Getama & another v Maroa (Suing as the legal representative of the Estate of Babere Ikwabe) (Environment and Land Appeal E029 of 2025) [2025] KEELC 7537 (KLR) (31 October 2025) (Judgment)

Neutral citation: [2025] KEELC 7537 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ENVIRONMENT AND LAND APPEAL E029 OF 2025

FO NYAGAKA, J

OCTOBER 31, 2025

BETWEEN

CATHERINE BAGENI GETAMA ..... 1ST APPELLANT

THOMAS ROSWE GETAMA ..... 2ND APPELLANT

AND

PETER MAROA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF BABERE IKWABE) ..... RESPONDENT

(Being an appeal from the Ruling of the Honourable M. O. Obiero SPM delivered in the Senior Principal Magistrate's Court in Kehancha MCELC No. E033 of 2025, on 2{{^nd}} September 2025)

JUDGMENT

Brief Facts

1. The appellants filed the instant appeal following the inter partes hearing and determination of an application dated 16th June 2025. In the said application the Respondent had sought the following orders:

    i. ... Spent

    ii. ... Spent

    iii. Pending the hearing and determination of this suit, the Honourable Court be pleased to grant an interim order of injunction restraining the Defendants/ Respondents either by themselves, agents, servants and/ or anyone claiming under them from interring the remains of one Josphat Ketama Roswe (deceased) in the land parcel number Bwirege/Bukihenche/990 formerly 227.

iv. The O.C.S. Ntimaru Police Station be ordered and/ or directed to enforce and/ or ensure compliance the Court orders herein.

v. Costs of this application be borne by the Defendants/ Respondents.

vi. Such further and/ or other orders be made as the honourable court may deem fit and expedient.

2. It is important to state at this point that during the inter partes hearing the questions raised in the arguments were, among others, that the matter was res judicata given that the issue of ownership was said to be have been determined in Petition no. 9 of 2010, and the jurisdiction of the court given that, according to the plaintiff, the issue concerned a burial dispute and not ownership.

3. The application which is now part of the Record of Appeal between pages 10 and 13 was based on the grounds that the Tribunal sitting at Ntimaru Division Land Disputes Tribunal and whose decision was reaffirmed by the Nyanza Land Appeals Committee found that one Babere Ikwabe Nyamosi (deceased) was the lawful owner of land parcel No. Bwiregi/Bukihenche/990 formerly 227, which was fraudulently registered in the name of the deceased Josphat Ketama Roswe. That the deceased was poised to be buried on the suit land. That the applicant, who was the legal representative and grandson of one Babere Ikwabe Nyamosi who was the undisputed owner of the land was seized with the rights over the said parcel of land.

4. In the middle of the month of May 2025 one Josphat Ketama Roswe died and his remains were due for interment on 20th June 2025 on the suit land. The Respondents had expressly and overtly planned to inter the remains of the deceased on the suit land. The said property was exclusively the property of Babere Ikwabe Nyamosi and the defendants had no right to bury the deceased on it.

5. They stated further that the interment on the parcel of land would prejudice the applicant and cause a multiplicity of issues, wrongs and animosities whose reversal would cause untold expense and cost. The Respondents had adamantly ignored and or refused to heed to the Plaintiff's clear demands that the said Joseph Ketama Roswe be not interred on the suit land. The Respondents' actions were a gross afront to the Plaintiff's constitutional right to equal protection of the law of property under Articles 27 and 40 of *the Constitution* of Kenya, 2010. Lastly, the Respondent would not suffer any prejudice if the orders sought were granted because the Defendants had never had any legal or actual interest on the suit land.

6. The application was supported by the Affidavit sworn on 16th June 2025 by Peter Maroa Ikwabe who sued as a legal representative of the said Babere Ikwabe Nyamosi. He repeated the contents of the grounds in support of the application but in deposition form. He only added to the deposition a copy of a Grant Ad Litem which he marked as PMI 001.

7. The Respondent filed grounds of opposition which were that the application was made in bad faith, had no sufficient reasons for it to be granted; the applicant had failed to disclose that the matter was res judicata since the issue had been determined in Kisii High Court ELC Petition No. 9 of 2010 in a judgment delivered on 28th March 2014; the applicant ought to execute the decree in the above Petition as the 12 year period is yet to expire; and the Respondents were strangers to the application and suit.

8. Following the inter partes hearing the trial court found that the applicant had succeeded in the application. He found that the issue in the suit before him was a dispute with respect to a burial place of the deceased, which was not an issue in the previous suit hence from the previous pleadings he was of the view that the plaintiff's contention held sway.

9. Further, the trial court found that the Defendants only raised the issue of the matter being res judicata and not more than that and did not give submissions on whether or not the prayers sought should be granted.

10. Thus, on the prima facie case, the learned trial magistrate found that the Plaintiff had demonstrated that he had a legal right over the suit land by demonstrating that he is "the administrator of the Estate of his father who is the registered proprietor of the same and that the defendants who have no rights over the same have the intention of interring the remains of the deceased on the same". It then proceeded to make a finding that "the Plaintiff has demonstrated that he has a prima facie case with a probability of success."

11. On the condition of irreparable harm, the trial magistrate found that judicial notice is that "most African communities have a lot of attachment to the graveyard of their deceased kinsmen.... should the defendants inter the body of the deceased on the suit land, they are likely to claim that portion of land and .... cause to the Plaintiff irreparable loss and or harm." The learned trial court therefore granted the injunction as prayed in (iv) and directed the OCS Ntimaru Police Station to enforce the order.

12. The Defendants having been dissatisfied with the ruling and orders of the learned trial court appealed to this Court on the following six grounds:

    1. The Trial Magistrate erred in law by allowing the application for injunction in favour of the plantiff who was not the registered owner of neither L.R. No. Bwirege/Bukihenche/990 nor the former L.R. No. Bwirege/Bukihenche/227 nor was the person through whom the Respondent sued.

    2. The learned Trial Magistrate erred in granting an injunction not understanding (sic) that the conditions set out in the case of Giella v. Cassman Brown & Company Limited (1973) E.A. 358 were not satisfied.

    3. The learned Trial Magistrate erred in law and fact by granting an injunction in favour of the Respondent who lays claim to the deceased's title on account of a Land Disputes Tribunal decree obtained on 4th April 2006 which is manifestly outside the limitation period for execution of decree (sic).

    4. The learned Trial Magistrate erred in law and fact by relying on a decree that was erroneous and ultra vires the powers under the repealed Land Disputes Tribunal Act.

    5. The learned Trial Magistrate erred in law and fact by ordering an injunction on L.R. No. Bwirege/Bukihenche/990 when the applicant was neither residing on the land nor was in occupation of the same.

    6. The learned Trial Magistrate erred in law and fact in ordering an injunction over LR No. Bwirege/Bukihenche/990 when the balance of convenience did not tilt in favour of the Respondent.

13. The appeal was disposed of by way of written submissions. But it is worth of note that the Respondent's filed ones dated 13th October 2025 and contained in the CTS were not signed but the similar copy handed over to the court was. This court, in placing reliance on intent rather than the form, relies on the signed hard copy handed over to it.

14. It is also worth of note that at the interlocutory stage of this appeal, when the appellant applied to set aside the orders impugned, pending the hearing and determination of this appeal, the court called upon the Area Chief, Ayub Magegwa, who attended court and testified as to the current occupation

of the suit land. He also gave evidence as to where, accrding to his observation, the Appellants wished or had demonstrated, by digging a grave, to bury the deceased. He was cross examined by the parties' learned counsel.

15. He testified that he was the Area Chief of Wangera Location from the year 2009. He knew the parties to the suit, and the parcel of land in issue. It was initially 227 but became 990.

16. He added that the appellants' family had been occupying the land which belonged to the deceased Joseph Getama Roswe. Even before he became Chief the family resided on the land. The Respondent had never resided on it. The appellants wanted to bury the deceased on the parcel of land in issue, in the compound where they had been residing all along. They had dug a grave in it.

17. In further cross examination he stated that the family of Peter Maroa resided to the right side of the disputed land. They claimed part of the suit land but he did not know the size. It was the one disputed. The entire parcel of land had never been subdivided. The right side of the land next to the compound of the appellants had about three (3) acres remaining. The lower part of the land was occupied by the eldest wife (widow) of the deceased.

Submissions

18. The Appellants began their arguments by first relying on the case of Owners of the Motor Vessel Lillian SS versus Caltex Oil Kenya Limited [1989] KECA 48 (KLR) where the Court of Appeal holding of Nyarangi JA on jurisdiction was clear that once a court finds that it does not have it, it downs its tools immediately. They argued that regarding the instant case, it was not so. They explained that the Respondent, armed with the decree of the Land Dispute Tribunal issued on 4th April 2006, moved the Kehancha SPM' Court vide a Plaint dated 16th June 2025 claiming to enforce the said decree. He claimed that the Tribunal awarded him 8 acres of the suit land.

19. They reproduced Section 3(1) of the Land Disputes Tribunal Act, now repealed. They argued that the Tribunal did not have jurisdiction to make the award. It was their contention that the Respondent was allegedly awarded 8 acres of the deceased's parcel of land number. Bukira/Bukihenche/227, which was first registration. The Respondent did not execute the decree obtained in 2006. He waited for 19 years before filing the instant case to enforce the said defective decree which was time barred after the expiry of 12 years.

20. They added that the court summoned the chief of the location where the land was situated. He confirmed that the Respondent had never resided on the suit land. Rather, it was the deceased who resided on it, together with the appellants and their families. They relied on the case of Giella vs. Cassman Brown & Co. Limited [1973] EA 358 which established the principles granting an order of injunction.

21. They submitted that the claimant did not establish a prima fascia case with the probability of success. They added that regarding the ownership of parcel number 990, it was still registered in the name of the deceased Joseph Roswe.

22. The appellants argued that the Respondent, who claimed 8 acres of land, strangely now sought an injunction in respect of the whole person of land. Further, there was no injury the Respondent who had no title to the land would suffer if the deceased was interred on a parcel of land registered in his name. They argued that the court misdirected itself in ordering a blanket injunction over the entire parcel of land. They argued that the balance of convenience tilted heavily towards the appellants. They relied on Section 24 of the *Land Registration Act* 2012 and stated that the deceased's title to the suit land had not been defeated, and the land had never changed hands to the Respondent. Therefore, the

Respondent's claim over the title was unlawful, even if he claims that he was given it by the defunct Land Dispute Tribunal. They relied on the case of Mcfoy vs United Africa Limited [1961] ALL ER, 1169. They also relied on the case of Joseph Malakwen Lelei and another v Rift Valley Land Disputes Appeals Committee and 2 others [2014] eKLR.

23. On the decree obtained in 2006, they contended that it was termed by the Court of Appeal as a nullity. They prayed that the injunction be lifted.

24. The Respondent submitted that the appeal was an attempt to circumvent the High Court judgment in ELC No. 9 of 2010 wherein the deceased was the Petitioner and the Respondent the 4th Respondent, and "what he deceased failed to achieve in his lifetime is now to be achieved in his death." He added that the deceased had sought several reliefs among which was that there be a declaration that parcel no. 990 belonged to him and restoration of the same in favour of the him (Petitioner). The High Court, in its judgment dismissed the Petition with costs to the Respondent, and the decree would expire in March 2026 hence it was still valid.

25. He added that the reference to the Kehancha Court decree of 2006 was misleading in relation to the Kisii High Court decree. He stated that the Statement of Christine Getama who was the wife of the deceased, which was part of the Record of Appeal, stated that the land was given to them by the grandfather for safe custody.

26. He added that the process of citation had been initiated vide Kehancha Citation Cause No. E024 of 2025. Therefore, the issue of the Land Disputes Tribunal was neither here nor there in view of the Kisii High Court ELC Case where the decree and jurisdiction of the Tribunal were address. He added that in view of the Petition the success of the case before the trial court was not in doubt. He summed that the appeal was dead on arrival.

Issue, Analysis And Determination

27. This Court has considered the entire appeal, starting with the Memorandum of Appeal and moving to the law, the facts as per the contents of the Record of Appeal and the evidence of the Chief and the submissions of the parties herein. I am of the view that the following issues arise for determination:

    a. Whether the appeal is merited

    b. Who to bear the costs of the appeal

28. This Court begins the determination herein with the analysis of the first issue which is whether the appeal is merited or otherwise. Being a first appeal, the court will rely on the principles as set out in Selle and another v Associated Motor Boat Company Ltd and others [1968] 1 EA 123 wherein the Court of Appeal held:

> "...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ..."

29. It is not lost to this Court, and the parties should not forget that the appeal herein lies from an order given at the interlocutory stage of the suit before the trial court. As such it is clear that the suit has it been heard and determined on merits. Therefore, the orders to be issued herein may affect the manner in which the court proceeds although it does not affect the rights of any of the parties to proceed therein.

30. Again, it is worth of note that this is an appeal that challenges the exercise of discretion by the trial court. As was held by Munyao J. in Daniel Kipkemoi Siele v Kapsasian Primary School & 2 others [2016] eKLR http://kenyalaw.org/caselaw/cases/view/118862, "... the grant or not of an order of injunction is upon the discretion of the court. However, like all other discretions, the same must be exercised judiciously."

31. That is the nature of the decision made on 2nd September 2025 that foregrounds this appeal. This court is obligated as an appellate level to consider whether the trial court proceeded judiciously.

32. The principles that govern the instances where an appellate court may interfere with a decision arrived at by the trial court during the exercise of discretion are now settled. One is that the court must be cautious when deciding to interfere with the discretion of a trial court. If this court must do so, the learned judge should not substitute his decision with the that of the trial court. He must consider and find, if he were to overturn the lower court decision, that the trial court failed to act judiciously or was plainly wrong on principles that he proceeded on or considered or failed to consider factors which he ought not or ought to have considered, respectively.

33. These are conditions which have been repeated by courts in various levels. Thus, in Supermarine Handling Services Ltd versus Kenya Revenue Authority [2010] eKLR (Civil Appeal 85 of 2006) the Court stated:-

> "... Thus, where a trial Court has exercised its discretion on costs, an appellate Court should not interfere unless the discretion has been exercised injudiciously or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule".

34. This is also the same point posited by the Court of Appeal in Farah Awad Gullet v CMC Motors Group Limited [2018] eKLR where it held that

> "...the Court of Appeal, in interfering with the exercise of discretion of the trial Judge appealed from, ought to satisfy itself that the exercise of that discretion either way was improper and therefore warrants interference."

35. Moreover, in Edward Sargent versus Chotabha Jhaverbhat Patel [1949] 16 EACA 63, it was held that there is no bar to an appeal lying to an Appellate Court against an order made in the exercise of judicial discretion, but for the Appeal Court to interfere only if it be shown that the discretion was exercised injudiciously.

36. Furthermore, in Mbogo and Another v Shah [1968] EA 93 at 96 the court held:

> "For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice."

37. Also, in Agola v Ngodhe (An administrator to the Estate of Zakayo Ngodhe) (Environment and Land Appeal E025 of 2024) [2025] KEELC 1367 (KLR) (6 March 2025) (Judgment), this court stated;

> " As for the instant appeal, it is clear that it arose from the low court's exercise of discretion. Regarding appeals of such nature, the appellate court will not normally interfere with the discretion of the trial court unless the trial magistrate or judge exercised the discretion wrongly, injudiciously or misdirected himself in some matter thereby arriving at a wrong decision, the decision clearly wrong."

38. In the instant case, the decision appealed from was the Ruling delivered on 2nd September 2024 by which the trial court found that the Respondent had established a prima facie case and shown that he would suffer irreparable harm or loss. Therefore, he issued an injunction barring the appellants from interring the remains of one Josphat Ketama Roswe (deceased) on land parcel number Bwirege/Bukihenche/990 formerly 227.

39. The law on the grant or refusal of issuance of injunctions is as summarized in the above cited authorities and Order 40 Rule 1 of the Civil Procedure Rules, 2010. The provision is to the effect that,

> " Where in any suit it is proved by affidavit or otherwise—
>
> (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
>
> (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,
>
> the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."

40. For the court to arrive at a decision of the nature, it is guided by the principles laid down in the case of Giella -vs- Cassman Brown [1973] EA 358, which stipulated that three limbs have to be satisfied. These are:

(a) Whether the applicant has established a prima facie case

(b) Whether the he or she would suffer irreparable loss that may not be compensated by damages and

(c) That if the court is in doubt, it may rule on a balance of convenience.

41. It is clear from the court record as demonstrated from the Record of Appeal herein that the trial court proceeded with the application before it and considered it along those conditions. It was satisfied that the Plaintiff, now Respondent, had proved them. The appellants think otherwise. They have given their reasons in the Grounds in the Memorandum of Appeal and explained them in their written submissions. This court must then reexamine the law, the facts and the submissions of the parties herein in order to find whether indeed the trial court erred in law and fact as alleged.

42. From the decision of the trial magistrate, it is apparent that he proceeded on the correct principles hence on that aspect, he cannot be faulted as to interfere with his discretion. Indeed, one must always

consider first whether the applicant has a prima facie case before going to the next issue of the possibility of irreparable harm which cannot be compensated by way of damages, and where, if the two exist but the court is in doubt it grants or refuses the injunction on a balance of convenience. This was stated in the case of Nguruman Limited v Jan Bonde Nielsen & 2 others, CA No. 77 of 2012; [2014] eKLR where the it held that,

> "In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
>
> a. establishes his case only at a prima facie level,
>
> b. demonstrates irreparable injury if a temporary injunction is not granted, and
>
> c. ally any doubts as to (b) by showing that the balance of convenience is in his favour.
>
> These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially."

43. To begin with, this Court carefully perused the copy of the Grant annexed and did not find where it indicated the date it had been issued or where it was signed by the magistrate issuing it. Thus, it was in doubt as to whether the Grant was valid or not. Be that as it may, assuming that indeed it was issued, then the court determines the application on merit as below.

44. The trial court having proceeded on the correct principles, did it arrive at the right decision or a wrong one? I will start be looking at the facts by way of deposition as were before the trial court.

45. The Plaintiff pleaded that he was the legal representative of the estate of Babere Ikwabe Nyamosi who was the owner of the suit land. He sought, on the one hand, to demonstrate this by giving a Gant Ad Litem which was undated and unsigned Grant that was issued by the Court. Did the Grant refer to the suit land or that the plaintiff was given the power, through it, to sue over the same land? No. Did it in any way show that the deceased was the registered owner of the suit land? No. the Grant stated generally that the Respondent was the legal representative authorized to sue on behalf of the Estate of Babere Ikwabe Nyamosi. Since the estate of the said deceased person may be vast, it was important that the Grant Ad Litem specifically points to the suit land as it being part of that estate. Be that is it may, the suit land is not currently registered in the name of the said deceased, Babere Ikwabe. This court doubts how the same can then form part of that estate without a legal finding. But the matter gets complicated for the Respondent in the sense that he claims only 8 acres out of the twenty acres of the parcel in issue.

46. On the other hand, he pleaded at paragraph 3 that the deceased, Josephat Ketama Roswe, was the registered owner of the parcel of land, though he claimed that the registration was fraudulent. Further, although in the plaint the Respondent had pleaded that the deceased Babere Ikwabe Nyamosi was the registered owner of the entire suit land, he changed later in the Affidavit in opposition to the interlocutory application on appeal to depone that the deceased Babere Ikwabe was entitled to only eight (8) acres out of the twenty. Thus, in my view the Respondent was not a candid person who would be entitled to the equitable remedy of injunction. He misled the court to grant it, in the first instance. He should have come to the court with clean hands: his are soiled with lies from the beginning. He lied, in part of the facts before the trial court, that the deceased Babere Ikwabe was the registered owner when his own pleadings showed that it was the deceased Ketama Roswe who was registered as owner

of the whole parcel. Thus, his prayer for injunction should have been "dead on arrival" (if this court may use the phrase his learned counsel applied in submissions he filed in this court).

47. Therefore, given the above negative answers to the questions raised above, this court fails to understand wherefrom the trial magistrate got the evidence that led him to find that the Plaintiff had demonstrated that he had a prima facie case when he found that the Plaintiff had shown that he had a legal right over the suit land by demonstrating that he is "the administrator of the Estate of his father who is the registered proprietor of the same and that the defendants who have no rights over the same have the intention of interring the remains of the deceased on the same". That finding was contrary to both the Plaintiff's pleading at paragraph 3 where he stated that the deceased was the registered owner and the Grant which failed to specifically include it.

48. Furthermore, the learned trial magistrate did not satisfy himself that indeed the plaintiff was in occupation of the suit land or was utilizing it. It because apparent from the evidence of the Area Chief that indeed it was the Defendants who were in occupation of the specific portion of the suit land since the year 2006 and that is where they intended to bury the deceased. Further, it was clear, from the Respondent's Affidavit and submissions that the Respondent only claims eight (8) acres out of the twenty (20) acres which is the size of the entire suit land. The Respondent submitted that he did not mind the Appellants burying the deceased on any other part of the suit land than on the eight (8) acres. He did not demonstrate how he arrived at the burial site or place which said to be within the compound where the deceased and the Appellants have been residing all along as choice of the location of the eight (8) acres he disputes and not the remainder. Besides, the trial court is yet to determine whether the decree resulting from the Ntimaru Land Disputes Tribunal which he seeks to enforce through proceedings in the trial court was lawful (in line with the legality of awards by a tribunal) and still valid as per the *Limitation of Actions Act* (where it provides that a decree may not be executed after the end of 12 years). In my humble view the learned trial magistrate arrived at a decision plainly wrong on this point.

49. On the condition of irreparable harm, the trial magistrate found that judicial notice is that

> "...most African communities have a lot of attachment to the graveyard of their deceased kinsmen.... should the defendants inter the body of the deceased on the suit land, they are likely to claim that portion of land and .... cause to the Plaintiff irreparable loss and or harm."

50. One cardinal legal point, under Section 107 of the *Evidence Act*, is that he who alleges the existence or otherwise of a fact bears the burden to prove it. The trial court found that the Respondent had proved that condition.

51. This court has carefully read the application, the grounds in support and the depositions in the supporting affidavit of Peter Maroa Ikwabe in the trial court. The only relevant point that the applicant, now Respondent, raised in the application, particularly in the supporting affidavit, was that the interment of the deceased on the suit land would "occasion gross prejudices and result in multiple issues, wrongs and animosities whose reversal will be at an untold expense and cost." This court has considered this deposition. I do not see any irreparable harm that may not be compensated by way of damages. If anything, the applicant says reversal of the burial would be possible but at a cost he says is untold. The phrase "untold cost" is extremely ambiguous and does not in any way demonstrate a high cost. What is an untold cost for a man of straw, for instance, who earns less that a dollar a day is not a high cost compared to one who earns, say, twenty dollars a day or more. Thus, this ia an ambiguous assertion that the cost is so high that it cannot be estimated. That is misleading. Be that as it may, there is no submission on how the burial of the deceased is irreparable harm.

52. I note that the trial court brought in the issue of custom and people's attachment to graves of loved ones. With due respect, this finding was not from a submission or deposition of any of the parties. The trial court went beyond its neutral position by taking sides with the applicant on this point. Further, for the court to rely on its imagination that the appellants would use a grave to claim the portion of land when their deceased father had title to it is, to say the least, a stretch too far to be correct. I find that the court proceeded on a wrong principle in that point and I would set aside that finding.

53. The upshot is that the appeal is merited. It is allowed in entirety. The Appellants shall have the costs thereof.

54. Further, the Respondent shall pay the costs of the mortuary expenses of the deceased from the 25th September 2025 when the court found, immediately before the delivery of the ruling on the application dated 18th September 2025, that the Respondent had filed a Replying Affidavit, without notice to both the Court and the other party. The said costs to be paid either forthwith or be included in the bill of costs on this appeal and, paid, with the costs to be taxed or agreed upon regarding this appeal.

55. The orders of injunction issued on 2nd September 2025 are hereby set aside with costs to the Appellants herein/ or Defendants in the lower court. However, the appellants are free to bury forthwith the deceased within the compound where they had already dug a grave to inter the remains. The Officer Commanding Station (OCS), Ntimaru Police Station is directed to ensure compliance of these orders and no interference.

56. Lastly, the parties are directed to move the trial court with speed as to have this matter concluded before the period contemplated by any party regarding the earlier determined matter(s) over the suit land end(s).

57. Orders accordingly.

JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM THIS 31ST DAY OF OCTOBER, 2025.

HON. DR. IUR NYAGAKA

JUDGE

From 12:39 PM, in the presence of,

Court Assistant: Ms Lola

Mr. Owino for Abisai for Appellants

Mr. Singei also for Abisai for Appellants

Abisai Advocate for the Appellants

Ms. Agade Advocate for Awino Advocate for the Respondent