



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**In re Mary Nthenya (Deceased) (Civil Suit E206 of 2023)
[2023] KEMC 256 (KLR) (12 July 2023) (Judgment)**

Neutral citation: [2023] KEMC 256 (KLR)

**REPUBLIC OF KENYA
IN THE MACHAKOS LAW COURTS
CIVIL SUIT E206 OF 2023
CN ONDIEKI, PM
JULY 12, 2023**

BETWEEN

MUSILI MUTIE NGALA PLAINTIFF

AND

JOSEPH MUTISYA DEFENDANT

JUDGMENT

Introduction

1. In *Calma vs. Sesar* 1992 106 FLR 446 at page 452, the Supreme Court of the Northern Territory of Australia (Martin, J.) had this to say: “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.”
2. The significance accorded to the right to bury the dead and place of burial by African customs and the attendant confounding synthesis between immense respect and morbid fear of the dead, compounded by the continually problematic supposed cultural nexus between the right to bury and succession; and the resultant cultural corollary on the social status of the person who actually buried the dead, has witnessed legal contests of monumental proportions around the right to bury and the place of burial, the most notable being that of *Virginia Edith Wamboi Otieno vs. Joash Ochieng Ougo & another* (1987) eKLR (hereinafter “the SM Otieno case”).
3. On account of a conspiracy of polycentric reasons, the decisional law in Kenya is far from being settled soon. It is characterized with considerable ambivalence. Having taken sight of this plurality of laws and the ever-raging clash of customs 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 “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.

4. In Kenya, determinations in this regard have often turned on the fulcrum of either burial customs of the subject community/clan; or the deceased’s ascertainable burial wish (provided it does not offend the said customs or general law or public policy or safety or that it is impractical or impossible); or the doctrine of legal proximity, but no known decision has authoritatively harmonized their interplay. This is the milieu of this decision.

Part II: The Plaintiff’s Case

5. Vide a Plaintiff dated 15th June 2023 and filed on 16th June 2023, the Plaintiff brought this action against the Defendant seeking Judgment for: (a) A declaration that the Plaintiff be entitled to bury the remains of the deceased. (b) Cost of the suit. (c) Interests on all the above. (d) Any relief that the honourable Court might deem fit to grant in the circumstances.
6. The Plaintiff avers that he got married to Mary Nthenya (hereinafter “the deceased”) under Kamba Customary Laws and that they have been cohabiting in that capacity for fifteen years till her demise. The Plaintiff avers that when the deceased was taken ill, she was admitted at Kijabe Hospital where he visited her every day till the Defendant –the deceased’s father- decided to discharge and take her to her paternal home where she died on 29th May 2023. The Plaintiff avers that he sought the hand of the Defendant in marriage and it was granted. It is averred that the Plaintiff and Defendant had a cordial relationship till the demise of the deceased. It is averred that upon demise, both the Plaintiff’s and Defendant’s families held a meeting where it was agreed that the Plaintiff will bury the deceased but the Defendant, contrary to the agreement, set plans to bury the deceased. It is averred that after the demise, the Defendant returned the goat called in an attempt to mark divorce in Kamba customary law.
7. At the hearing of the Plaintiff’s case, PW1, the Plaintiff adopted his witness statement dated 15th June 2023 and filed on 16th June 2023 as his evidence-in-chief. In his said statement, the Plaintiff entirely rehashes the facts in the Plaintiff. In addition, the Plaintiff states that sometime in 2022, together with the Plaintiff’s close family members, they visited the Defendant with a view of paying dowry and that they took 7 goats as per the Kamba customary law. It is stated that one goat was slaughtered and they shared a meal as a symbol of acceptance as the husband of the deceased. He states that he also took some money for the elders. He states that upon demise on 29th May 2023, a meeting was held on 1st June 2023 where it was agreed that the Plaintiff will bury the deceased but later, the Defendant decided to return one goat in an attempt to mark divorce in Kamba customary law. In buttressing his claim, the Plaintiff exhibited the following documents: (i) a copy of the dowry payment agreement as the Plaintiff’s Exhibit 1; (ii) a copy of the agreement between the two sides on burial arrangements as the Plaintiff’s exhibit 2; (iii) a certificate of interpretation for items 1 and 2 as the Plaintiff’s Exhibit 3; (iv) a copy of Kijabe Guest House receipt as the Plaintiff’s Exhibit 4; (v) a copy of photograph showing the Plaintiff, the Defendant and elder during the burial ceremony of Prince Aden at the Defendant’s home as the Plaintiff’s Exhibit 6; (vi) a copy of photograph showing the Plaintiff and the deceased during the burial ceremony of Prince Aden at the Defendant’s home as the Plaintiff’s Exhibit 7; (vii) a copy of photograph taken during the burial ceremony of Prince Aden at the Defendant’s home showing



- the deceased and other attendees as the Plaintiff's Exhibit 8; (viii) a copy of photograph showing the Plaintiff and some elders during the burial ceremony of Prince Aden at the Defendant's home as the Plaintiff's Exhibit 9; and (ix) a copy of the burial permit issued to the Plaintiff as the Plaintiff's Exhibit 10.
8. While under cross-examination, the Plaintiff stated that they had no child with the deceased. He stated that the first time he went to the Defendant's home was in 2006/2007. He stated that he also went together with the deceased on 25th December 2021 to inform the Defendant of their marriage plans and that he was given till March 2022 to pay dowry. He stated that in January 2022, they took the dowry. He stated that dowry was among the issues they discussed with the Defendant in December 2021. He stated that he met the Kamba customary law requirements of paying ntheo in January 2022 by slaughtering one of the goats and sharing a meal with the deceased's family. He stated that he did not bring traditional beer but he bought wine for elders. He stated that they held a burial meeting and he was allowed to bury the body of the deceased. He stated that the Defendant did not sign the agreement (the Plaintiff's exhibit 1). He stated that the Defendant did not sign the Plaintiff exhibit 2 because only the leaders of the meeting were signing. He stated that he did bring the dowry requirements in September 2022. He stated that when she was discharged by the Defendant and taken to the Defendant's home, he did not visit the deceased because he was threatened with dire consequences if he stepped his foot there. He stated that he was not informed about the discharge. He stated that he was not aware of the burial wishes of the deceased.
 9. In re-examination, he stated that his ntheo was accepted.
 10. PW2, Munyoki Nongwea, adopted his witness statement dated 19th June 2023 and filed on 20th June 2023, as his evidence-in-Chief. In his said statement, he states that on 22nd January 2022, he was part of the elders who escorted the Plaintiff to the Defendant's home for ntheo (kuthea) ceremony. He states that all the ceremony were conducted as required by the Kamba customary law regarding dowry payment. He states that the Plaintiff did slaughter one goat and poured blood on the ground to signify the union between the Plaintiff and the deceased and that the Plaintiff shared a roasted liver with the elders of the two families to signify that the two families had been united by the Plaintiff and the deceased. He states that the Plaintiff gave goats, shopping and money in accordance with the requirements of the Kamba customary marriage.
 11. During cross-examination, PW2 stated that the Plaintiff is his nephew (his brother's son). He stated that the Plaintiff's father died and he thus escorted the Plaintiff in his capacity as the foster father. He stated that he first met the Defendant on 22nd January 2022. He stated that they took 11 goats. He stated that he was not in the planning meeting that decided to take 11 goats. He stated that one goat was slaughtered by the Plaintiff and they shared it. He stated that the Plaintiff did share the roasted liver with the elders of both sides. He stated that there is a possibility of variation of the ntheo requirements in Mwingi and Machakos. He stated that blood is not usually mixed with traditional brew. He stated that if at all they were not accepted, the Defendant would have turned them away. He stated that he is not aware of a burial wish.
 12. During re-examination of PW2, he stated that the Plaintiff did slaughter one goat for ntheo ceremony and another goat for eating ceremony.
 13. PW3, Ronald Musyoka Kamwithi, adopted his witness statement dated 15th June 2023 and filed on 16th June 2023, as his evidence-in-Chief. In his said statement, he states that on 22nd January 2022, he was part of the elders who escorted the Plaintiff to the Defendant's home for ntheo (kuthea) ceremony. He states that all the ceremony was conducted as required by the Kamba customary law regarding dowry payment. He states that the Plaintiff did slaughter one goat and poured blood on the ground



- to signify the union between the Plaintiff and the deceased and that the Plaintiff shared a roasted liver with the elders of the two families to signify that the two families had been united by the Plaintiff and the deceased. He states that the Plaintiff gave goats, shopping and money in accordance with the requirements of the Kamba customary marriage.
14. During cross-examination, PW3 stated that he was the secretary during the 22nd January 2022 ceremony. He stated that he first met the Defendant on 22nd January 2022. He stated ntheo ceremony was conducted and the Plaintiff slaughtered one goat, poured blood on the ground and shared the roasted liver with the elders of both sides. He stated they took 11 goats, 7 goats for the family and 4 for slaughtering. He stated that blood is not usually mixed with traditional brew. He stated that the elder who represented the Defendant signed the burial agreement.
 15. During re-examination of PW3, he stated that the proper ntheo ceremony was conducted.
 16. PW4, Kilonzo Kiema Itila, adopted his witness statement dated 19th June 2023 and filed on 20th June 2023, as his evidence-in-Chief. In his said statement, he states that on 22nd January 2022, he was part of the elders who escorted the Plaintiff to the Defendant's home for ntheo (kuthea) ceremony. He states that all the ceremony was conducted as required by the Kamba customary law regarding dowry payment. He states that the Plaintiff did slaughter one goat and poured blood on the ground to signify the union between the Plaintiff and the deceased and that the Plaintiff shared a roasted liver with the elders of the two families to signify that the two families had been united by the Plaintiff and the deceased. He states that the Plaintiff gave goats, shopping and money in accordance with the requirements of the Kamba customary marriage.
 17. During cross-examination, PW4 stated that the Plaintiff is his nephew (his sister's son). He stated that he first met the Defendant on 22nd January 2022. He stated that they took 11 goats. He stated that one goat was slaughtered by the Plaintiff and they shared it. He stated that the Plaintiff did share the roasted liver with the elders of both sides. He stated that they did not take the traditional brew. He stated that blood is not usually maize with traditional brew. He stated that if at all they were not accepted, the Defendant would have turned them away. He stated that he is not aware of a burial wish.
 18. During re-examination of PW4, he stated that the Plaintiff did slaughter one goat for ntheo ceremony.
 19. In her written Submissions dated 27th June 2023 and filed on 29th June 2023, learned Counsel Ms. Mukami instructed by the Firm of Messieurs Mukami Njeru & Associates Advocates representing the Plaintiff, proposes two issues for determination as follows: (i) whether the Plaintiff married the deceased in accordance with the Kamba customary law; and (ii) whether the Plaintiff has the right to bury the deceased.
 20. On whether the Plaintiff and the deceased were married under the Kamba customary law, it is submitted that section 3(2) of the *Judicature Act* provides that a Court can be guided by the African customary law in civil cases in which one or more of the parties 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 and without undue regard to technicalities of procedure and without undue delay. It is submitted that the principles of applying African customary law were laid in *Hortensia Wanjiku Yawe vs. The Public Trustees, Civil Appeal 13 of 1976*. It is submitted that in accord with these principles, the Plaintiff has proved that he indeed performed ntheo Ceremony thus proved that he was married to the deceased as required by the Kamba customs and traditions. It is submitted that it is clear from the testimonies from both parties that the most important part of the Kamba Customary law marriage is the ntheo and that once ntheo ceremony has been performed, the marriage is sealed. Further, it is submitted that the ntheo ceremony was admitted by DW3 in his



witness statement that the Plaintiff came with goats and they slaughtered one as a symbol of the ntheo ceremony. It is submitted once ntheo ceremony is proved, then a Kamba customary marriage is proved, placing reliance in *Re Andrew Manunzyu Musyoka (Deceased)* [2005] eKLR; *Re Estate of James Simu Nthiwa* [2005] eKLR; and *Raymond Kamwanza Ndolo & Another vs. Christopher Kiamba Maingi* [2018] eKLR.

21. On whether the Plaintiff has a right to bury the deceased, it is submitted that once marriage is proved, in Kamba customary law, the Plaintiff is entitled to bury the remains of the deceased.
22. Finally, Counsel urges this Court to allow the suit with costs.

Part Iii: The Defendant's Case

23. In his Statement of Defence dated 20th June 2023 and filed on the even date, the Defendant denies that the Plaintiff was the lawful husband to the deceased on grounds that the Plaintiff failed to perform all the required Kamba customary rites of marriage. The Defendant however admits that he had consented to the Plaintiff marrying the deceased but despite initial introductions, the Plaintiff did not take steps towards payment of the dowry as agreed. The Defendant further admits that a meeting was held towards agreeing on the burial but no agreement was reached. The Defendant further states that the goat he returned was not ntheo but it was meant to alert the Plaintiff's family that "the bond between them had been broken." The Defendant states that he is ready and willing to refund all the gifts and items given to the Defendant's family.
24. At the hearing of the Defendant's case, DW1, the Defendant, adopted his witness statement dated 20th June 2023 and filed on the even date as his evidence-in-chief. In his said statement, the Defendant states that he is the deceased's father. He states that the Plaintiff is known to him as the deceased's boyfriend who he got to know in December 2021 when he was brought home by the deceased. He states that when he inquired from the Plaintiff the kind of relationship he had with the deceased, he promised to visit the deceased's home officially for introductions and dowry negotiations. He states that in sometime in the January 2022, the Plaintiff and his friends came home for a visit whereof they brought some gifts and that during the said visit, none of the Plaintiff's immediate family members were present. He states that during the said visit, the Plaintiff and his friends requested that the gifts they had brought be considered during dowry payment at a later date and that he (the Defendant) did express his dissatisfaction with the Plaintiff's conduct because, instead of coming to his home to bring his family members for the initial introductions and dowry negotiations, he chose to bring gifts (live goats) which had not been asked for and which he himself wanted taken into account towards the dowry payment which is against our customs. The Defendant states that during the January 2022 visit, it was agreed that the dowry payment would be done in September 2022, the same did not take place because the two had disagreed and the deceased actually told him that he did not want to continue with the union. The Defendant states that if the said gifts are the basis upon which the Plaintiff states he is formally married to the deceased; he is ready to refund the same. He states that his family does not know and has never met the Plaintiff's immediate family members and they have never visited the Plaintiff's home. The Defendant states that he was reliably informed by his granddaughter Mwende that the Plaintiff was not living with them at her mother's house at Mlolongo and that his relationship and conduct was that of a boyfriend who would visit her mother once in a while and sometimes he would be away for even two months. The Defendant states that it is not true that they had a cordial relationship with the Plaintiff since the final blow to any relationship if any, was when he abandoned the deceased at Kijabe hospital and they had to go there and clear all the bills and take her to his home where he nursed her until her death. The Defendant states that he learnt of the deceased's illness when the Plaintiff made an arrogant call to him and demanded that he picks his daughter from Kijabe hospital



and that clears the medical bill of KShs. 400,000 and that immediately the Plaintiff relayed the said information, he disconnected the call and the Defendant was not able to get any further information from him. He states that through his granddaughter (daughter to the deceased) he learnt that the Plaintiff had abandoned the deceased who was admitted at Kijabe AIC hospital and that with other family members, they visited the said hospital and they were able to process discharge after paying the outstanding bills through Mpesa and partly by NHIF and that after discharge on 12th May 2023, the Defendant took the deceased to her house at Mlolongo where they stayed with her for 3 days and due to her bad state of health plus the Plaintiff's bad attitude towards her, he took her to his home at Kenya Israel in Machakos, where the Defendant's family nursed her until her demise on 29th May 2023 during which time the Plaintiff did not appear. The Defendant states that there was no agreement between the Defendant's family and the Plaintiff as to where the deceased should be buried. In buttressing his claim, the Defendant exhibited the following documents: (i) a copy of the medical bill and receipts as the Defendant's Exhibit 1; (ii) a copy of the deceased's burial wishes as the Plaintiff's exhibit 2; (iii) receipts for rent payment as the Plaintiff's Exhibit 3; and (iv) a copy of the identity card of the Josephine Mwendu Nzeki, the deceased's daughter, as the Defendant's Exhibit 4; and (v) a certified copy of the burial permit as the Defendant's Exhibit 5.

25. During cross-examination of DW1, he stated that the Plaintiff did bring 9 goats and that two goats were slaughtered on that day. He stated that there were more than 10 persons who attended the ceremony. He stated that the event was not ntheo but a goat-eating ceremony. He stated that in December 2021 visit, the deceased introduced the Plaintiff as her boy-friend of more than 10 years and that they lived in Mlolongo during the said period. He stated that he first met the Plaintiff officially in December 2021 but he had known him for more than 15 years as a fellow long-distance driver. He stated that there was no prior report that they were coming for ntheo. He stated that he initially protested but he later permitted to have the goat-eating ceremony. He again stated that it was not a full ntheo but a partial ntheo called "itima". He stated that the deceased left a burial wish (the Defendant's exhibit 2) but he could not tell where it was written. He stated that the deceased orally told him about her wish to be buried at the Defendant's home but she did not give her the written burial wish. He stated that it was the deceased's daughter who was left with the written burial wish. He stated that although a meeting on burial was held, they did not agree on the place of burial.
26. In re-examination of DW1, she stated that there was no traditional brew and so, the Plaintiff failed to mix goat blood for consumption of the elders and that the Plaintiff further failed to spill goat blood in the Defendant's compound.
27. DW2, Theofrey Nthenge Muasa, adopted his witness statement dated 20th June 2023 and filed on the even date as his evidence-in-chief. In his said statement, DW2 states that he is the deceased's uncle. He states that he met the Plaintiff for the first time in January 2022 when the Plaintiff brought his relatives and friends to the Defendant's home at Kenya Israel for introductions towards dowry negotiations towards marrying the deceased. He states that on the said date, they had gathered about 15 relatives and friends to welcome and meet the Plaintiff and his entourage of 8 people. He states that they brought 9 goats and some food stuffs. He states that the Defendant's family was shocked to see the Plaintiff and his entourage carrying goats to an introduction ceremony and that they expressed their dissatisfaction with their conduct which was against the Kamba customs and beliefs since they had not alerted the Defendant's family of their intention to bring goats. DW2 stated that the Plaintiff and his entourage informed them that their intentions were that one goat be cooked as stew for the ceremony and that another goat be slaughtered as ntheo. That traditionally in Kamba custom the groom's family provides the food and also does the cook DW2 states that the Defendant's family permitted that one goat be slaughtered and cooked as stew but we refused the slaughtering of the second goat towards the ntheo ceremony. DW2 states that the Plaintiff and his entourage pleaded with them to accept the ntheo



ceremony to take place because it would be tedious to return with the goats but the Defendant's family told them that the ceremony could not be half done because there were certain crucial items that had not been brought towards performing the ntheo ceremony. DW2 states that after much haggling at about 5 pm, the Defendant's family agreed the second goat be slaughtered towards starting the ntheo ceremony but they agreed that the same would be completed at later date. He states that no blood was poured as claimed by the Plaintiff and that ntheo ceremony as envisaged in the Kamba customary tradition and rites did not take place and it was agreed as between the two sides that it would be conducted at a later date, in September 2022, but this did not happen because by then, the couple had started disagreements. DW2 states that on 1st June 2023, there was a family meeting of the two families and that he informed the meeting that the deceased had expressed her wishes to be buried by her father owing to the disagreements between the Plaintiff and the deceased. DW2 states that the deceased had left a written document where she expressed her wish to be buried at her farm in Mwala and or be buried by her father. DW2 states that the deceased had informed her about the wish because the Plaintiff told her that he had left a will with his lawyers that in the event he died, he would be buried in his sitting room at Kitui, which position infuriated the deceased and she proceeded to purchase the land at Mwala and started constructing a home for herself and daughter. Finally, DW2 stated that the Plaintiff did not pay dowry and perform all the Kamba customary rites of marriage and he is not the lawful husband to the deceased.

28. During cross-examination of DW2, he stated that he attended the 22nd January 2022 meeting where they were shocked to see the Plaintiff's family bring goats. He stated that the meeting was an introduction meeting and not a ntheo ceremony. He admitted that two goats were slaughtered and that one was to start the process of ntheo. He admitted that the elders of the two sides partook in eating the two goats. He stated that the deceased informed of her wish to be buried at her father's farm. He stated that the burial wish was done in the hand of the deceased and left with her daughter.
29. During re-examination of DW2, he stated that the goats which were slaughtered were for a mere ceremony and not for ntheo.
30. DW3, Josephine Mwendu Nzeki, adopted her witness statement dated 20th June 2023 and filed on the same date as her evidence-in-chief. In the said statement, DW3 states that she is the deceased's daughter. He states that the Plaintiff is not her biological father. DW3 states that prior to her mother's ill-health and death, they lived at Mlolongo with her late mother and her cousin named Vincent Mwongela Joseph. She states that she knows the Plaintiff as the deceased's boyfriend and that he would visit the deceased occasionally. She states that they have never had a father-daughter relationship with the Plaintiff and on days he visited, he would appear at the deceased's house at night or evening and then leave early the following morning and there is no single instance the Plaintiff stayed at the deceased's house for a continuous period of one week. She states that the deceased was living in her own rented house over which she used to pay rent and the deceased merely visited.
31. In cross-examination of DW3, she stated that in primary school days, she used to commute from Mlolongo and back. She stated that in secondary schooling, she went to boarding school.
32. In her written Submissions dated 29th June 2023 and filed on the even date, learned Counsel Ms. Gichuki instructed by the Firm of Messieurs Gladys Gichuki & Associates Advocates representing the Defendant proposes three issues for determination as follows: (i) whether the Plaintiff was lawfully married to the deceased as envisaged by the Kamba customary rites of marriage; (ii) where should the deceased be buried and to whom should the deceased body be released to be buried; and (iii) who should bear accrued mortuary charges and the costs of this suit.



33. On whether the Plaintiff lawfully married the deceased as envisaged by Kamba customary rites of marriage, it is submitted that section 43(1) of the *Marriage Act* provides that an African customary marriage shall be celebrated in accordance with the customs of the communities of one or both of the parties to the intended marriage. Counsel thus advances that this provision of the *Marriage Act* requires that a customary marriage be celebrated in accordance with the customs of one or both parties and a party cannot claim to be married under customary law if the requirements of the communities' customs were not satisfactorily performed as is the case in this matter.
34. Further, it is submitted that the Plaintiff did not comply with the requisites of Kamba customary marriage rites and as such the Plaintiff and the deceased were not married in any colour of right. It is submitted that the Plaintiff on the day he was to bring his family for the initial introductions and dowry negotiations with the Defendant's family, unknown to the Defendant, purported to bring dowry which had not been requested for and that in most African traditional settings, the marriage ceremony is a consensus. It is submitted that the bride's family and the groom's family meet prior to and agree on certain things and especially on how the traditional marriage shall be conducted and that the groom's family is notified of the key requirements of the marriage rites and a date is set when such rites shall take place. This did not happen, it is submitted.
35. For the Defendant, it is submitted that the essential ingredients of a Kamba customary marriage have been elucidated in by Dr. Eugene Cotran in his book; *Marriage and Divorce*, 1st edn, (1968) 28 as (a) Capacity; (b) Consent; (c) slaughter of a billy goat; (d) Marriage consideration; and (e) Cohabitation. It is submitted that in line with this, the most important aspect of the marriage rites in the Kamba tradition is Ntheo which has to be performed in strict conformity with the Kamba traditions. It is submitted that the Kamba customary marriage rites dictate that before the Ntheo ceremony is conducted, there has to be formal introductions and dowry negotiations and that the two events cannot happen at the same time. It is argued that the Kamba community refers to the introduction as 'Kutuma Nduu' loosely translated to mean making friendship. It is submitted that Courts have taken judicial notice of this position, citing *Raymond Kamwanza Ndolo & another vs. Christopher Kiamba Maingi* [2018] eKLR, paragraph 95. Counsel urges that it is the Defendant's position that this important step which precedes the ntheo ceremony was not adhered to by the Plaintiff and that the Plaintiff purported to bring dowry to the Defendant's family in January 2022 before the same had been agreed upon and that it was the evidence of the Defendant that the Plaintiff was categorically informed by the Defendant's family that they could not accept the ntheo and an agreement was reached that the proper ceremony and payment of bride price was to take place in September 2022 but the same did not happen, citing *Raymond Kamwanza Ndolo & another vs. Christopher Kiamba Maingi* (supra) at paragraph 99.
36. On where the deceased's body should be buried, it is submitted that Courts have made pronouncement on the factors to be considered in determining where deceased person is to be buried. It is submitted that the Court in *Neema Mulwa vs. Joyce Mwango* [2015] eKLR, where the deceased had conducted a Church wedding, separated with his wife and subsequently proceeded to cohabit and establish a home with another woman, and had left instructions to be buried by the second woman; the Court opined as follows "In my view, marriage or lack of marriage cannot be the only issue to be considered where burial is in issue. A married person who has been abandoned by a spouse, has a right to choose whom to cater and care for him or her and who to bury his or her body. There only needs to be evidence that he or she has made that choice. Much was said about Kamba Customary Law. Customs and customary law apply to every person. Customs apply everywhere in the world, unless taken away by statute. However, such customs apply to somebody when his or her conduct cherished or respected that custom, and where he/she has not made a will that departs from the said practices of that custom."



37. It is further submitted that in the same case, the Court went further and made the following observations: “Having re-evaluated this matter, in my view, the facts are quite clear. The deceased was subject to Kamba customs. He was married under the African Christian Marriage and Divorce Act (Cap. 151) to the respondent. They were estranged with the respondent as they could not live together. The deceased elected to go and marry or cohabit with the appellant under Islamic Law. They lived openly for several years until death. Even if the two were not legally married, they were closely connected and related. They supported each other. There is no evidence that the respondent, at any time, wanted to live with the deceased as a husband and wife, nor that she had an interest in his welfare and wellbeing... The deceased also permanently lived in his own land, and did not at any time during his last years, come to live in his ancestral land even for a short period. In my view the natural conclusion from the uncontroverted facts is that the deceased acquired a residence of choice which should be respected. It was also natural for the deceased to tell the appellant where he wanted to be buried, and by whom.”
38. In this connection, it is submitted that the conduct of the Plaintiff towards the deceased was wanting since the Plaintiff abandoned her at her last moments only to re-surface after her demise. Counsel submits that Courts have opined that this conduct ought to be put into consideration in determining who has the right to bury the deceased, placing reliance in *SAN vs. GW* [2020] eKLR, where the Court opined that “The other consideration is that the person claiming the right to bury the deceased must be one who is demonstrated to have been close to him or her during his or her lifetime. Regarding this last limb, the Court of Appeal in *Samuel Onindo Wambi vs. COO & Another Kisumu Civil App. No. 13 of 2011 (2015) eKLR* expressed the following view: “... A person’s conduct to a deceased person can extinguish the right of that person of burying the remains of the deceased. The appellant did not show any family closeness with the deceased when she was alive...”
39. It is thus submitted that in line with the learned Judges’ observations above, evidence on record indicates that the dowry ceremony was to be conducted in September 2022 and this did not happen because the couple had disagreed and that the Defendant at paragraphs 13-19 of his statement demonstrates that the deceased herein spent her last days at her father’s home. It is submitted further that the Defendant paid his late daughter’s medical bills at Kijabe hospital and the Plaintiff did not visit the deceased during her last days at her father’s home and his allegations that he did not visit her because he received threats from the Defendant are just that mere allegations.
40. Further, it is submitted that in *re Burial of Musa Magodo Keya (Deceased)* [2021] eKLR, the Court stated at paragraph 50 that “The place of burial of a person is closely linked to three things: the person’s wishes, the duty imposed on those closely related to the deceased during his lifetime to bury him and whether the deceased had established a home...” Further, it is submitted that the Court in *Jacinta Nduku Masai vs. Leonida Mueni Mutua & 4 others* [2018] eKLR, opined the ascertainable wishes of the deceased take priority in determining the place of interment. This Court is thus urged to invoke the deceased’s burial wishes, citing *SAN vs. GW* [2020] eKLR. It is submitted that the Court pronouncements are in line with the entrenched freedom of expression in the *Constitution* of Kenya, citing *In re Burial of Musa Magodo Keya (Deceased)* [2021] eKLR. This Court is thus urged to dismiss the suit with costs to the Defendant and issue orders to the effect that the deceased be buried by her family in accordance with her last wishes.

Part Iv: Points for Determination

41. Gleaning from the Plaintiff, the Statement of Defence and the rival written Submissions, this Court has distilled five questions for determination as follows:



- i. First, whether the Plaintiff has established – on a preponderance of probabilities – that there was a Kamba customary marriage between him and the deceased.
- ii. Second, if the foregoing is answered in the negative, whether a marriage by presumption can be inferred in the special circumstances of this case.
- iii. Third, whether a burial wish has been established.
- iv. Fourth, the party entitled to inter the remains of the deceased and the place of interment.
- v. Fifth, who should shoulder the costs of this suit.

Part V: Analysis of the Law; Examination of Facts; Evaluation of Evidence and Determination

42. I now embark on analysis, interrogation, assessment and evaluation of each of the five points, seriatim.

(i) Whether the Plaintiff has established – on a preponderance of probabilities - there was a Kamba customary marriage between him and the deceased

43. Whereas the crux of the Plaintiff’s case is that there was a customary marriage and thus entitled to inter the remains of his wife, the gravamen of the Defendant’s case is that having failed to meet the Kamba customs on marriage governing ntheo ceremony, there was no Kamba customary marriage. It is the further Defendant’s position that the deceased made a burial wish both orally and in writing. In the alternative, the Defendant takes a position that in light of the Plaintiff’s conduct towards the deceased in her final days where he abandoned her, this Court should not grant his prayers.
44. I thus discern the Plaintiff’s claim as based primarily on the Kamba customary law. On the other hand, I discern the Defendant’s position based on a burial wish and in alternative, the Plaintiff’s conduct towards the deceased in her final days.
45. In circumstances where there is no statutory or common law or doctrine of equity governing a legal dispute, then provided it’s not repugnant to justice, morality and the written law and further provided that it is not inconsistent with the Constitution, customary law is applicable. See section 3(2) of the Judicature Act which provides that “The High Court, the Court of Appeal and all subordinate Courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.” Further, see Article 2(4) of the Constitution which provides that “Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”
46. Customary law marriage (marriage by native law or custom) is recognized by the Marriage Act, 2014. Section 43(1) provides that “(1) A marriage under this Part shall be celebrated in accordance with the customs of the communities of one or both of the parties to the intended marriage. (2) Where the payment of dowry is required to prove a marriage under customary law, the payment of a token amount of dowry shall be sufficient to prove a customary marriage.”
47. In *Hottensiah Wanjiku Yawe vs. Public Trustee* [1976] eKLR, Wambuzi, P.; Mustafa V-P; & Musoke, JA, adopted the three principles which were laid down by the trial Court (the High Court) by Kneller, J. regarding proof of a customary marriage as follows: “i. The onus of proving customary law marriage is generally on the party who claims it; ii. The standard of proof is the usual one for a civil action,



namely, one the balance of probabilities; iii. Evidence as to the formalities required for a customary law marriage must be proved to that evidential standard.”

48. Further, in *Kimani vs. Gikanga* [1965] EA 735, the Court of Appeal of Eastern Africa laid the following principles regarding proof of a customary marriage: “To summarise the position; this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity, the customary law must be accurately and definitely established. The Court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward customary law. This might be done by reference to a book or document reference and would include a judicial decision but in view, especially of the present apparent lack in Kenya of authoritative text books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law would have to call evidence to prove that customary law, as would prove the relevant facts of his case.”
49. What are the specific requirements of a Kamba customary marriage? One of the recognized and celebrated recorded secondary sources of African customary law are the series of publications authored by Dr. Eugene Cotran namely Customary Criminal Offences in Kenya, 1962; Report of Customary Criminal Offences in Kenya, 1963; Restatement of African Law in Kenya, Volume I, 1968; Restatement of African Law in Kenya, Volume II, 1969; Readings in African Customary Law, Volume 1, 1970; The Place and Future of African Customary Law in East Africa, 1971; Annual Survey of African Law, 1975; and Casebook on Kenya Customary Law, 1987. In particular - in *The Law on Marriage and Divorce*, Volume I, 1968 - Dr. Cotran sets down the essentials of Kamba customary marriage as follows: (i) Capacity; (ii) Consent; (iii) Slaughter of a billy goat; (iv) Marriage consideration; and (v) cohabitation.
50. In *Munyao Ndolo & 3 others vs. Mary Nduku Mutisya* [2018] eKLR, per C. Kariuki, J.; and *In re Estate of Joseph Muoki Ndivo (Deceased)* [2019] eKLR, per W. Musyoka, J. the elements of a Kamba customary marriage rites were discussed at great length. In *Munyao Ndolo & 3 others vs. Mary Nduku Mutisya* [2018] eKLR, C. Kariuki, J. rendered himself as follows: “48. It is clear from the evidence of all the witnesses that the most essential step in a Kamba custom marriage is the ntheo. That once the ntheo ceremony has been performed, there exists a valid Kamba custom marriage. 49. I have looked at several judicial proceedings where witnesses gave evidence on the issue of marriage under Kamba custom law. I will sample a few. 50. In *Re Andrew Manunzyu Musyoka (deceased)* [2005] eKLR, Steven Mututu Mutisya (DW2) testified as an expert on Kamba custom law. He said that a marriage is contracted when goats of “Ntheo” are paid to the girl’s parents and that even if dowry is not paid “Ntheo” has to be paid and concludes a marriage. 51. He said that if a woman leaves the husbands home with children and one dies the body has to be taken back to the man’s home for burial. Similarly, if the woman dies when at her parents’ home, the body has to be taken back to the husband’s home if “Ntheo” had been paid. A lady can only inherit from her father’s estate if she divorces her spouse by returning “Mbui sya ulee” – where goats are returned to the husband by the woman. 52. In *Re estate of James Simu Nthiwa* [2005] eKLR there was a contestation as to whether the deceased was married. The objector was the deceased’s mother, she averred that he was not married as he had never informed her of it nor had any dowry been paid in accordance with Kamba custom law where goats called “Mbui sya ntheo” are taken to the girl’s parents and one is slaughtered. 53. She also denied that there were any negotiations with the parents of any girl with a view to marriage. She visited him once in 1977 at his place of work and did not see any woman living with the deceased. 54. I have also looked at the views of Judicial Officers with regard to this issue. In *Re Estate of Stephen Kimuyu Ngeki* (1998) eKLR, J.W Mwera, J. (as he then was) stated that Akamba custom marriage follows an elaborate course and emphasis seems to lie more with payment by the groom of 3 traditional goats called Mbui Sya Ntheo. 55. There is also no doubt in my mind that where ntheo 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.” See also Anna Munini & another vs. Margaret Nzambi [1984] eKLR, per A.A. Kneller, J.; and Andrew Manunzyu Musyoka (Deceased) [2005] eKLR, per R. Wendo, J.

51. From the foregoing, it cannot be gainsaid that in a Kamba customary marriage, whereas failure to present ngasya to the parents of the bride is not fatal, ntheo is accorded a premium and thus indispensable, without which a Kamba customary marriage will suffer a fatal blow.
52. Was the rite of ntheo fulfilled? Having addressed my mind to the evidence presented by both sides, it is incontrovertible that on 22nd January 2022, there was a ceremony at the Defendant’s home, which brought together the families of the Plaintiff and Defendant. What is intensely contested – by the Defendant - is the whether the ceremony amounted to what can properly be deemed a ntheo ceremony in the face of the Akamba customs.
53. In the Kamba customary marriage, ntheo signifies a binding union. This Court – hence - discerns a ntheo ceremony to be an event which brings together families of the both the groom and the bride to offer a platform to formally convey an offer to marry the bride and acceptance of the offer by the bride with the consent of the bride’s parents with a view of signifying the ultimate union of the groom and the bride. In this connection and invariably so, consensus ad idem (a meeting of the minds) is essential not only between the groom and bride, but also between the two families since in general principles of contract, a union presupposes consensus ad idem.
54. In reaching a conclusion whether there was consensus ad idem in this instance, intention of the two families to be bound has to be excavated from the available evidence. It then becomes necessary to delve into and interrogate the intention of the two families, upon which this Court can properly found its determination. In this case, intention of the two families can primarily be gleaned and inferred from the recorded proceedings of the D-day, exhibited by the Plaintiff (as the Plaintiff’s Exhibit 1).
55. Having carefully examined the said record, this Court gathers therefrom that by the time the two families parted ways on 22nd January 2022, they were reading from the same script that the ntheo ceremony was incomplete. This position – of incompleteness - succinctly reflects in the resolutions of the elders of both sides (recorded in the Plaintiff’s Exhibit 1). The Defendant’s position - that the bride’s family was caught by surprise having not anticipated a ntheo ceremony since they were expecting and prepared for a kutuma nduu ceremony (an introduction ceremony) - is vindicated by this record. For this key reason, the further Defendant’s position that the bride’s family half-heartedly permitted initiation of the ntheo process on condition that the balance shall be completed on a later date, is also vindicated by this record. From the record, the balance of the ceremony was - by consent of the two families - deferred to 5th March 2022 and September 2022, for the sole purpose of attaining completeness of the ntheo ceremony.
56. In the premise, it will be reasonable to infer that the final acceptance of the offer was conditioned - by consent of the two families - on completion of the ceremony on 5th March 2022 and September 2022, as per the said resolutions. But as things would turn out, it never came to pass since the event never took place on 5th March 2022 and September 2022, contrary to the contemplation of elders of both families.
57. The ntheo ceremony is necessarily consensual. Since acceptance of the offer and consent of the bride’s parents is consensual in nature - at the full liberty of the bride and the bride’s parents - is not and cannot be imposed.



58. It follows that it will be impermissible for the groom to claim acceptance of the offer, if the ceremony remained incomplete -for whatever reasons- since consensus ad idem cannot be said to have been reached if the purported ntheo ceremony was incomplete as was the case herein.
59. Reasons wherefore this Court concludes that the Plaintiff has failed to generate persuasion in the mind of this Court on a preponderance of probabilities that the ceremony which was held at the Defendant's home on 22nd January 2022 - having lacked both consensus ad idem and the final consent of the bride's parents - amounted to what can properly be deemed a ntheo ceremony in accordance with the customs of the Akamba as envisaged by section 43(1) of the *Marriage Act*, 2014. Having so failed and this being the most essential ceremony in a kamba customary marriage, this Court is unpersuaded that there was a Kamba customary marriage between the Plaintiff and the deceased.

(ii) Whether a marriage by presumption can be inferred in the special circumstances of this case

60. Can marriage be presumed in circumstances where a customary marriage is defective for want of fulfilling one or more key rites?
61. Halsbury's Laws of England, 5th Edition, 2015, Matrimonial and Civil Partnership Law, Volume 72, defines a marriage by presumption in the following words: "Where a man and a woman have cohabited for such a length of time in such circumstances, as to have acquired the reputation of being man and wife, a lawful marriage between them will be presumed even if there is no prior evidence of any marriage ceremony having taken place, particularly where the relevant facts have occurred outside the jurisdiction and this presumption can only be rebutted only by strong and weighty evidence to the contrary."
62. Whenever there is a defect in any form of marriage, by operation of law, a Court of law is obligated to consider the alternative which is whether considering the totality of evidence, a marriage can be presumed in the special circumstances of the case. A marriage by presumption or cohabitation is thus a default fall-back and taking this road cannot be the rule, but rather the exception. In the recent case of MNK vs. POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) (Petition 9 of 2021) [2023] KESC 2 (KLR) (Family) (27 January 2023) (Judgment), the Supreme took a judicial view that a presumption of a marriage is the exception rather than the rule and at paragraph 64, laid down the parameters applicable upon which a Court may presume the existence of a marriage as follows: "We find it prudent at this juncture to lay out the strict parameters within which a presumption of marriage can be made: 1. The parties must have lived together for a long period of time. 2. The parties must have the legal right or capacity to marry. 3. The parties must have intended to marry. 4. There must be consent by both parties. 5. The parties must have held themselves out to the outside world as being a married couple. 6. The onus of proving the presumption is on the party who alleges it. 7. The evidence to rebut the presumption has to be strong, distinct, satisfactory and conclusive. 8. The standard of proof is on a balance of probabilities."
63. In the above connection, a common law marriage can still be inferred even where there was an attempt at customary marriage but it was not perfected, leaving a defect in the customary marriage. See *Mary Njoki vs. John Kinyanjui Muthuru & 3 Others* [1985] eKLR, where the Court of Appeal reasoned as follows: "In my judgment, before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute. If the woman bears a child or better still children, so that the man could not be heard to say that he is not the father of the children, that would be a factor very much in favour of presumption of marriage. Also, if say, the two acquired valuable property together and consequently had jointly to repay a loan over a long period, that would be just what a husband and wife do and so it would be unreasonable to regard the particular man and woman differently.



Performance of some ceremony of marriage would be strong evidence of the general repute that the parties are married. To sum it, there has to be evidence that the long cohabitation is not close friendship between a man and woman, that she is not a concubine but that the cohabitation has crystallized into a marriage and that it is safe to presume that there is a marriage. To my mind, these features are all too apparent in the Yawe and in Mbiti (supra). To my mind, presumption of marriage, being an assumption does not require proof, of an attempt to go through a form of marriage known to law.”

64. In the Court of Appeal case of *Mary Wanjiru Githatu vs. Esther Wanjiru Kiarie* (2010) 1 KLR 159 which cited in approval re *Estate of Christopher Geoffrey Onzele Indure (Deceased)* [2021] eKLR, where the Court reasoned that “There is a long line of authorities in which Kenyan Courts have presumed the existence of a marriage due to long cohabitation and circumstances which show that although there was no formal marriage, the parties intended to live and act together as husband and wife. The doctrine of presumption of marriage is based on section 119 of the *Evidence Act*, Cap 80, Laws of Kenya which provides that the Court may presume the existence of any fact which it thinks likely to have happened...”
65. The Court of Appeal reiterated the above position in *Phylis Njoki Karanja & 2 others vs. Rosemary Mueni Karanja & another* [2009] eKLR, by taking a judicial view that “Before presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage. We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed.”
66. So did Ojwang, J. (as he then was) do in *Njau and Another vs. Wahito* [2008] eKLR, where his Lordship reasoned “...the principle of this decision is that the overriding presumption may cut across all formal processes of marriage, whether they be statutory, ecclesiastical, or customary, and by this principle, marriage existing defects, whereby a man and woman simply cohabit”
67. Similarly, and more recently, in re *Estate of Joseph Muoki Ndivo (Deceased)* [2019] eKLR, W. Musyoka, J. reasoned at paragraph 19 that “Even if were to find that there was no valid customary law marriage between the deceased and the applicant, I find that the deceased and the applicant satisfied all the requirements stated in *Hortensiah Wanjiku Yawe vs. The Public Trustee CACA No. 13 of 1976*, upon which a Court could presume that the two were married. There is evidence that the two cohabited as man and wife, initially at Nyahururu and later in Nairobi. The administrator’s witness confirmed that cohabitation, even as she sought to downgrade their status to that of fiancées and boyfriends/girlfriends. The cohabitation produced three children, whom the administrators’ witness acknowledged as children borne by the two cohabitantes. Thirdly, traditional ceremonies were conducted in an effort to formalize the relationship. The relationship between the two had all the hallmarks of a marriage. I need not presume marriage, however, as I have already found for a fact that there was a valid customary law marriage between the two.”
68. And so, in Supreme Court decision in *MNK vs. POM*, supra, where a period of 20 years cohabitation was inferred as a long period of time.
69. The question to pose here is whether there are acts or conduct which can be inferred to point to a presumption that the Plaintiff and deceased were husband and wife. Do circumstances of this case meet the parameters which were laid by the Supreme Court in *MNK vs. POM* case?
70. The parameters in the Supreme Court case *MNK vs. POM* case have not been met in the following ways. First, on a balance of probabilities and having considered the fact that the Plaintiff’s evidence was disturbed by the evidence of DW3 that the Plaintiff was ordinarily a visiting as opposed to an in situ boy-friend, this Court was unpersuaded that the Plaintiff and the deceased lived together for



ten years and this puts the element of long cohabitation in considerable doubt. Second, there was no demonstration or evidence or markers - on a balance of probabilities – that the Plaintiff and deceased held themselves out to the world as being a married couple, as no such evidence was called worsened by the fact that they had no child together.

71. Reasons wherefore this Court draws a conclusion that the Plaintiff's evidence has again failed the test of marriage by presumption.

(iii) Whether a burial wish has been established

72. The first and second questions having been answered in favour of the Defendant, it will be otiose to determine whether a burial wish has been established. But had this court proceeded to determine this question on merit, it would have been answered in the negative.

(iv) The party entitled to inter the remains of the deceased and the place of interment

73. Since this question is contingent on the outcome of the first or the second questions, it follows that the Plaintiff is not entitled to inter the remains of the deceased. Since there was no counter-claim, this Court cannot issue any order in favour of the Defendant in this regard.

(v) Who should shoulder the costs of this suit?

74. The law on costs as I discern it is that first, an award of costs and interest is discretionary. Second, save where costs and interest are compromised, the Court retains the discretion thereon. See *Morgan Air Cargo Ltd vs. Everest Enterprises Ltd* (2014) eKLR, Gikonyo, J. Third, even where a suit has been compromised without including costs and interest in the compromise, the discretion of the Court aforesaid remains unscathed. See *Rose Kaume & Another vs. Stephen Gitonga Mbaabu & Another* [2016] eKLR, per C. Kariuki, J.
75. How then is this discretion exercised? Discretion is not the same thing as *carte blanche*. Beacons demarcating how discretion is exercised are as follows.
76. First, that discretion ought to be exercised with circumspection and judiciously. See *Christopher Kiprotich vs. Daniel Gathua & 5 others* [1976] eKLR; *Mbogo and Another vs. Shah* [1968] EA 93 and *Mohindra vs. Mohindra* (1953) 20 EACA 56; *Sharp vs. Wakefield* [1891] 64 L.T Rep. 180 Ap. Ca.173, per Lord Halsbury L. C.; and *Rooke's case*, 5 Rep. 99b (1598), cited in approval by Mativo, J. in *Republic vs. Public Procurement Administrative Review Board & 2 others* [2018] eKLR.
77. Second, that costs follow the event unless the Court finds a good cause to negate this trajectory. See *Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & another* [2016] eKLR). In this context, the meaning ascribed to the words "costs shall follow the event" is that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the Defendant or Respondent will bear the costs. See the seminal works of Kuloba, J. (as he then was), *Judicial Hints on Civil Procedure* 2nd edition at page 99; *Dipchem East Africa Limited vs. Karutturi Limited (In Receivership)* [2015] eKLR, per Gikonyo, J.; *Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & Another* (2016) eKLR, per Mativo, J.; and *Jasbir Singh Rai & 3 others vs. Tarcholan Singh Rai & 4 others* (2014) eKLR, per Mutunga, CJ & P (as he then was) Tunoi, Ojwang and Rawal, SCJJ (as they then were) Ibrahim and Wanjala, SCJJ.
78. Third and closely intertwined with the second is that costs should not be used to penalize the losing party but rather to compensate the successful party for the trouble invested in the proceeding or defending the suit. See *Joseph Oduor Anode vs. Kenya Red Cross Society* [2012] eKLR, per Odunga, J.



79. Fourth and also closely connected with the second and third is that the purpose served by an award of costs is guided by the principle restitution in integrum i.e to reimburse the successful party the money expended in the case. See the SCOK decision in Jasbir Singh Rai & 3 others vs. Tarcholan Singh Rai & 4 others (2014) eKLR, per Mutunga, CJ & P (as he then was) Tunoi, Ojwang and Rawal, SCJJ (as they then were) Ibrahim and Wanjala, SCJJ.
80. Fifth and also connected to the second, third and fourth beacons is that a successful party should ordinarily be awarded costs unless its conduct is such that it would be denied costs or the successful issue was not attracting costs. See Orix Oil (Kenya) Ltd vs. Paul Kabeu & 2 Others (2014) eKLR; and Morgan Air Cargo Ltd vs. Everest Enterprises Ltd (2014) eKLR, Gikonyo, J.
81. This Court has found no good cause to depart from the general proposition of the law that costs follow the event.

Part Vi: Disposition

82. Wherefore this Court finds this suit without merit and accordingly dismisses it with costs to the Defendant.
83. As to whether the gifts which were presented to the bride's family on 22nd January 2022 are returnable, this Court directs the question be resolved by elders in accordance with the customs of the Akamba, in that regard.
84. The Plaintiff, his family members and friends are at liberty to attend both the burial arrangements and the burial of the deceased.
85. Before I sign off, this Court sends deepest sympathies to the two affected families, for the loss of their loved one. Finally, it will be remiss of this Court if it fails to make mention of the immense cooperation which was exhibited in this matter by both sides. This Court thus wishes to extend its deepest appreciation to Ms. Mukami of Mukami Njeru & Associates Advocates representing the Plaintiff and Ms. Gichuki of Gladys Gichuki & Associates Advocates representing the Defendant, for their commendable job which saw this matter disposed within the shortest time deserving of such matters. It's the sincere hope of this Court that this calibre of cooperation will be replicated in other matters.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS LAW COURTS THIS 12TH DAY OF JULY, 2023.

.....

C.N. ONDIEKI

PRINCIPAL MAGISTRATE

In the presence of:

Advocate for the Plaintiff

Advocate for the Defendant

Court Assistant: Mr. Kamau

