way paying due regard to the need to have a dead body disposed of without reasonable delay, but with all proper respect and decency.”
- 47. Which law is applicable in burial disputes? In the current circumstances where there is no statutory laws governing burial disputes, then three sets of laws can be invoked alternately. First, African customary law. Second, common law. And third, is the freedom of choice exercisable while one is alive and actualized through expressing a burial wish in any form, including oral, written, video, et alia.
- 48. See sections 3(1)(c) & (2) of the *Judicature Act* which provides as follows: “(1) The jurisdiction of the High Court, the Court of Appeal and of all subordinate Courts shall be exercised in conformity with — (a) *the Constitution*; (b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule; (c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England



on the 12th August, 1897, and the procedure and practice observed in Courts of justice in England at that date: Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary. (2) 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.”

49. I will first discuss African customary law. Subject to the condition that it is not repugnant to justice and morality or that it is not inconsistent with any written law, African customary law may be invoked. See, inter alia, *Virginia Edith Wambui Otieno vs. Ochieng Ougo & Anor* [1987] eKLR (at the High Court); and *Virginia Edith Wamboi Otieno vs. Joash Ochieng Ougo & another* [1987] eKLR (at the Court of Appeal level) (hereinafter “the SM Otieno case”). See also the subsequent holdings in *Morris Odawa vs. Samuel Ochieng Auma* [2019] eKLR, where, citing the Court of Appeal decision in *Edwin Otieno Obanjo vs. Martin Ondera Okumu* [1996] eKLR, the Court 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’.” Similarly, see the Court of Appeal decision in *Michael Musau Kitivo vs. Maurice Ndambuki Kitivo* [2008] KLR 119, where it was held that “Section 82 of *the Constitution* of Kenya clearly permits the Application of customary laws relating to burials, among other matters and in the absence of any other provisions relating to burial, the Kamba Customary Law was the relevant applicable law. The learned Judge erred by declining to consider the Kamba Customary Law.” See also *Kandie & 2 others vs. Cherogony* [2002] eKLR, where the High Court held that “... the customary law of the Tugens is that a man must be buried by his father and family members at his ancestral home. In the case of the deceased herein, at Tiriodonin, Baringo District. It was never suggested that such a custom is inconsistent with any written law and in SM Otieno’s case, the Court of Appeal held that it is not repugnant to justice or morality.” Also, see *Salina Soote Rotich vs. Cheptoo et al* [2010] eKLR, where the High Court set aside a Magistrate’s Court decision which released the body to the daughter of the deceased to be buried in a piece of land away from his ancestral home and the Court upheld the principles in the SM Otieno case. In *Florence Maweu & Another vs. Bernard Mutinda Maweu & 2 Others* [2019] eKLR, Odunga, J. held that “...in this case it has not been contended that Kamba customary law relating to burial is repugnant to justice and morality...” Precisely put, whenever it is demonstrated that a burial custom is not repugnant to justice and morality, the Court will invoke it.
50. How then should a claim anchored purely on customary be presented? In circumstances where a claimant anchors the claim on customary law, opinion evidence is mandatory. Section 51 of the *Evidence Act* provides that “51. (1) When the Court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of such custom or right of persons who would be likely to know of its existence if it existed are admissible. (2) For the purposes of subsection (1) of this section the expression “general custom or right” includes customs or rights common to any considerable class of persons.”
51. It follows that a claim premised purely on customary law, arising from the fact that customary law unlike statutory law is not in such form that the Court may take judicial notice, it is necessary that expert evidence led. In the absence of such expert testimony, there can only be one conclusion, such claims remain unproved. In *Ernest Kinyanjui Kimani vs. Muiiru Gikanga and Another* [1965] EA 735, Duffus, J. held that “Time and again it has been stated that in cases resting purely on customary law it is absolutely necessary that experts versed in the customs be summoned to testify so as to assist the Court reach a fair verdict since the Court itself is not well versed in those customs and traditions. In the



absence of such expert testimony, there can only be one conclusion, such claims remain unproved.” This position has been adopted in multiple cases including *Nyariba Nyankomba vs. Mary Bonareri Munge* [2010] eKLR, where Makhandia, J. observed that “Time and again it has been stated that in cases resting purely on customary law it is absolutely necessary that experts versed in the customs be summoned to testify so as to assist the Court reach a fair verdict since the Court itself is not well versed in those customs and traditions...” See also the *SM Otieno* case; *Frank Angatia vs. Lubembe* [2016], per Sitati, J.; and *CBG v JLW* [2017], per Achode, J.

52. Are there exceptions to the general rule that a customary practice must be proven by an expert witness? In circumstances where there is a judicial precedent over a particular community’s customary practice over burial, then since this is deemed to be part and parcel of the laws of Kenya or where the Customary Law is set out in a book or document of reference, then a Court of law is entitled to take judicial notice of such a Customary Law. In *Sakina Sote Kaitany & Ano. vs. 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 these customary laws to be established as facts before the Court are. 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.” Similarly, in *Johnstone Kassim Mumbo & 2 Others vs. Mwinzi Mumbo & Another* [2018] eKLR, it was held that “This Court concurs with trial Court, that there is no statutory law on burial; however, there is case-law and by virtue of the principle of *stare decisis* ought to persuade or bind this Court on determination...The totality of the evidence is that the Akamba customary law prescribes ancestral home and woman at her matrimonial home unless, all families members agree to the alternative site where one bought land and lived.” The only impediment to Application of a customary law is an ascertainable wish and the repugnancy clause. While considering the Application of the Kamba customary law to a burial dispute like the one before me in *Florence Maweu & Another vs. Bernard Mutinda Maweu & 2 Others* [2019] eKLR, Odunga, J. held that “...in this case it has not been contended that Kamba customary law relating to burial is repugnant to justice and morality...”
53. The second applicable law, is common law and specifically the doctrine of legal proximity. In circumstances where the claim is not directly based on a burial custom, the dispute is determined on basis of the doctrine of legal proximity. In this doctrine, the right is reposed in the person who is closest to the deceased in legal terms. For instance, if there is a marital union, then the spouse ranks top unless there are compelling reasons to the contrary. The closeness contemplated here is not physical closeness but legal closeness. The doctrine of legal proximity was laid in *Ruth Wanjiru Njoroge vs. Jemimah Njeri Njoroge & Anor* [2004] eKLR, by J.B. Ojwang, J. (as he then was) when his Lordship reasoned that “The person, in social context prevailing in this country, who is in the first line of duty in relation to the burial of any deceased person, is the one who is closest to the deceased in legal terms. Generally, the marital union will be found to be the focus of the closest chain of relationships touching on the deceased. And therefore, it is only natural that the one who can prove this fundamental proximity in law to the deceased, has the colour of right of burial, ahead of any other claimant.”
54. In the doctrine of legal proximity, it also follows that unless there are compelling reasons to depart from the general principle, the person with the first ranking right to bury a deceased spouse is the spouse and not children of the spouse. See *Christopher Muthini Mbatha vs. Florence Mukii Mukita* [2008] eKLR, per Hatari Waweru, J.



55. In connection to the said doctrine, in *John Omondi & Anor vs. Sueflan Radal* [2012] eKLR, Mabeya, J. held that “...when it comes to the disposal of the body of a married man or woman the spouse should play a leading role...”
56. In *JMK & another vs. JMM* [2019] eKLR, JNM (deceased) died on 17th February 2019 and a dispute arose as to who was entitled to inter her remains. The 1st Appellant was her estranged husband and the 2nd Appellant her son. As at the time of death, she was living with the Respondent as husband and wife. The Appellants’ case was that the deceased had not validly divorced the 1st Appellant under Kamba customary law and as such, the 1st Appellant was entitled to inter her remains. After full trial, the learned trial Magistrate dismissed the suit with no orders as to costs. She however allowed the 2nd Appellant and his siblings to participate fully in the funeral arrangements. Aggrieved by the said judgment, the Appellants preferred this appeal. In granting the Respondent the right to inter the remains of his wife having been proved that she had successfully divorced the 1st Appellant, H.I. Ongúdi, J. adopted the principle which had been laid down in *Ruth Wanjiru Njoroge vs. Jemimah Njeri Njoroge & Anor* [2004] eKLR, per J.B. Ojwang, J. (as he then was) that the person, in social context prevailing in this country, who is in the first 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 this context, a marital union should be the first consideration in the chain of relationships touching on the deceased.
57. The principle of legal proximity to the deceased was also applied in *R.L.A vs. F.O & another* [2015] eKLR where Court held that “This Court’s conclusion is that the deceased and the Plaintiff were close friends. Their relationship bore LL. However, during the time of need, it is deceased’s mother and siblings who were closest to her. This is why she called DW 2 to collect her from under a tree after visiting the Coptic Hospital. It is also the reason why when she fell seriously sick, she called her mother who provided help by sending her sister DW 3 to nurse her at the hour of her most need. During her final moments in this world, 28th – 31st May, 2015 it is DW 2 and DW 3 who were beside her. The Plaintiff was away in Eldoret doing business. The Plaintiff must have had his own house where he was living with his two (2) other sons and would be visiting the deceased as and when he felt the need to. There was no marriage by cohabitation. It was a relationship or friendship of convenience. This Court saw all the witnesses testify. The testimonies for DW 1, DW 2 and DW 3 were not only consistent but also firm and unshaken. The Court believed them.”
58. In *BCC vs. JMG* [2018] eKLR, therefore, the Court held that after establishing existence of a marriage, the Court should proceed in the manner prescribed in *Ruth Wanjiru Njoroge vs. Jemimah Njeri Njoroge and John Omondi Oleg & Anor vs. Sueflan Radal* discussed supra.
59. In this doctrine of legal proximity, which order should be applied? In the obita dicta in the lead judgment in *Ontweka & 3 others vs. Ondieki* (Civil Appeal E692 of 2023) [2024] KECA 11 (KLR) (25 January 2024) (Judgment), Gachoka, JA, with concurrence of Tuiyott & Achode, JJA., reasoned that that the order is similar to that set down under section 66 of the [Law of Succession Act](#) and aid as follows: “I dare add that this order of priority is unwittingly proximate to the order of priority for the inheritance of the estate of an intestate under the [Law of Succession Act](#). Whereas a burial dispute is not a succession dispute, the people closest to the deceased will oftentimes be the spouse, parents, siblings, and members of the clan. In determining the order of priority, the Court will upon considering the evidence, weigh all the issues on the constitutional scale of justice.”
60. However, there are compelling circumstances which can force departure from the principle of legal proximity. In *Edwin Otieno Ombajo vs. Martin Odera Okumu* [1996] eKLR, for instance, it was held that “the husband’s right to bury his deceased wife’s body may be superseded by the deceased’s wishes if the husband’s behavior renders him undeserving to bury the remains of his wife.”



61. In exceptional circumstances, where a compelling reason is demonstrated, a burial wish can prevail over legal proximity. In *Edwin Otieno Ombajo vs. Martin Odera Okumu* [1996] eKLR, for instance, it was held that “the husband’s right to bury his deceased wife’s body may be superseded by the deceased’s wishes if the husband’s behavior renders him undeserving to bury the remains of his wife.”
62. Third and finally, a burial dispute can be determined in accordance with a burial wish. An ascertainable burial wish of the deceased prevails over a burial custom. But since a wish is a common law brainchild (as was observed in *Apeli vs. Buluku* [1980] eKLR, per Law, Miller & Potter, JJA) it’s not binding and can only survive if it comports with the customs of the Clan or community. In other words, customary law is overridden by a burial wish if the customs so permit. See *Eunice Moraa Mabeche & Anor vs. Akinyi* (1994) eKLR. Further see *Charles Onyango Oduke & Anor vs. Onindo Wambui* [2010] eKLR, where the High Court held that “Courts ought to give effect to the wishes of the deceased as far as possible.” And so, if a burial wish of the deceased has been proven, it should prevail unless there is a compelling reason against effecting it. See also *SAN vs. GW* [2020] eKLR, where Ouko, JA (as he then was), Gatembu & Murgor, JJA stated that “The wishes or a will on how the deceased’s remains will be disposed of upon death are not, as a general rule binding because, in the first place, there is no property in a dead body and secondly, because a dead person cannot take part in the decision of his or her own burial. There must, however, be compelling reasons for not heeding the expressed wishes of the deceased.” And so, in the Court of Appeal decision in *Samuel Onindo Wambi vs. COO & Another* [2015] eKLR, the Court rendered itself as follows: “A deceased person’s burial wishes are akin to a will. Save for a compelling reason, they supersede customary law and should be followed...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. The Appellant’s claim to bury the deceased at Masaana is only being driven by custom. 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, we find no good or compelling reason to go against the deceased’s wishes. Consequently, we find no merit in this appeal and we accordingly dismiss it. We order that each party bears its own costs.” The supremacy of a burial wish over burial customs was elucidated better in *Dinah Odhiambo Oyier vs. Hellen Achieng & 3 Others* [2017] eKLR, where it was held that “In the absence of a will regarding preferred burial site Courts have upheld the traditional customs so long as these were not repugnant to justice and morality or contrary to written law.”
63. Similarly, in *Jacinta Nduku Masai vs. Leonida Mueni Mutua & 4 Others* [2018] eKLR, it was held that a burial wish of the deceased is paramount and supersedes all including customary law and legal proximity. The Court stated thus: “The main issues for consideration in a burial dispute is the wishes of the deceased if any had been expressed and the kind of relationship the contestants had with the deceased...Those are more relevant to burial dispute than question for disposal of material assets and related claims and things. They, rather than the succession regime should prevail in determining questions of burial...In an article *Legal Approaches To The Burial Rights Of A Surviving Wife* By Dr Remigius N. Nwabueze *Amicus Curiae* Issue 73 Spring 2008 it is opined that; “Most western legal systems recognize the right of a surviving wife to control the disposition of the remains of her deceased husband. In the USA, the surviving wife is the appropriate person to determine the time, manner and place of burial of her deceased husband. Although she is expected to take the wishes of other members of the family into consideration, her own sepulchral wishes are controlling and paramount in the event of a conflict. In this way the prioritization of a widow’s right to bury her deceased husband



reinforces her pre-eminent status as the closest person to the deceased (at least formally). It also gives acute expression to the binding character of marriage and the precedence that it attracts in family relations. But the American widow is not given priority at all cost and in all circumstances. For instance, a widow's priority is subject to the burial wishes of her deceased husband. If the decedent's sepulchral wishes are ascertainable and clear, American Courts will enforce them. Accordingly, the widow's priority is lost where the deceased husband gave particular directions regarding the disposition of his remains. Whether these mortuary directions were actually given and what their contents are would always remain questions of fact and the answer would depend on the surrounding circumstances of each case."

64. Regarding the place of burial, a burial wish overrides custom. *Oliver Bonareri Omoi & 5 others vs. Joseph Basweti Orogoo* [2010] eKLR, Maraga, J (as he then was) held as follows: "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 view as to where and who should bury his or her body as well as other circumstances do in most cases override that right. It is common knowledge and I take judicial notice of the fact that a reasonable fraction of Kisii 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 home when they die."
65. In exceptional circumstances, where a compelling reason is demonstrated, a burial wish can prevail over legal proximity. In *Edwin Otieno Ombajo vs. Martin Odera Okumu* [1996] eKLR, for instance, it was held that "the husband's right to bury his deceased wife's body may be superseded by the deceased's wishes if the husband's behavior renders him undeserving to bury the remains of his wife."
66. One of the common compelling reasons which will lead to rejection of a burial wish is whenever the wish offends custom or the general law or public policy or safety. See *Pauline Ndeti Kinyota Maingi vs. Kinyota Maingi* [1984] eKLR, where the High Court ruled that the wishes of the deceased over his burial place could not be respected as they violated Kamba customary law. See also *Apeli vs. Buluku* [1980] eKLR, where Law, Miller & Potter, JJA (as they then were) held that "... the most important rule is that the wishes of the deceased person, though not binding, must so far as possible be given effect to... Where the wishes of the deceased are not contrary to custom nor the general law or public policy or safety, as it was in this case, the High Court has a general discretion to order the removal of the remains of the deceased from one place to another subject..." See the COA judicial view expressed in *Ontweka & 3 others vs. Ondieki* (Civil Appeal E692 of 2023) [2024] KECA 11 (KLR) (25 January 2024) (Judgment), paragraph 47 where the COA stated that "47. The wishes of a deceased, therefore, may be disregarded if they are contrary to *the constitution* or the customary practices of the particular community."
67. What approach should the Court take if a burial wish is not proved or unascertainable?
68. Wherever the claimant adduces insufficient evidence to clearly ascertain the deceased's burial wishes, then customary law should be invoked. See *Dinah Adhiambo Oyier vs. Hellen Achieng & 3 Others* [2017] eKLR and *Morris Odawa vs. Samuel Ochieng Auma* [2019] eKLR which adopted the reasoning in the Court of Appeal decision in *Edwin Otieno Ombajo vs. Martin Odera Okumu* [1996] eKLR. In circumstances where it is one's word against the other regarding the burial wishes of the deceased, the Court found the evidence of the Appellants insufficient to prove the wishes of the deceased in *Johnstone Kassim Mumbo & 2 Others vs. Mwinzi Mumbo & Another* [2018] eKLR, and rendered itself thus: "The totality of the evidence is that it is one's word against the other on the diverse statements that the deceased is alleged to have said with regard to his wishes and place of burial. Since this Court cannot conclusively determine what the deceased said to who about his wishes the Court



shall rely on Kamba Customary law...This Court cannot rely on the will as it is contested nor can it rely on verbal statement of the deceased's family members and elders, they are diverse wishes which this Court is unable to confirm or verify.”

69. Alternatively, wherever a claimant fails to prove a burial wish, then the Court should consider the person first in line of duty in relation to the burial of any deceased person, which person should be the one who is closest to deceased in legal terms. In *Florence Maweu & another vs. Bernard Mutinda Maweu & 2 others* [2019] eKLR, Odunga, J. had this to say about the ranking of wishes viz aviz legal proximity. “100. Accordingly, what the Court has to consider is whether the deceased left directions as to the disposal of his body but such directions are not legally binding on his personal representatives. In this case there was no evidence that there is a person who is a personal representative of the deceased. In those circumstances as was held in *Ruth Wanjiru Njoroge vs. Jemimah Njeri Njoroge & Another* (2004) eKLR thus “In the social context prevailing in this country 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 deceased in legal terms. Generally, the marital union will be found to be the focus of the closest chain of relationship touching on the deceased. And therefore, it is only natural that the one who can prove this fundamental proximity in law to the deceased, has the colour of right of burial, ahead of any other claimant.”
70. Having laid the general principles, copiously so, this Court now turns to determine the first question for determination. Which party - between the Plaintiff and the 1st Defendant - has established on a balance of probabilities, that she is vested with a right to take the lead role in interment of the deceased.
71. Limited to the first question for determination, I discern the Plaintiff's claim as anchored on both the burial customs of the Akamba community and the doctrine of legal proximity. On the other hand, I discern the 1st Defendant's defence as erected on a burial wish.
72. Since a burial wish is capable of superseding both burial customs of the subject community and the doctrine of legal proximity – except whenever it offends the said burial customs or general law or public policy or safety - this Court will first embark on interrogation of the burial wish asserted by the 1st Defendant.
73. In this connection, three prominent issues emanated from the proceedings generally and evidence of the 1st Defendant in particular.
74. First, the procedure fashioned for proof of a handwriting and signature was side-stepped by the 1st Defendant. Whenever proof of a party's case will be contingent on association of a handwriting and/or signature to the asserted author, the burden falls upon the party to prove that it was authored by the person asserted. Section 48 of the *Evidence Act* provides that “(1) When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions. (2) Such persons are called experts.” In Sarkar's *Law of Evidence*, 17th Edition (2010), at page 1258, the learned authors state as follows concerning expert evidence: “The infirmity of expert evidence consists in this that it is mostly matters of opinion and is based on facts detailed by others, or assumed facts and opinions against opinion; and experts are selected by parties by ascertaining previously that they will give an opinion favourable to the party calling them. Expert evidence is, however, of value in cases where Courts have to deal with matters beyond the range of common knowledge and they could not get along without it, eg matters of scientific knowledge or when the facts have come within the personal observation of experts.” The purport of the said section 48 was explicated by the Court of Appeal in *Mutonyi vs. Republic* (1982) KLR 203, at page 210, where Potter, JA. (as he then was) expressed himself as follows: “Expert evidence is evidence given by a



person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurements and the like. Section 48 of the *Evidence Act* (Cap 80) provides that where, inter alia, the Court has to form an opinion upon a point “of science, art, or as to identity or genuineness of handwriting or finger or other impressions”, opinions on that point are admissible if made by persons “specialist skilled” in such matters. In Cross on Evidence 5th edition at page 446, the following passage from the judgement of President Cooper in *Davie versus Edinburgh magistrates* (1933) SC 34,40, as scenting the functions of expert witnesses: “Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgement by the application of these criteria to the facts put in evidence.” So, an expert witness who hopes to carry weight in a Court of law, must, before giving his expert opinion:

1. Establish by evidence that he is specially skilled in his science or art.
2. Instruct the Court in the criteria of his science or art, so that the Court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.
3. Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness.”

The place of opinion evidence was illuminated in *Shah and Another vs. Shah and Others* [2003] 1 EA 290, where the Court expressed itself as follows: “One of the special circumstances when witnesses may be called to give evidence of opinion is where the situation involves evidence of expert witness and this is an exception to the general rule that oral evidence must be direct...The expert opinion is however limited to foreign law science or art; including all subjects on which a course of study or experience is necessary to the formation of an opinion and handwriting is one such field...However as a rule of practice, a witness should always be qualified in Court before giving his evidence and this is done by asking questions to determine and failure to properly qualify an expert may result in exclusion of his testimony...The opinion of the expert witness is not binding on the Court, but is considered together with other relevant facts in reaching a final decision in the case and the Court is not bound to accept the evidence of an expert if it finds good reasons for not doing so...If there is a conflict of expert opinion, with experts appearing for both parties, resolution of conflicting evidence or the acceptance of the evidence of the expert in preference to the opinion of the other, is the responsibility of the Court... Properly grounded expert evidence of scientific conclusion will be extremely persuasive in assisting the Court to reach its own opinion.” Although not binding, opinion evidence should be accorded the highest regard. See the Court of Appeal’s judicial view in *Juliet Karisa vs. Joseph Barawa & Another Civil Appeal No. 108 of 1988*. Failure to call expert evidence where necessity so requires translates that the party relying on such handwriting and/or signature fails to discharge his burden of proof and ultimately fails to pass the standard of proof for civil cases. Faced with similar situation in *Re estate of Julius Mimano (Deceased)* {2019} eKLR, the Court held that “It is the applicants contention that the signatures on the Will were forged and did not belong to the deceased. He did not call a document examiner to give expert opinion on the said signatures. The applicant did not express himself to be a qualified document examiner, or handwriting expert, whose word on the matter could be given weight (See Section 109 of the *Evidence Act*). That places the burden of proof on him. The proviso states that “The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any Law that the proof of that fact shall lie in a particular person.” Alternatively, section 76 of the *Evidence Act* empowers a Court to compare the handwriting and signature with the known handwriting and signature. It provides that “(1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the Court to have been written or made by that person, may be compared by a witness or by the Court with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose. (2) The Court may direct any person present in Court to write any words or



figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person. (3) This section applies with necessary modifications to finger impressions.” When this mode is adopted, two conditions must be present in alternative. First, the asserted known signature and/or handwriting should either be uncontested or incontestable. Secondly, as contemplated by subsection (2), the Court should have at its disposal an option to verify and it presupposes that the asserted author must be a person before the Court or subject to the jurisdiction of the Court. See *Machakos County Government vs. Kapiti Plains Estate Ltd & another* [2019] eKLR, per Angote, J. The two conditions are absent in the 1st Defendant’s case since first, the 1st Defendant did not place before this Court any known signature and/or handwriting. Second, since the subject in this case is deceased, there is no way this could verify the authenticity of the handwriting in accordance with the said subsection (2). Further, since this Court does not, certainly, know and is expected not to know the signature and handwriting of the deceased, it was necessary to call a handwriting forensic expert in this regard, without which the handwriting and signature so badly asserted by DW2 and DW3 (exhibited by DW3 as the 1st Defendant’s Exhibit 5) are certainly unverifiable. It follows that the claim that the deceased expressed a burial wish has hit the headwinds.

75. Second and in any event, the burial wish could not have seen the light of the day since in her response to the Plaint, the 1st Defendant filed a Statement of Defence only, without a Counterclaim. It follows that the 1st Defendant has no suit of her own, upon which the prayers set out in the said Statement of Defence can be anchored. The prayers set out in the Defence are thus anchorless.
76. The third and even more deleterious reason which cannot sustain the asserted burial wish is that although it prominently features in the witness statements of DW2 and DW3, the asserted burial wish was not pleaded at all in the said Statement of Defence and more importantly, in a Counterclaim which was absent. It was necessary that such a material fact is pleaded in Counterclaim. It’s instructive to underscore that a party is bound by his own pleadings. It’s impermissible to tender evidence on a fact which was not pleaded. It follows that the evidence in this regard must be disregarded. See *Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others* [2014] eKLR; *Dakianga Distributors (K) Ltd vs. Kenya Seed Company Limited* [2015] eKLR; *Malawi Railways Ltd vs. Nyasulu* [1998] MWSC 3; and *Adetoun Oladeji (Nig) Ltd vs. Nigeria Breweries Plc S.C. 91/2002*.
77. Which brings this Court to the other two fulcrums namely burial customs of the Akamba community and the doctrine of legal proximity. In this connection, the relationship of the Plaintiff to the deceased is germane.
78. At this stage, and in order to contextualize the doctrine of legal proximity, this Court thinks it appropriate to highlight the different characterizations of a wife known to law.
79. Is marital status important in burial disputes? If yes, is there a difference of a wife for purposes of succession and purposes of burial disputes? If yes, who then is a wife for purposes of succession? And who then is a wife for purposes of a burial dispute? In burial disputes, which legal regime should then prevail between succession and marriage? These will be fundamental questions to be tackled below.
80. There is a difference of a wife for purposes of succession on one hand and a wife for other legal purposes like burial disputes, other legal rights, obligations and privileges. For purposes of succession only, if a woman claims to be a wife married under customary law to a man who had contracted a monogamous marriage - where the man has contracted a previous or subsequent monogamous marriage to another woman – and avails herself within the narrow remit of section 3(5) read with sections 29 and 40 of the [*Law of Succession Act*](#), she may be considered. The lesser I say about this in this decision, the better.



81. However, in burial disputes, it's the marital status of a woman in the strict sense of the *Marriage Act*, Cap 150 of the Laws of Kenya (repealed) or the *Marriage Act*, 2014, or common law, which constitutes the gateway to legal proximity. In this connection, the law on marriage is relevant as opposed to the law on succession, premised on the understanding that deceased will be mourned and buried by his/her closest in family relationships and the marriage factor in this connection, creates a closer chain of relationship around the deceased than the succession factor. It is on the foregoing context that whenever two or more women purport to have been in a marital relationship with the deceased man, then the question about their marital status with the deceased is key in disentanglement of the controversy. This principle was laid down in *Ruth Wanjiru Njoroge vs. Jemimah Njeri Njoroge & another* [2004] eKLR, when, faced with a similar situation like this where the deceased had married two women, the first under statute and the second under customary law, J.B. Ojwang, J. rendered himself as follows: "... I am in agreement with Counsel for the respondents, that questions about marital status, by virtue of the matrimonial law, are more relevant in relation to burial, than questions of disposal of material assets and related claims and things, that is, questions of succession ...The fundamental issue that will resolve most of the claims in this application is marital status prior to the death of Mr Samuel Njoroge Muiruri. This position is fully recognized by the applicant and by the respondents. As I have already stated earlier on, the person, in social context prevailing in this country, who is in the first line of duty in relation to the burial of any deceased person, is the one who is closest to the deceased in legal terms. Generally the marital union will be found to be the focus of the closest chain of relationships touching on the deceased. And therefore, it is only natural that the one who can prove this fundamental proximity in law to the deceased, has the colour of right of burial, ahead of any other claimant. It is proven in this case that the first respondent was the lawfully wedded wife of the deceased, their marriage having been celebrated in church, and legally sanctified under both the African Christian Marriage and Divorce Act (cap 151) and the *Marriage Act* (cap 150)... Therefore, in law, we see nothing but a family hub of relations, featuring a husband, a wife, and their children. As a matter of law, this apparent unity and reality of family life cannot be overlooked. The alternative would not, in my view, be tenable in law... When we apply the same yardstick to the applicant, we find that she cannot prove an authentic structure of social family relations enacted by father and-mother-and-children...Yet only custom, habit and repute could accord the applicant's position legitimacy, in relation to the family life of the deceased. While this is only right and proper, so far as it goes, it falls a foul of the official legal system, which through section 37 of the *Marriage Act*, (cap 150), has provided unchallenged protection to the first respondent's monogamous marriage."
82. Wheas the Plaintiff overwhelmingly proved that she was joined in a Christian marriage with the deceased on 8th May 1971 and that they have never divorced (through a Court decree), it was proved by the Plaintiff, corroborated by the 1st Defendant and DW3, that the 1st Defendant married the deceased in 1999 under customary marriage, and divorced in 2011.
83. This Court is alive to the position of the Kamba marriage customs - which was so faultlessly elucidated by PW1 - that once a he-goat (mbui ya ulee) is returned to the parents of the husband and accepted, that marks a complete divorce, whether or not dowry is refunded. See *Munyao Ndolo & 3 others vs. Mary Nduku Mutisya* [2018] eKLR, per C. Kariuki, J.; *In re Estate of Joseph Muoki Ndivo (Deceased)* [2019] eKLR, per W. Musyoka, J.; and *JMK & another vs. JMM* [2019] eKLR, per Ong'udi, J.
84. However, since it was irrefutable that the Plaintiff was joined with the deceased in a Christian marriage on 8th May 1971 and that by the time of the deceased's demise, they had not divorced with the Plaintiff through a Court action.
85. A Christian marriage is a monogamous marriage. Section 37 of the *Marriage Act*, Cap 150 of the Laws of Kenya (which was in force at the material time but now repealed and substituted with the *Marriage*



- Act, No. 4 of 2014) provided as follows: “37. Any person who is married under this Act, or whose marriage is declared by this Act to be valid, shall be incapable during the continuance of such marriage of contracting a valid marriage under any native law or custom, but, save as aforesaid, nothing in this Act contained shall affect the validity of any marriage contracted under or in accordance with any native law or custom, or in any manner apply to marriages so contracted.”
86. Since the 1st Defendant purportedly married the deceased under Kamba customary law afterwards, in 1999 while the monogamous marriage was subsisting, it follows that the deceased was not qualified to contract another marriage and the 1st Defendant was not the deceased’s wife not because of return of mbui ya ulee as asserted and ably proved by the Plaintiff, but by operation of law (section 37 afore-discussed).
87. Even if the 1st Defendant would have managed to demonstrate that there was no divorce (by way of return of mbui ya ulee to the deceased’s parents) in the hierarchy of laws, any marriage custom which defies, offends or contradicts a constitutional or statutory edict, is said to be against public policy and to that extent invalid.
88. Consequently, the legality of the subsequent purported marriage with the 1st Defendant is, for purposes of a burial claim, void and in *Macfoy vs. United Africa Co Ltd* (1961) 3 All ER 1169, Lord Denning held that “If an act is void, then it is in law a nullity.” In *GWM vs. WMK* [2016] eKLR, W. Musyoka, J. held as follows: “33. At the time the respondent married the applicant under statute, he was already married under customary law to another woman. By virtue of section 11(d) of the repealed Marriage Act, he had no capacity to contract a statutory with any other person besides the woman that he had previously married under customary law. His marriage to the applicant therefore cannot be a valid statutory marriage, and she cannot as a consequence appropriate the benefits that come with such a marriage. The ceremony of 1983 therefore did not render invalid the respondent’s earlier marriage to the first wife or the subsequent one to the third wife.”
89. On force of the foregoing reasons, this Court reaches a conclusion that the Plaintiff was the one and only legally married wife of the deceased, by the time of his demise.
90. It follows that on the podium of the doctrine of legal proximity, the 1st Defendant ranks nowhere close to the Plaintiff and cannot be heard to claim the right take lead role in interment of the remains of the deceased. Although this Court acknowledges that the 1st Defendant is not a stranger to the deceased de facto, she’s certainly a stranger to the deceased de jure. On the plane of the doctrine of legal proximity, therefore, the Plaintiff succeeds.
91. Consequently, the AKamba burial custom which commands that the deceased can only be buried in the house of the first wife as asserted by the Plaintiff, cannot be invoked in the circumstances, since this Court has afore-concluded that the deceased had only one wife by operation of law.
92. What then is the place of a spouse in burial? It will be recalled that in *BCC vs. JMG* [2018] eKLR, the Court held that after establishing existence of a marriage, the Court should proceed in the manner prescribed in *Ruth Wanjiru Njoroge vs. Jemimah Njeri Njoroge and John Omondi Oleg & Anor vs. Sueflan Radal* [2012] eKLR.
93. In the said *John Omondi Oleng & Anor vs. Sueflan Radal* [2012] eKLR, it was held that it is the responsibility of the surviving spouse to bury the dead spouse. In his judgement, Mabeya, J. expressed a view that “... 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...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...”
94. In *Martha Wanjiru Kimata & Anor vs. Wanjiru & Anor* [2015] eKLR, it was held that a wife was the closest in proximity to the husband, and therefore had the right to bury the deceased husband. In the doctrine of legal proximity, it also follows that unless there are compelling reasons to depart from the general principle, the person with the first ranking right to bury a deceased spouse is the spouse and not children of the spouse.
 95. Further, in *Jacinta Nduku Masai vs. Leonida Mueni Mutua & 4 others* [2018] eKLR, C. Kariuki, J. held that “117. This is also supported by the provisions of the Article 45 (1) and (3) Constitution of Kenya... 118. That, having found for the spouse’s right to bury her deceased husband, the next question is the venue of the burial.” See also *Christopher Muthini Mbatha vs. Florence Mukii Mukita* [2008] eKLR; *Ruth Wanjiru Njoroge vs. Jemimah Njeri Njoroge & Anor* [2004] eKLR; *JMK & another vs. JMM* [2019] eKLR; *R.L.A vs. F.O & another* [2015] eKLR, et alia.
 96. Most recently, in the *Ontweka* case discussed supra, at paragraphs 58-61, the COA concurred with the High Court that the interest of the nuclear family ought to be respected and disapproved customary edicts which supersede the natural and paramount unit of society, safeguarded under Article 45 of *the Constitution*, concluding that without family, there cannot be customs and social norms. In reconciling burial customs and the doctrine of legal proximity, the COA expressed a judicial view that legal proximity combined with close familial bond supersedes burial customs, proceeding on the understanding that without family, there cannot be customs and social norms. The COA stated thus: “58. In instances where the customs and religious practices form part and parcel of the factual basis of a burial dispute, the same ought to be considered to the extent that they are not contrary to *the constitution* and other laws. However, they do not automatically attain a higher place than the burial right of the person with the most proximate legal and familial bonds with the deceased. 59. The elephant in the room is who has the right to bury the deceased and in which place? No case is on all fours with another, and each case is determined by the particular circumstances and the evidence that is adduced at the trial. In this appeal, we have a deceased who constructed two houses in two different places and the evidence on record shows that both had two doors in line with the Gusii customary law. 60. The place of burial has been discussed by the persuasive decision of the High Court sitting in Uganda in *Namusoke Annet Kiwanuka vs. Eva Amuge and two others* Miscellaneous Cause No. 004 of 2023 as that which is: “to be 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. 61. I agree with the High Court that the interest of the nuclear family ought to be respected. I disapprove of customary edicts that supersede the natural and paramount unit of society, safeguarded under Article 45 of *the Constitution*. Without family, there cannot be customs and social norms.” Put differently, unless you demonstrate absence of a familial bond, then the *Ontweka* case approved the principle which was laid in *Ruth Wanjiru Njoroge vs. Jeremiah Njeri Njoroge & Another* (2004) eKLR, by Ojwang, J. (as he then was).
 97. This does not mean that the 1st Defendant should not play a role in the burial arrangements and interment of the deceased since the right of the Plaintiff is to play the lead role. See *John Omondi & Anor vs. Sueflan Radal* [2012] eKLR, supra. The 1st Defendant and all her children have a right of participation.
 98. It would be remiss of this Court if I fail to observe, gleaned from the evidence emanating from both sides that evidently, it was not all bliss and roses between the deceased and the Plaintiff. Although the Plaintiff attempted to assign one excuse after the other to cover for the evident gaps, none succeeded



to persuade this Court. Looking at the last days of the deceased, this Court was reminded of Chinua Achebe's metaphor - which his last days mirror - that "When suffering knocks at your door and you say there is no seat for him, he tells you not to worry because he has brought his own stool." The overall picture depicts a disconsolate, turbulent and tempestuous relationship between the deceased and Plaintiff leading to a long stint of separation. So was the relationship between the deceased and 1st Defendant before they parted ways. Invoking section 119 of the *Evidence Act* - the common course of natural events and human conduct in their relation to the facts of this case - to suggest that such was unique to the marriage between the deceased and the Plaintiff is to bury our heads in sand. The Plaintiff was said to be childless throughout her marriage life. Addressing my judicial mind to the African culture context, which this Court takes judicial notice, nothing in this marriage can be said to be out of character of a normal childless marriage, and especially, when salt is rubbed into the wound with a second woman into the picture. That notwithstanding, a lost bliss does not necessarily mean a lost marriage. Despite all, it clearly seems to this Court, that the deceased was not desirous of ending the marriage between him and the Plaintiff.

99. Wherefore this Court is eminently persuaded on preponderance of probabilities - on the scale of the doctrine of legal proximity - that the Plaintiff is the closest and in the premise vested with the right to play the lead role in interment of the remains of the deceased.

(ii) Where should the remains of deceased be interred?

100. In this regard, the tension is between the doctrine of legal proximity on one hand and the asserted burial wish, on the other hand.
101. Having been unsuccessful to prove the alleged burial wish, and the this Court having reached a conclusion that there were no two wives and in this context, burial customs relating to two wives do not apply, this Court is left to determine this issue on basis of the doctrine of legal proximity.
102. As concluded under the first question, the doctrine of legal proximity favours the Plaintiff in her capacity as the only lawful wife by the time of demise of the deceased, prevails.
103. In this connection, this Court reaches a conclusion that the Plaintiff's claim, seeking an order of this Court to the effect that the body of the deceased should be interred in Land Reference Number Kathiani/Ithaeni/659, is well-founded on preponderance of probabilities.

(iii) Which party should bear the costs of this suit?

104. Upon considering the nature of this matter, the cause of action and the circumstances unique to this suit including the relationship between the Plaintiff and 1st Defendant which at one point shared a confluence, the deceased in this matter, this Court has found a good cause to depart from the general proposition of the law that costs follow the cause.

Part VII: Disposition

105. In the upshot, this Court reaches a conclusion that the Plaintiff's claim is meritorious and accordingly, Judgment is entered in favour of the Plaintiff in the following terms:
- i. A declaration is hereby issued that the Plaintiff is reposed with the right to play the lead role in interment of the remains of the deceased, Roman Ngali Wambua.
 - ii. It is hereby declared that the 1st Defendant and all her children, have a right to fully participate in the funeral arrangements and interment of the deceased.



- iii. A permanent order of injunction is hereby issued restraining the 1st Defendant, either by herself, her agents, family members, relatives and/or any other person whomsoever acting under her instructions from preventing the Plaintiff in playing the said lead role.
- iv. An order is hereby issued compelling Machakos Funeral Home, the 2nd Defendant, to release the body of the deceased to the Plaintiff or her agents for interment.
- v. The body of the deceased shall be interred at L.R. Kathiani/Ithaeni/659.
- vi. Both the Notification of Death and Burial Permit which were issued to the 1st Defendant, are hereby revoked and this Court directs that a fresh Notification of Death and Burial Permit, be issued to the Plaintiff within 24 hours of service of this order.
- vii. An Order is hereby issued compelling the 1st Defendant to release the deceased's Identity Card to the Plaintiff forthwith.
- viii. The Officer Commanding the nearest Police Station, is hereby directed to ensure compliance of the foregoing orders and directions.
- ix. For the reasons assigned above, each party will bear her own costs of this suit.

106. It is so ordered.

107. Before I sign off, this Court sends sympathies to the affected family, for the loss of their loved one. For their immense cooperation which saw this matter disposed within the shortest time deserving of such matters, this Court wishes to extend its deepest appreciation to Ms. Thiong'o of Ann Thiong'o & Company Advocates and Mr. Ng'ang'a of Kariah & Company Advocates. It's the sincere hope of this Court that this calibre of co-operation will be replicated in other matters.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS LAW COURTS THIS 2ND DAY OF APRIL 2024

.....

C.N. ONDIEKI

PRINCIPAL MAGISTRATE

Advocate for the Plaintiff:.....

Advocate for the 1st Defendant:.....

2nd Defendant:.....

Court Assistant:.....

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