

REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
FAMILY DIVISION
MISC. CIVIL APPLICATION NO. E016 OF 2025

IN THE MATTER OF THE ESTATE OF KILLIAN ANSELM MWOLOI
(DECEASED)
AND
IN THE MATTER OF APPLICATION FOR BURIAL ORDERS
BETWEEN

MARGARET HALIMA MWOLOI.....

APPLICANT/RESPONDENT

-VERSUS-

JULIET KAMBUA KITONYO.....1ST
RESPONDENT/APPLICANT

JOSEPH MBALU MUTAVA.....2ND
RESPONDENT/APPLICANT

KIBWEZI FUNERAL HOME.....3RD
RESPONDENT

RULING

Introduction

1. There are two applications for determination. The application dated 10/09/2025 was filed by Margaret Halima, seeking *inter alia* for an injunction to restrain Juliet Kambua, Joseph Mutava and their agents from interfering with the body of the late Killian Anselm Mwoi or proceeding with any burial arrangements. Margaret deponed that she is the only legal wife of the deceased.
2. Juliet Kambua and Joseph Mutava reacted to the said application through an application dated 23/09/2025 which seeks to have the former struck out for being *res judicata*.

Background

3. Joseph Mutava was the Applicant in Makindu CM's Succession Misc Application No. E071 of 2025 where he deponed that he is an executor of the deceased's last will and testament and sought to enforce the deceased's wishes as set out in the will. He deponed that the deceased had clearly expressed his wishes, in clause 5 of the will, to be buried at his homestead in Matundani, Kangeso, Kibwezi but Margaret objected to the same and insisted that the deceased be buried at her home in Kyanginywa.

4. The trial court delivered a ruling on 19/09/2025 and issued the following orders;

a) That a declaration is hereby made that the late Killian Mwoi, who died on 11th August 2025, died testate having prepared and executed a last will and testament dated 8th March 2025 which is uncontested.

b) That a declaration is hereby made that the will names the Applicant as the executor of the will, which appointment bestows upon the executor legal authority to enforce and implement the terms of the will.

c) That a declaration is hereby made that the late Killian Anselm Mwoi be buried at his homestead in Matunduni, Kangeso, Kibwezi, in accordance with clause 5 of his duly executed will and that such burial be undertaken and completed within 14 days of the issuance of this court orders.

d) That an order is hereby made restraining Ms. Margaret Njeri Mwoloi, her family members, friends, agents, servants or any other person acting under her instructions from disputing the burial site, blocking, disrupting or in any way interfering with the funeral and burial arrangements of the late Killian Anselm Mwoloi at Kangeso, Kibwezi.

e) That the Officer Commanding Station (OCS) Kibwezi do supervise the funeral arrangements and burial of the deceased at Kangeso, Kibwezi and ensure that peace, order and security are maintained during the burial.

The Application dated 23/09/2025

5. The applicant sought the following orders;

a) That this honorable court be pleased to strike out the Applicant's application dated 10th September 2025 for being res judicata, frivolous, vexatious and an abuse of the process of this honorable court, the issues therein having been conclusively determined in Makindu CM Misc Application No. E071 of 2025.

- b) That this Honourable Court do find and hold that the present application is filed in contravention of Sections 6 and 7 of the Civil Procedure Act, as the matter is already determined, and the Applicant as well as the parties were fully aware of the orders issued on 19th September 2025.*
- c) That this Honourable Court do reaffirm and direct strict compliance with the orders issued on 19th September 2025 by Hon. O. A. Nyandusi, RM, in Makindu CM Misc. Application No. E071 of 2025.*
- d) That pending the hearing and determination of this application, the Applicant/Respondent herein do bear the costs of preservation of the body of the deceased.*
- e) That costs of this application be awarded to the Respondent.*
6. The application is supported by the grounds on its face and the affidavit of Joseph Mbalu Mutava sworn on the same day.

7. He deponed that he is well versed with the matters in issue hence competent to swear this affidavit and is also the executor of the will of the late Killian Anselm Mwoi made on 8th March 2025. A copy of the will is exhibited as **JMM1**. That, following the death of the late Mwoi, he duly convened the families of his two widows Margaret Halima Mwoi and Juliet Kambua Kitonyo and read the will to both of them virtually on 19/08/2025 and thereafter physically at Kibwezi on the 29/08/2025. A screen shot of the video conference is exhibited as **JMM2**.
8. That, inspite of Clause 5 of the will expressly indicating the deceased's preferred place of burial, being Matundani, Kangesu Kibwezi, the Applicant herein refused to heed and demanded to bury the deceased in her home in Kyanginywa. That in order to implement the terms of the will in his capacity as executor, he filed an application at Makindu Principal Magistrates Court, on 05/09/2025, being MCSUCCMISC/E071/2025 Joseph Mbalu Mutava -vs- Margaret Njeri Mwoi and Juliet Kambua Kitonyo (interested party) - 'Makindu matter'. A copy of the application is exhibited as **JMM3**.

9. He deponed that on 08/09/2025, the court directed that the application be served upon the Respondents for *inter partes* hearing and it was duly served on 09/09/2025. A copy of Affidavit of Service is exhibited as **JMM4**. *That, despite service of the pleadings, the Respondent did not file a reply to the application and subsequently the application was heard and determined on 19/09/ 2025 and the court granted the orders sought in the application in their entirety.* A copy of the court order is exhibited as **JMM5**. That, it is therefore clear that the application filed in Makindu Law Courts was earlier in time and involved the same parties and the same subject matter as the present application hence rendering the present application *res judicata*.

10. He deponed that the Applicant, being fully aware of the subsisting proceedings and orders of the Makindu Principal Magistrates Court, has now resorted to filing the present application before this Honourable Court as a calculated and clever ploy to circumvent and undermine the lawful orders issued therein, in the hope of securing a more favourable forum, which amounts to forum shopping and a blatant abuse of the court

process. That, the present application is an abuse of the court process and ought to be struck out *in limine*.

11. He deponed that as executor of the estate, he continues to bear responsibility for safeguarding the estate's assets and meeting necessary expenses and the ongoing disputes are causing the estate to incur unnecessary costs and delays in administration.

12. The application was opposed through the Replying Affidavit of Margaret Halima sworn on 29/09/2025.

13. She deponed that according to advice from her Advocates which she believes to be true, the Application dated 23/09/2025 is fatally defective and an abuse of court process and time and should be struck out. That, on **11/09/2025**, she received a phone call from her brother-in-law, at around 11am, while in Nairobi having a meeting with her Advocates on record. The brother-in-law informed her that some documents had been dropped at her home in Uthithuni Village by two unknown individuals who only identified themselves as Musau of telephone number 0758058708 and the other was Samson.

14. That, after returning home, she perused the documents and found that they had neither a case number nor a stamp and upon

further consultation and review by her Advocates on record, he confirmed that the same had no case number and stamp as already admitted in their Affidavit of service marked as **“JMM-4”** and thus he was not in a position to verify the authenticity of the documents in the e-filing portal and as such, she was to ignore the documents until served with a proper order and pleadings. A copy of the bundle of documents delivered to her home is exhibited as **MHM-01**.

15. That, she instructed her Advocates on record to file the Application dated 10/09/2025 and the same was filed under urgency on 11/09/2025 and directions issued on 13/09/2025. A copy of the Court's directions issued is exhibited as **MHM-02**.

16. That, on 15/09/2025, her Advocates served the pleadings and court order of 13/09/2025 upon the Respondents through WhatsApp but it was only the 3rd Respondent herein who acknowledged receipt and indicated that the matter indeed related to their mortuary. That, an Affidavit of service dated 15/09/2025 was filed.

17. That, on 17/09/2025, her Advocates on record effected physical service of the pleadings and Court order upon the 2nd Respondent at their offices located in Bankers Court, Green Lane (behind Daystar University) and they acknowledged receipt by appending their stamp on the documents. An Affidavit of service dated 17/09/2025 was filed.

18. She deponed that according to advice from her Advocates which she believed to be true, by the time the 1st and 2nd Respondents were granted their order on 19/09/2025, they were already aware of this Honorable Court's Orders granted on 13/09/2025. That, by 19/09/2025, when Makindu CM Misc Application No. E071 of 2025 was coming for directions before the Magistrate Court, the 1st and 2nd Respondents herein were aware that she had appointed the firm of JN & P LAW ADVOCATES LLP to represent her hence they ought to have served them with a Mention Notice for the upcoming matter but they deliberately failed to do so.

19. She deponed that according to advice from her Advocates which she believed to be true, the 1st Respondent is a Senior Counsel and former High Court Judge and thus he had a professional

obligation as an officer of the Court to bring to the attention of the Makindu court, the Orders issued on 13th September and further request the Court to stay the proceedings pending the determination of the Application filed herein as the High Court is a superior court and all its orders supersede those of the Chief Magistrate Court.

20. She deponed that according to advice from her Advocates which she believed to be true, the Orders granted in Makindu CM Misc Application No. E071 of 2025, were obtained fraudulently and through concealment of material facts and the same would not have been granted if the Magistrate Court was made aware of the Orders issued by this Honourable Court on 13/09/ 2025.

21. She deponed that the orders of 19/09/2025 in Makindu CM Misc Application No. E071 of 2025 were null and void and cannot be used as a basis of the Application dated 23/09/2025 as the same were obtained when orders of the High Court existed and thus the principle of *res judicata* cannot be invoked herein.

22. The application dated **23/09/2025** has priority as it has potential to be dispositive. *The same was canvassed through*

written submissions but I didn't see any submissions from Margaret Halima with respect to the application.

Submissions by the Applicants (Juliet Kambua & Joseph Mutava)

23. It was submitted that the Originating Summons (O.S) dated 10/09/2025 offends the doctrine of **sub judice** as codified under section 6 of the Civil Procedure Act, and is further barred by the doctrine of *res judicata* under section 7 of the same Act. That, instead of filing a response to the Makindu matter, Margaret Halima chose to file the O.S in this court while fully aware that there was a live matter before the Makindu court involving the same parties, the same subject matter and the same reliefs. That, this conduct is a textbook example of forum shopping, which our courts have consistently frowned upon. Reliance was placed on **Thiba Min. Hydro Co. Ltd -vs- Josphat Karu Ndwiga [2013] eKLR** where the Court emphasized that pursuing parallel proceedings over the same matter creates a risk of conflicting decisions and an abuse of the judicial process.

24.It was submitted that on 19/09/2025, the Makindu court delivered a ruling in which it upheld the validity of the Will, affirmed Clause 5 and directed that the deceased be buried at Matundani, Kangeso, Kibwezi. That, the issues raised herein *to wit*, burial place, validity of the Will, and rights of the parties were conclusively determined by a court of competent jurisdiction. Reliance was placed on **E.T -vs- Attorney General & Anor [2012] eKLR** where the Court of Appeal stated;

“The doctrine of res judicata is meant to bar parties from litigating on the same issues again and again, and also to protect the court’s precious time from being wasted. Litigation must come to an end.”

25.It was submitted that the Makindu Court affirmed the validity of the will and the burial directions therein and unless set aside, that ruling binds all parties and must be respected. It was contended that the application dated 23/09/2025 is not speculative or misplaced but is a necessary procedural step to ensure that the deceased is laid to rest in accordance with his lawful wishes and the binding orders already issued. That, to deny this application would not only prolong unnecessary

anguish but would also erode public confidence in the sanctity of court orders and finality of litigation.

26. I have carefully considered the applications, responses and submissions, and the issue for determination is whether the O.S dated 10/09/2015 is barred by the doctrines of *sub-judice* and *res judicata* based on the Makindu matter.

Analysis

27. **Section 6** of the Civil Procedure Act provides that:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

28. The plain reading of the above section connotes the existence of multiple similar suits involving the same subject matter and same parties but filed in different forums of competent jurisdiction. That is not the case here as the Makindu matter is no

longer active before that court pursuant to the ruling delivered on 19/09/2025.

29.As for the doctrine of *res judicata*, **section 7** of the Civil Procedure Act provides that;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties ... and has been heard and finally decided by such court.”

30.Jurisprudence from our courts: **John Florence Maritime Services Limited & another -vs- Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR** has now distilled the essential ingredients of the doctrine to be;

a. Was there previous litigation in which identical claims were raised or in which identical claims could have been raised?

b. Are the parties in the present suit the same as those who litigated the original claim?

c. Did the Court which determined the original claim have jurisdiction to determine the claim?

d. Did the original action receive a final judgment on the merits?

31. The application before the Makindu court was basically about the place of burial where it was alleged that the deceased had left a will in which he expressly stated that he wished to be buried at the home of Juliet Kambua Kitonyo. The O.S before this court seeks to have the deceased buried at the home of Margaret Halima which, allegedly, is his matrimonial home. The existence of the deceased's will is also hotly contested in the O.S. Evidently therefore, the issues raised in both proceedings are identical.

32. The parties in both proceedings are also similar save for the 3rd Respondent (Kibwezi Funeral Home) which was not a party in the Makindu matter. Further, it is not in dispute that the Makindu court had jurisdiction to determine the claim.

33. As to whether the Makindu matter received a final judgment on the merits, it is a fact that the matter proceeded unopposed

when Margaret Halima did not participate. On one hand, Margaret Halima deponed that she was served with court papers without a case number hence impossible for her Advocate to verify their authenticity on the Judiciary e-filing portal. On the other hand, Juliet Kambua and Joseph Mutava insisted that she was served with proper papers but she willingly chose not to participate. That back and forth notwithstanding, it is a fact that on 13/09/2025, this court had issued directions pursuant to the O.S where it allowed prayer (ii) therein *to wit*;

“That pending the hearing and determination of this application inter partes, this Honorable court be pleased to issue a temporary injunction restraining the 1st and 2nd Respondents, their agents, servants or any person acting on their instructions from interfering with the body of the deceased Killian Anselm Mwoi or proceedings with any burial arrangements contrary to the wishes of the Applicant and the immediate family.”

34.The Affidavit of Service dated 17/09/2025 and filed by the Advocate of Margaret Halima shows that the 2nd Respondent was served with the directions of this court on 17/09/2015. Indeed,

the return copy of the directions has a stamp affixed on it showing that the same was received at the office of the 2nd Respondent at 8.48am on the said date. Considering that the 2nd Respondent (Joseph Mutava) was the applicant in the Makindu court, it is evident that by the time he appeared in the Makindu court on 19/09/2025, he was well aware of the directions of this court

35. The 2nd Respondent, being an officer of the court as had a duty to inform the learned magistrate about the proceedings in the superior court otherwise as it stands now, the ruling of the Makindu court contradicts the directions of this court and having been made after the said directions, it cannot stand as a to the O.S in this court.

36. Be that as it may, the Makindu matter did not receive a final judgment on merits in that, the alleged will is hotly contested and it was never propounded in order to determine its validity or lack thereof. Further, the marital statuses of Margaret Halima and Juliet Kambua to the deceased have not been determined to their logical conclusion. In the persuasive case of **M W K -vs- A**

M W [2016] eKLR, which I agree with, the court (*Joel Ngugi J*) posited that;

“Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by res judicata when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. Res Judicata bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of res judicata.”

37. The upshot is that the O.S dated 10/09/2025 is not *res judicata* hence the application dated 23/09/2025 was overtaken by the event of the directions of this court in the O.S as will be seen below.

The Originating Summons dated 10/09/2025

38. The O.S seeks the determination of the following questions;

- i. Whether this Honourable Court should issue an injunction to restrain the 1st Respondent from intermeddling with the body and burial arrangements of the deceased, Killian Anslem Mwooi.*

- ii. Whether the Applicant, as the lawful widow married under the The African Christian Marriage Act (now repealed) has the primary right to oversee the funeral and burial arrangements of her deceased husband.*

- iii. Whether the deceased should be buried at his matrimonial home in Plot no. 1128 Ngandani Settlement Scheme, in Uthithuni Village, Ngandani Location in Kibwezi District with the applicant or at his ancestral home in Mbuveni Village, Mwonjani Sub-Location, Mwonjani Location in Mbitini, Makueni County, for a dignified and peaceful burial.*

- iv. Who should bear the costs of this Application?*

39. Further, the O.S seeks the following orders;

- i. Spent.*
- ii. Spent.*
- iii. That pending the hearing and determination of the underlying Succession Cause, this Honourable Court be pleased to issue an injunction restraining the 1st and 2nd Respondents, their agents, servants, or any person acting on their instructions from interfering with the body of the deceased or the burial arrangements.*
- iv. That this Honourable Court be pleased to appoint the Applicant as the sole person mandated to oversee and conduct the funeral and burial arrangements of the deceased.*
- v. That this Honourable Court be pleased to order that the deceased be buried at his matrimonial home in Plot no. 1128 Ngandani Settelement Scheme, in Uthithuni Village, Ngandani Location in Kibwezi District with the*

applicant or at his ancestral home in Mbuveni Village, Mwonjani Sub-Location, Mwonjani Location in Mbitini, Makueni County, for a dignified and peaceful burial.

vi. That the costs of this application be provided for.

40. The O.S is supported by the grounds on its face and the affidavit of Margaret Halima sworn on the same day and further affidavit sworn on 29/09/2015. She deponed that she is the lawful widow of the late Killian Anselm Mwoloi (*the deceased*) who died on 11/08/2025. That, she was lawfully married to the deceased under The African Christian Marriage Act (*now repealed*) on 20/04/1974 and the marriage was blessed with Five (5) children. A copy of the marriage certificate is exhibited as **MHM-01**.

41. She deponed that they established their matrimonial home in Plot No. 1128 Ngandani Settlement Scheme, in Uthithuni Village, Ngandani Location, in Kibwezi District in Makueni County where they resided together as a family until the time of his demise. A letter from the area Assistant Chief is exhibited as **MHM-02**. That, the deceased was diagnosed with terminal illness in

December, 2024 and after prolonged and painful illness, he succumbed to the illness on 11/08/2025 after which his remains were transferred to Kibwezi Funeral Home (3rd Respondent) where they have been kept pending funeral preparations.

42. She deponed that her family was busy planning for Deceased's funeral when the 1st Respondent herein emerged and purported to have been married to the deceased under Kamba customary law and claimed that she was the deceased's legitimate wife and therefore responsible for the funeral and burial arrangement. That, any such marriage is null and void as it was contracted during the subsistence of a valid marriage. That, the 1st Respondent is therefore a stranger to the estate of the deceased and has no *locus standi* whatsoever with respect to the funeral arrangement, burial and determination of the burial place.

43. She deponed that following the death of her husband, the 1st Respondent informed them that prior to his demise, the deceased had left a written Will which was under the custody of the 2nd Respondent. That, thereafter, together with her Children and other family elders they had a meeting with the 2nd

Respondent's at the East View Hotel in Kibwezi which was also attended by the 1st Respondent wherein the 2nd Respondent produced a Will which is highly contested and which the 1st and 2nd Respondents are now using to claim a right to bury the deceased at the 1st Respondent's home in Matundani Village, Kangeso, in Kibwezi District.

44. She deponed that they have perused the Will purported to have been written and signed by the deceased and a cursory look of the same will establish that it is a forgery in that, it is not signed by the deceased with his own handwriting but instead it purports that the deceased executed the same by placing his thumb print yet the deceased was a qualified Clinical Officer who, throughout his career, worked at both the AMREF and Action Aid International before he opened his Clinic in Kibwezi town. A copy of the purported will is exhibited as **MHM -03**.

45. She deponed that the intended burial of her husband at the 1st Respondent's home is abhorrent to their family culture and traditions, is opposed by their children, the entire extended family and their Clan and is a recipe for chaos and breach of

peace. A copy of a letter from their children is exhibited as **MHM-04**.

46. She deponed that as the lawful widow, it is her right and duty to give her husband a dignified burial at their matrimonial home in Plot No. 1128 Ngandani Settlement Scheme, in Uthithuni Village, Ngandani Location, in Kibwezi District or, in the alternative, at his ancestral home in Mbuwuni Village, Mwonjani Sub-Location, Mwonjani Location, in Mbitini, Makueni County where his parents and ancestors are buried. That, the actions of the 1st and 2nd Respondents are causing her and her children immense mental anguish and are desecrating the memory of her late husband.

47. She deponed that this matter is extremely urgent as the 1st and 2nd Respondents are making rapid plans for the burial and may move the body from the mortuary at any time, thereby rendering this application nugatory. A letter from the 2nd Respondent issuing an ultimatum is exhibited as **MHM-05**. That, it is in the best interest of justice that this Honourable Court grants the orders sought to ensure a peaceful, dignified, and proper burial and to preserve the sanctity of her lawful marriage.

48.The O.S is **opposed through the Replying Affidavit** of Juliet Kambua sworn on 26/09/2025 where she deponed that she began cohabiting with the deceased, as husband and wife, in the year 1996 and from that time until his death on 11/08/2025, they lived together continuously as man and wife. That, out of the said union, they were blessed with two children namely Michael Muamba, born on 16/02/1997, and Esther Kalekye born on 09/11/1999.

49.She deponed that the deceased acknowledged both children as his own, and their birth certificates clearly bear his name as their father. Copies of their birth certificates are exhibited as **JKK1a** and **“JKK1b**. That, in further affirmation of their marital relationship, the deceased swore an Affidavit of Marriage on 30/03/1997 under Chapter 150 of the Laws of Kenya, confirming their cohabitation as husband and wife. A copy of the affidavit is exhibited as **JKK2**. That, since 1996, they lived together with the deceased and their children on his parcel of land situated at Matundani, Kangeso, Kibwezi, measuring 0.33 hectares, and registered in his name. A copy of the title deed is exhibited as **JKK**. That, this parcel of land has been the deceased’s

homestead and is where they built their home, raised their children and lived as a family for nearly three decades.

50. She deponed that the applicant's claim of the said land not being the deceased's property or being a mere plot unsuitable for burial is false, misleading and intended to discredit the clear facts.

51. She deponed that in December 2024, the deceased fell ill and commenced treatment as an outpatient at Bishop Kioko Hospital. That, his condition worsened and he was referred to St. Mary's Hospital, Lang'ata, where he was diagnosed with prostate cancer whereafter, the deceased underwent prolonged and intensive treatment at several facilities including Kenyatta University Teaching, Referral and Research Hospital, Texas Cancer Centre Kenya, Nairobi West Hospital and Makueni County Referral Hospital. That, throughout the entire period of illness, she personally took charge of his welfare, accompanied him to all medical appointments and ensured that he received the best treatment available. Discharge summary forms and medical appointment records from various hospitals are exhibited as **JKK4.**

52. That, she paid the medical bills, purchased the medication and provided both physical and emotional support to the deceased until the time of his demise. That, the medical expenses spanned into millions of shillings which she met through her own resources. m-PESA statements and receipts of hospital payments are exhibited as **JKK5**.

53. She deponed that despite his illness, the deceased remained of sound mind, and on 08/03/2025, he executed his last Will and Testament. That, upon his death, the Will was read to the family virtually on 19/08/2025 and physically at Kibwezi on 29/08/2025, in the presence of the Applicant and all concerned parties. That, Clause 5 of the will clearly provides that the deceased be buried at his parcel of land in Matundani, Kangeso, Kibwezi, which is his homestead and which has always been their residence as a family. That, the Applicant is fully aware of these burial wishes yet she seeks to frustrate them by filing the present application, despite having accepted other provisions of the Will that benefit her.

54. She deponed that as part of preparations for his burial, she lawfully procured the death certificate, a letter from the Civil Registry confirming surrender of the deceased's National Identity Card and a Burial Permit. Copies of these documents are exhibited as **JKK6a, 6b & 6c.**

55. She deponed that it is inconceivable that she would be in possession of such sensitive and official documents unless she was truly part of the deceased's life and aware of his wishes concerning his final resting place. That, the Chief of Kangeso Location, by his letter dated 25/09/2025 confirmed that she and her children were the family of the deceased and had lived with him on his parcel of land at Matundani. A copy of the letter is exhibited as **JKK7.**

56. She deponed that the Applicant has chosen to selectively rely on provisions of the Will that are favourable to her while rejecting Clause 5 which is inconvenient to her. That, this selective acceptance of the Will is dishonest and contrary to law, as a Will must be respected in its entirety. That, the Applicant's actions have delayed the burial for weeks causing immense anguish to

her, her children and the extended family, while depriving the deceased of a dignified and peaceful rest.

57. That, she was advised by her advocates on record, which advice she verily believes to be true, that under section 11 of the Law of Succession Act, the deceased's Will was validly executed and duly attested. She humbly prays that this Honourable Court dismisses the application with costs, upholds the ruling of the Makindu Court, and directs that the deceased be buried at his parcel of land at Matundani, Kangeso, Kibwezi, in accordance with his last Will and Testament.

Rejoinder

58. In her further affidavit sworn on 29/09/2015, the Applicant, Margaret Halima, deponed that there is nowhere in her Supporting Affidavit where she has validated the impugned "will" or admitted that her family has accepted any bequest in the purported "Will" given that the property mentioned therein is her matrimonial home and the deceased does not have the legal capacity to bequest the same by way of a Will.

59. She reiterated that at the point of signing the purported will, the deceased lacked testamentary capacity for the following reasons;

- a) The deceased was a renowned trained clinical officer who at the time of his demise was operating a successful Clinic in Kibwezi town and if he wanted to make his wishes known through a written will, he ought to have signed the same with his own handwriting;
- b) It is common knowledge to everyone, a fact that has even been acknowledged by the 1st and 2nd Respondents in their respective Replying Affidavits that by the purported date when the Will was written, the deceased was suffering from Stage IV of prostate cancer and was totally incapacitated both physically and mentally to the point that hospitals had discharged him to be taken back home for terminal care.
- c) During the period from January 2025 until sometime in July 2025, the deceased's immediate family, tasked the deceased's younger brother, Albanus Kavai Mwoi, to be following up on his treatment and care including personally

taking care of him and accompanying and sleeping with him whenever he was admitted in the hospital.

d) The said Albanus Kawai Mwoloi has sworn an affidavit dated 29th September 2025 (annexed) in which he established that;

- i. Beginning January, 2025, the Deceased was totally incapacitated both physically and mentally;
- ii. That the deceased was totally dependent on those around him and that he was not in any position to feed himself or attend to himself in anyway and that he relied on home nursing support to feed and clean him and in any event, he was almost paralyzed;
- iii. That the deceased could not use his hands to hold onto anything not even write down anything;
- iv. That the deceased could not speak or utter any single words;

- v. That the deceased was mentally incapacitated and lacked any cognitive capacity and/faculty, he could not recognize any one around him including his own biological brother with whom they had grown up together. The affidavit of Albanus Kavai Mwoi was exhibited as **MHM-2-01**.

60. She deponed that in April 2025, the said Albanus Kavoi Mwoi arranged for the deceased's immediate family and siblings to visit the deceased and during the meeting, the deceased was not able to recognize her and his children together with his siblings and it was evidently clear to everyone that the cancer had advanced so much and impaired him both physical and mentally. That, it is inconceivable how the deceased would, in such state of both physical and mental incapacity, issue verbal instruction, understand his intentions and wishes and issue the purported testamentary wishes and sign them with his thumbprint.

61. She wondered why the 1st and 2nd Respondents did not record a video or take a photograph of the deceased signing the Will or uttering his wishes, in this age of technology and mobile devices,

if indeed the deceased anticipated that his will and burial wishes would be contested. She deponed that Faustina Ngina Mulandi, who is purported to have attested the will is an employee of the 1st Respondent at his law firm in Kibwezi.

62. She deponed that her marriage to the deceased was valid hence the deceased lacked the legal capacity to contract any subsequent marriage both statutory or customary. That, the reason why the law recognized a statutory marriage as a monogamous union is for reasons such as the present one where third parties would invade other people's institution of marriage and claim to be the legal wife and accordingly, the law must come to the aid of a wife married under a statutory union from this kind of third parties, usurpers and imposters who would shamelessly attempt to snatch a dead husband from his immediate wife and family and assert a right to bury him contrary to the law and the customs of the Deceased.

63. She deponed that it is not true that, in the impugned will, the deceased stated that he wished to be buried in land parcel No. Kikumbulyu/Mikuyuni/1006 measuring 0.33 Hectares (0.8 acres). That, this is not the parcel of land that the 1st and 2nd

Respondents have communicated to all and sundry as the designated burial place as it is a tiny plot measuring $\frac{3}{4}$ of an acre in Kibwezi town. That, the said parcel of land is not even indicated in the purported Will by its title number neither is it indicated by its title number anywhere in the pleading filed at the magistrate court. That, this is another attempt by the 1st and 2nd Respondents to play sharp practice and conceal material facts from the Courts.

64. She deponed that it is only her family, the deceased's siblings and clan who have the sole right both in law and under customary law to bury the deceased and that his body should not be released to third parties who have no *locus standi* or any standing in law other than on the guise of a forged will and who do not have the audacity to explain to the Court how they will take care of the emotional and legitimate interests of the deceased's large family apart from the desire to inter him in strange land.

65. The O.S was canvassed through written submissions.

Submissions by the Applicant (Margaret Halima Mwoi)

66. *For the Applicant the following issues arose for determination;*

a. *Whether the 1st Respondent has locus standi to participate in the burial arrangements of the deceased;*

b. *Whether the Court has jurisdiction to override burial wishes in a will.*

67. As to whether the 1st Respondent has *locus standi* to participate in the burial arrangements of the deceased, it was submitted in the negative for the reason that she was not a legally recognized wife to the deceased and does not form part of his immediate family. That the applicant is the lawful widow of the deceased as the two were married under the African Christian Marriage and Divorce Act (now repealed) on 20th April, 1974.

68. It was submitted that in the Chief's letter dated 29/08/2025, the 1st Respondent is not recognized to have any familial relationship with the deceased and she cannot purport to be married to the

deceased under customary marriage as at the time of the purported marriage, the deceased was already in a monogamous statutory marriage with the Applicant under African Christian Marriage. Reliance was placed on sections 6(2) and 9 of the Marriage Act of Kenya, No. 4 of 2014.

69. It was submitted that the purported marriage between the deceased and 1st Respondent is a void marriage under the provisions of Section 11 (c) of the Marriage Act as the deceased lacked the capacity to contract any other marriage while still in a subsisting monogamous marriage. Reliance was placed on **Mary Wanjiku Githatu -vs- Esther Wanjiru Kiarie [2010] eKLR** where the court (*Bosire JA*) stated;

“The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except where by reason of a written law it is excluded. For instance, a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute.

However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by a long cohabitation or other circumstances evinced an intention of living together as husband and wife.”

70. It was submitted that the marriage between deceased and applicant was not dissolved by either party thus at the time of the purported marriage between the deceased and the 1st Respondent, the deceased was in a subsisting monogamous statutory marriage. It was contended that a statutory marriage confers exclusivity and bars subsequent polygamous unions. Reliance was placed on **Re Estate of Samuel Mburu Ngirau (Deceased) [2021] KEHC 12528 (KLR)** where the court stated that;

“The union of Julia Muthoni Mburu and the deceased could not attain the marriage status as the deceased was in a monogamous marriage and, therefore, incompetent to marry because of that subsisting marriage.”

71.As to whether the court has jurisdiction to override burial wishes in a will, it was submitted that the court has jurisdiction to do so if the same are in contravention of the immediate family's best interest and customs of the community. Reliance was placed on the following cases

a) **Dinah Odhiambo Oyier -vs- Hellen Achieng & 3 others (2017) eKLR** where the court stated;

“Where the people who are legally closest to the deceased: “have shown that they cannot now agree on that issue, it is desirable and, indeed imperative, in the circumstances of this case for this court to intervene and direct as to the deceased’s place of burial.”

b) **Virginia Edith Wamboi Otieno -vs- Joash Ochieng Ougo & Anor [1987] eKLR** where the court (*Bosire J*) stated;

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

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

c) **San -vs- GW, Civil Appeal No. 1 of 2020** where the Court of Appeal in Kisumu stated;

"In burial disputes, the two questions that will always arise are, who has the right to bury the deceased and the place of burial. The wishes or a will on how the deceased's remains will be disposed of upon death are not, as a general rule, binding because, in the first place, there is no property in a dead body and secondly, because a dead person cannot take part in the decision of his or her own burial.

There must, however, be compelling reasons for not heeding the expressed wishes of the deceased. The third aspect of this dispute is that the law only recognizes the persons who are closest to the deceased to have the right to bury the deceased. Those persons have been identified as the spouse, children, parents and siblings, in that order.

d) **Apel -vs- Buluku [2008] 1 KLR (G&F) 873** where the Court of Appeal declared that:

“There can be no property in a dead body. A person cannot dispose of his body by will. If the deceased had left directions as to the disposal of his body though these are not legally binding on his personal representative, effect should be given to his wishes as far as that is possible. The wishes of the deceased, though not binding must be so far as practicable be given effect, so long as the same is not contrary to customs nor contrary to the general law or policy”

e) **Jacob Blasto Okumu & 4 Others vs. Claris Auma [2014] eKLR** where the court stated;

“The only time that a court will not enforce the wishes of the deceased is where such wishes are clearly offensive, illegal or unenforceable”

f) **Jacinta Nduku Masai -vs- Leonida Mueni Mutua & 4 others [2018] eKLR** where the court stated;

“It is trite law that there cannot be property in a dead body and a person cannot dispose his body by will, but it should be noted that courts have long held that the wishes of the deceased, though not binding must so far as practicable be given effect, so long the same is not contrary to the general law or policy.”

g) Muumbo & Anor -vs- Muumbo & 2 Others [2022] KECA 568 (KLR) where the court stated;

“Under Kamba Customary Law where a deceased’s person’s wish on his preferred burial place is not clear or known he may be buried either in the ancestral home or where settled subject to mutual agreement by the family.

72.It was submitted that the deceased’s wishes are highly contested by his immediate family and they contradict not only the customs of the AKamba community but also the principles of the general law, public policy and safety.

73.It was submitted that section 3(2) of the Judicature Act of Kenya, customs and traditions remain relevant unless repugnant to justice or inconsistent with written law. Further, it was submitted that the purported will is highly contested in terms of its validity

and cannot be used as a basis for the 1st Respondent to bury the deceased in her home in Matundani Village, Kangeso, in Kibwezi District instead of either the deceased's matrimonial home in Plot No. 1128 Ngandani Settlement Scheme, in Uthithuni Village, Ngandani Location, in Kibwezi District or, in the alternative, at his ancestral home in Mbuwuni Village, Mwonjani Sub-Location, Mwonjani Location, in Mbitini, Makueni County where his parents and ancestors are buried, as suggested by his immediate family.

74. It was submitted that the 1st Respondent is a stranger to the deceased's widow and his children and he should not be buried in her home as the same is not in the best interests of the deceased's immediate family and is not accessible to them. It was submitted that courts have not hesitated to disregard wills directing burial in circumstances where such wishes conflicted with family rights and customs and the same reasoning applies here. That, the deceased cannot be buried away from his lawful wife's matrimonial home in favour of a disputed second union.

Submissions by the Respondents (Juliet Kambua & Joseph Mutava)

75.The Respondents identified the issues for determination to be;

a) Whether the deceased, Killian Anselm Mwoi, left behind a valid Will dated 08/03/2025.

b) Whether Clause 5 of the Will, directing that the deceased be buried at his parcel of land in Matundani, Kangeso, Kibwezi, should be respected and enforced.

76.As to whether the will is valid, reliance was placed on **Re Estate of Julius Mimano (Deceased) [2019] KEHC 10103 (KLR)** for the submission that validity of a will rests on two factors *to wit*; capacity of the testator at the material time and compliance with the formal requirements of execution.

77.It was submitted that the deceased demonstrated full testamentary capacity and an example was given of clause 2 where he deliberately bequeathed land to the Applicant measuring 25 hectares. It was contended that the deceased identified the beneficiary, the parcel of land and even size of the

land, which facts were only within his knowledge. That, in clause 5, he directed his burial at his homestead in Matundani, Kangeso, Kibwezi. It was submitted that these provisions show that he knew the extent of his estate and the natural claims upon him, thus meeting the test in **Banks -vs- Goodfellow (1870) LR 5 QB 549**, where the court held that;

“A testator shall understand the nature of the act and its effects, shall understand the extent of property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect ...”

78. Relying on section 5(4) of the Law of Succession Act (*the Act*), it was submitted that the burden of proving incapacity lies on the person alleging it. It was contended that the Applicant has provided no medical report, no testimony and no material suggesting that the deceased did not know what he was doing on 08/03/2025. That, on the contrary, the death certificate dated 08/09/2025 confirms that the cause of death was cancer, with nothing attributable to any mental illness.

79.It was submitted that the forgery alleged by the applicant, at paragraph 8 of her supporting affidavit, cannot be proved by mere suspicion or lay opinion. Reliance was placed on **Re Estate of Samuel Ngugi Mbugua (Deceased) [2017] eKLR** where the court stated that;

“The allegation that the said signature was not that of the deceased amounts to a claim that the signature was forged or that fraud was exercised in the procurement of the alleged will. That is to say that someone other than the deceased had affixed that mark on the will with the intent of passing the same as the signature of the deceased. Forgery is a criminal offence. The applicant is in fact imputing criminal conduct on either the person propounding the will or those who were involved in the operation that is purported to have been its execution. The burden of proving forgery lies with the person alleging it.”

80.Further reliance was placed on **Nairobi Court of Appeal Civil Appeal number 128 of 1995; Elizabeth Kamene Ndolo -vs- George Matata Ndolo** where it was stated that;

“..the charge of forgery or fraud is a serious one, and the standard of proof required of the allegor is higher than that required in ordinary civil cases”

81.It was submitted that the Applicant has not called a document examiner to give expert opinion on the said signature neither did she express herself to be a qualified document examiner or handwriting expert whose word on the matter could be given some weight. That according to section 109 of the Evidence Act, Chapter 80 of the Laws of Kenya, the burden of proof is on her. It was contended that bare allegations based on a “cursory look” cannot impeach a Will that is regular and duly attested.

82.Relying on section 7 of the Act, it was submitted that the applicant produced no evidence of fraud, coercion, undue influence or mistake. That, she has not shown that the deceased was in a weakened condition at the time or that the Respondents procured or controlled the making of the Will. That, on the contrary, the Will was witnessed by two independent witnesses and Clause 2 itself makes a generous bequest to the Applicant hence inconsistent with any suggestion of manipulation. Reliance was placed on **John**

Wagura Ikiki & 7 others -vs- Lee Gachigia Muthoga [2019] eKLR where the Court of Appeal adopted the holding in **Karanja & Anor -vs- Karanja (2002) 2 KLR 22** *to wit*;

“Where the will is regular on the face of it with an attestation clause and signatures of attesting witnesses and the signature of the testator, there is a rebuttable presumption of due execution (Omnia esse riteatta).”

83.It was contended that the applicant has not displaced that presumption hence her allegations remain unsupported and the Will remains valid and unimpeached under section 7.

84.It was submitted that section 11 of the Act recognizes not only a signature but also the affixing of a mark, such as a thumbprint, as a valid form of execution. That, in the present case, the deceased executed the Will by thumbprint owing to frailty from illness and two competent witnesses attested the Will, each having seen the deceased affix his thumbprint. Reliance was placed on **re Estate of M’rukaria M’turuchiu (Deceased) (Succession Cause**

(Ruling) where the court stated;

“The objector also claims that the will is a forgery because it bears the thumbprint of the deceased, yet he was literate and would have been expected to sign it. It is my considered view that the mere fact that a person, who is literate, thumbprints a document rather than putting down his signature in writing, is not a ground for invalidating a will. Additionally, it is trite law that he who alleges must prove. The Applicant has not tendered any cogent documentary evidence to prove fraud and this ground is unmerited.”

85. Consequently, it was submitted that execution by thumbprint, even by a literate testator, does not invalidate a Will. That, the law protects the testator’s choice of a mark so long as intention is clear and attestation requirements are satisfied. This court was urged to uphold the validity of the Will dated 08/03/2025 and give effect to the clear intentions of the deceased.

86.As to whether clause 5 of the Will should be enforced, it was submitted that while there can be no property in a dead body, a deceased person's burial wishes, though not strictly binding, must as far as practicable be respected. Reliance was placed on **Apeli - vs- Buluku [2008] 1 KLR (G&F) 873** where it was stated;

"It is trite that there cannot be property in a dead body and a person cannot dispose of his body by will, but it should be noted that courts have long held that the wishes of the deceased, though not binding must, so far as practicable be given effect, so long as the same is not contrary to custom nor contrary to the general law or policy."

87.Further reliance was placed on **Samuel Onindo Wambi -vs- C O O & Anor [2015] KECA 620 (KLR)** (Civil Appeal 13 of 2011) where the court stated;

"A deceased person's burial wishes are akin to a will. Save for a compelling reason, they supersede customary law and should be followed."

88. It was submitted that the Applicant's invocation of culture and traditions cannot defeat the deceased's solemnly expressed wishes and that the lawful widow's right is not absolute. Reliance was placed on **Jacinta Nduku Masai -vs- Leonida Mueni Mutua [2018] KEHC 1077 (KLR)** where the High Court cited the article: **Legal Approaches to The Burial Rights of a Surviving Wife by Dr Remigius N Nwabueze; Amicus Curiae Issue 73 Spring 2008** that opined that;

“Most western legal systems recognize the right of a surviving wife to control the disposition of the remains of her deceased husband. In the USA, the surviving wife is the appropriate person to determine the time, manner and place of burial of her deceased husband. Although she is expected to take the wishes of other members of the family into consideration, her own sepulchral wishes are controlling and paramount in the event of a conflict.

In this way the prioritization of a widow's right to bury her deceased husband reinforces her pre-eminent status as the closest person to the deceased (at least formally). It also gives

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

89. It was submitted that the above persuasive opinion reflects the spirit of our constitution and prevailing changes in sophistication of our way of lives and especially those living in urban areas. That, the wishes of the deceased in the instant matter are congruent with the widow's desire thus the court will have to enforce same to resolve the dispute herein.

90. Further reliance was placed on **Edwin Otieno Ombajo -vs- Martin Odera Okumu [1996] eKLR** for the submission that even a husband's right to bury his wife may be superseded by the deceased's wishes if his conduct renders him undeserving. That, by parity of reasoning, the Applicant cannot insist on overriding the deceased's Will when she has neither demonstrated care for him in his final illness nor shown that she supported his last wishes. That, nothing has been filed by the Applicant to show that she took charge of the deceased's care or welfare during his difficult period of illness and she only emerged after his death to demand custody of the body in defiance of the deceased's burial directions. That, the equities, therefore, weigh heavily against her position.

91. It was submitted that the Applicant's reliance on custom and clan wishes cannot displace the deceased's Will as affirmed by the Court of Appeal in **Samuel Onindo Wambi -vs- C O O & Anor (supra)**. This court was urged to uphold clause 5 of the Will and direct that the deceased be buried at Matundani, Kangeso, Kibwezi, in accordance with his solemn wishes.

92. From the foregoing the following issues arise for determination;

- a. What are the marital statuses of Margaret Halima Mwoloi and Juliet Kambua Kitonyo to the deceased?
- b. Whether the document dated 08/03/2024 constitutes a valid will for the purpose of the burial dispute?
- c. Where should the deceased be buried?

Analysis & Determination

What are the marital statuses of Margaret Halima Mwoloi and Juliet Kambua Kitonyo to the deceased?

93. The marriage certificate exhibited by Margaret Halima shows that she got married to the deceased on 20/04/1974 and the said marriage is not contested by the Respondents. She deponed that the union was blessed with 5 children but the letter from the Assistant chief (MHM-02) discloses 4 children only. Be that as it may, section 6(2) of the Marriage Act (*the Act*) provides that a Christian, Hindu or civil marriage is monogamous while section 16 provides that;

“A marriage registered under this Act subsists until it is determined by;

(a) the death of a spouse;

(b) a decree declaring the presumption of the death of a spouse;

(c) a decree of annulment;

(d) a decree of divorce; or (e) a decree of divorce or annulment obtained in a foreign country and recognized in Kenya under this Act."

94. In this case, there is no evidence whatsoever that the monogamous union between Margaret Halima Mwoi and the deceased was ever dissolved. Consequently, Margaret Halima was married to and was the wife of the deceased during his lifetime.

95. On the other hand, Juliet Kambua Kitonyi deponed that she started cohabiting with the deceased in 1996 and that they were blessed with two children and that she lived with the deceased as husband and wife for almost three decades. She exhibited an affidavit of marriage sworn by the deceased on 30/03/1997 and the birth certificates of her children which indeed bear the deceased's name as the father. The fact however is that the deceased could not get into a valid union with her because his marriage to Margaret Halima was subsisting. Section 9(a) of the Act provides that; *'a married person shall not while in a monogamous marriage contract another*

marriage.’ Any resultant union by people who have no capacity to marry is described as a void marriage by section 11(c) of the Act to wit; ‘A union is not a marriage if at the time of the making of the union, either party is incompetent to marry by reason of a subsisting marriage.’

96.The union between Juliet Kambua Kitonyi and the deceased was succinctly described by Musyoka J in **re Estate of Lihasi Bidali (Deceased) [2019] eKLR** to wit;

“Under the marriage statutes, a man who had contracted a previous statutory monogamous marriage, such as a Christian marriage, has no capacity to contract another marriage, under any system of marriage, during the pendency of the previous statutory monogamous marriage. If he does contract any other marriage despite pendency of the statutory monogamous marriage, that other marriage would not be valid or recognized in law so long as the man is alive. However, upon his death, and by virtue of section 3(5) of the Law of Succession Act, such subsequent marriages would be recognized for the purposes of succession under the Law of Succession Act, to the extent that

they were contracted under systems of law that permit polygamy.”

97. Consequently, the union between Juliet Kambua Kitonyi and deceased is not recognized as a valid marriage.

Whether the document dated 08/03/2024 constitutes a valid will?

98. With regard to validity of a written will, section 11 of the Law of Succession Act (LOSA) provides;

“No written will shall be valid unless;

(a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

(b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

(c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his

signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

99. All these issues are contested. There is a pending succession cause and it is my view that it would not be just to deal with the validity of the will in toto here when what is before me is an interlocutory issue, where and who should bury the deceased. Hence, I am reluctant to deal with this issue conclusively as it would pre-empt the issues that will arise in the succession cause. I will have to consider the contents of the will as the wishes of the deceased as to where he would have wished to be buried, and consider all the other available evidence. It would be premature to state here whether or not the will is valid. That must remain an issue to be determined in the succession cause.

Where should the deceased be buried?

100. Assuming that the the deceased left a valid will, it would seem obvious that his burial wishes under clause 5 should be enforced. However, the deceased was legally married to the Applicant with whom he got four children and he never took steps to dissolve the

union in his lifetime despite his cohabitation with Juliet Kambua. On the other hand, Juliet Kambua states that she was the one taking care of the deceased in his sunset days and she produced evidence in form of medical documents and mpesa statements to establish the that.

101. The Applicant cited a long list of authorities showing that a court can override the burial wishes in a will in appropriate circumstances. This stands out as one of those cases where the court has to override the burial wishes of the deceased. He was still legally married to the Applicant, when he was living with the 1st Respondent. He lived with her prior to his illness and death and sired two children with her. It is her position that he settled her as the 'second family' in the land at Matundani, Kangeso, Kibwezi.

102. This case presents the classic case of the man has a wife under statutory marriage, a structurally monogamous marriage. He then proceeds to marry another wife or other wives under a polygamous system of marriage, or who has several wives and for one reason or the other choses one to marry under the monogamous marriage structure. To him that piece of paper with the first wife ceases to

hold any meaning as to him these are all his legal wives. It is the wife married under the monogamous system who stands , rightfully, with her certificate saying she is the only legal wife yet to this man, each of them was. When this man dies having not reconciled his families, these disputes arise where his burial turns into a legal dispute.

103. It goes without saying that he shared himself with each family at some point and both families deserve the opportunity to participate in his funeral , and in the emotional attachments that family members have with the burial place of their kin. The man deserves to rest. Will it be on his wishes?

104. The authorities cited direct that there must be compelling reasons to override those wishes. For instance, if they are *contrary to customs or contrary to the general law or policy, are offensive, unlawful or unenforceable*. The court must also consider *that the law only recognizes the persons who are closest to the deceased to have the right to bury the deceased. Those persons have been identified as the spouse, children, parents and siblings, in that order*.

105. In this case the deceased was legally married to the applicant. He never divorced her and she remains his spouse who is legally recognized as the person who ought to bury him. The respondent is not legally recognized as his spouse. If he had intended to have her recognized as such, he would have divorced his wife. He never did so and the presumption would be that he never intended to do so. To that extent his wishes became unenforceable. They are contrary to general policy and the customs of his people.
106. Never the less considering that the relationship between these 'families' appears strained as evidenced by these court proceedings, this issue would be amicably resolved by having him buried in a neutral place not claimed by either the applicant or the 1st respondent and accessible to all of them .
107. I am persuaded that that neutral burial place is as proposed by the Applicant. There was no objection from anyone when that was proposed and this place would be the deceased's ancestral home in Mbuveni Village, Mwonjani Sub-Location, Mwonjani Location in Mbitini, Makueni County.
108. In the circumstances ; Both the application and the O.S are determined through the following orders;

- a) The Applicant, as the lawful widow married under the The African Christian Marriage Act (*now repealed*), is the one with the primary right to oversee the funeral and burial arrangements of the deceased **KILLIAN ANSELM MWOLOI** to take place in the deceased's ancestral home in Mbuyuni Village, Mwonjani Sub-Location, Mwonjani Location in Mbitini, Makueni County.
- b) The 1st Respondent and her children to be allowed to attend the burial.
- c) Each party should bear their own costs.

Dated, signed and delivered virtually, this 7th November 2025

Mumbua T Matheka

Judge

Kiamba for Mbalu Mutava for respondents

Ngwele for Applicant