



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ELCLA E033 OF 2023

NYAKARI MWAURA.....
.....APPELLANT

VERSUS

ELIZABETH NYAGUTHII.....1ST
RESPONDENT

ANNE WANJIKU.....2ND
RESPONDENT

SERAH WANGUI NJAU.....3RD
RESPONDENT

(Being an Appeal from the Ruling of the Honorable Magistrate Mr. Kibet Sambu (SPM) delivered on 16th August 2023 in ELC Case No. E039 of 2023 at Kiambu Chief Magistrate's Court).

IN

**IN THE CHIEF MAGISTRATE'S COURT ELC CASE NO. E039 OF
2023**

**(IN THE MATTER OF PLACE OF BURIAL OF NJAU KANYOGE
(DECEASED))**

ELIZABETH NYAGUTHII.....1ST
PLAINTIFF

ANNE WANJIKU.....2ND
PLAINTIFF

SERAH WANGUI NJAU.....3RD
PLAINTIFF

VERSUS

NYAKARI MWAURA.....
.....DEFENDANT

JUDGMENT

- 1) This Appeal by the Appellant who was the Defendant before the Subordinate Court, is against the Ruling delivered by the Hon. Kibet Sambu (SPM) in Kiambu Chief Magistrate's Court **CMELC No. E039 of 2023** whereby the Learned Trial Magistrate granted an injunctive order to the Applicants and costs to be borne in the cause.
- 2) The brief facts of the matter are that the Respondents are the Plaintiffs in the lower Court filed the suit claiming to be the beneficial owners of all that parcel of land known as Komothai/Kiratina/1132 currently registered in the name of Njau Kanyoge (deceased) to hold in trust of the Plaintiffs.
- 3) That prior to the demise of Njau Kanyoge, he was cohabiting with the Appellant herein after the deceased chased away the Respondents who are his biological daughters together with their mother Miriam Wairimu Wanjohi.
- 4) That the Appellant, who is the Defendant in the lower Court in total disregard of the Plaintiffs' rights to the parcels insist on burying the deceased on one of the suit parcels despite there being a pending suit on the termination of trust held by the deceased in favour of the Respondents herein.

5) Respondents who are the Plaintiffs in the lower Court filed a
Plaint and Notice of Motion and sought the following Orders:-

a) Spent.

b) THAT pending the hearing and determination of this
Application, a temporary Order of Injunction do issue
restraining the Respondent whether by herself, her
representatives, servants and/or agents or whomsoever
acting from burying Njau Kanyoge (deceased) and his
remains on Land Parcel Numbers
Komothai/Kiratina/1132, or from trespassing or
howsoever dealing or in any other manner interfering or
otherwise dealing with the Plaintiff's property known as
Land Parcel Numbers **Komothai/Kiratina/1132**.

c) THAT the Honorable Court do order that an autopsy
examination be carried out on the body of the deceased
Njau Kanyoge by the Applicant's preferred Pathologist
to establish the cause of the deceased's death, in any
way interfering with or otherwise dealing with all the
property known as Land Parcel Numbers
Komothai/Kiratina/1132.

d) THAT pending the hearing and determination of this
suit, a temporary Order of Injunction do issue
restraining the Respondent whether by herself, her
representatives, servants and/or agents or whomsoever
acting from burying Njau Kanyoge (deceased) and his

remains on Land Parcel Numbers **Komothai/Kiratina/1132**, or from trespassing or howsoever dealing or in any other manner interfering or otherwise dealing with the Plaintiff's property known as Land Parcel Numbers **Komothai/Kiratina/1132**.

- e) THAT the restraining/injunctive orders be enforced and served by the Officer Commanding Station (OCS) Kibichoi Police Station to provide security and ensure/enforce compliance.
 - f) THAT costs of this Application be provided for.
- 6) The Defendant filed a Replying Affidavit sworn on 2/06/2023 in response to the application and deponed that she is the lawful wife of the deceased having been married in 2008 under the Kikuyu Customary Law, and they were blessed with four issues.
- 7) That prior to the marriage the deceased was staying alone having been abandoned and left without care for over ten years by his first wife Miriam Wairimu Wanjohi and his children the Plaintiffs.
- 8) She deposed that she opposed the orders sought since they were meant to delay the interment of her husband and will lead to accumulation of the mortuary charges of which no security has been provided.

- 9) Further that the deceased had only one parcel of land known as **Komothai/Kiratina/1132** in which they have lived for over 15 years without disruptions.
- 10) That the deceased had obtained Orders for termination of the trust in respect of the said parcel and proceeded to allocate the property to all his children and herself being his lawful wife. She therefore prayed for dismissal of the application and sought the Court to allow the interment of the deceased on the suit property. The Defendant also filed a Supplementary Affidavit sworn on 27/06/2023 where she averred that the deceased had written a Will in which he indicated how the suit property should be shared in the event of his death.
- 11) The Court delivered its Ruling dated 16/08/2023 and stated:

“All considered and upon careful consideration of the issues raised by the parties herein, and for the noted reasons herein before do ultimately find the Plaintiffs/Applicants having demonstrated and met the settled threshold for grant of the interlocutory injunctive orders as settled in the celebrated case of Giella vs Cassman Brown Limited (1973) EA 358. The Plaintiffs’/Applicants Notice of Motion dated 25th April 2023 is therefore merited and the same is

allowed in terms of prayer (4) thereof. Costs of the Application to be in the costs in the cause.”

- 12) It is this Ruling that is the subject of this Judgment.
- 13) The Appellant being dissatisfied with the Court’s Ruling brought this Appeal through a Memorandum of Appeal with 7 grounds as hereunder:

- 1. THAT the Honorable Learned Magistrate erred in law and fact by allowing prayer 4 of the application as prayed without taking into an account the fact that the Appellant stays in the suit property with her children some of whom are minors and school going.**
- 2. THAT the Honorable Learned Magistrate erred in law and fact by failing to take into consideration the fact that in granting prayer 4 of the application in its entirety it opened an opportunity to the Respondents to evict the Appellant and her family from the suit property before hearing and final determination of the suit.**
- 3. THAT the Honorable Learned Magistrate erred in law and fact by failing to consider and take into account the fact the Orders sought were meant to restrain the Appellant and her family from accessing her matrimonial home and the**

crops in the suit property before hearing and final determination of the suit.

- 4. THAT the Learned Magistrate erred in law and fact in failing to evaluate, consider and appreciate the pleadings and the evidence presented by the Appellant to make a fair and just decision based on the circumstances of the case.**
- 5. THAT the Honorable Learned Magistrate erred in law and fact by failing to consider and appreciate the fact that the trust in respect of the suit property had been vacated by an Order of the Court of Competent jurisdiction which has not been set aside.**
- 6. THAT the Honorable Learned Magistrate erred in law and fact by granting the orders of injunction based on a search document in respect of the suit property which cannot overrule a valid order of the Court which terminated the trust.**
- 7. THAT the Honorable learned Magistrate erred in law and fact in disregarding the Appellant's submissions in response to the issue of injunction and applied wrong principles of law, that is to say by failing to consider and take**

into account the facts presented to the Court as a whole.

8. And the Appellant shall request this Honorable Court for Orders as follows:-

a) That this Appeal be allowed.

b) The Ruling made by the Honorable Court granting an injunction against the Appellant on 16th August 2023 be set aside, varied and/or reviewed.

c) This Honorable Court do issue its own Orders in respect of the facts and evidence in the record of the lower Court.

d) Costs of this Appeal be awarded to the Appellant.

14) The Appellant seek to have the Appeal allowed and the Ruling of the lower Court set aside and to be awarded the Costs of the Appeal.

15) The Appeal was canvassed vide written submissions. The parties were given 42 days to file their written submissions from the 19/05/2025 and the Judgment set for 26/02/2026.

Analysis and Determination

16) This Court as an Appellate Court of first instance is obligated to reconsider and re-evaluate the evidence and

reach its own conclusions, and/or findings. The Court is not bound by the findings of fact and/or conclusions reached by the Trial Magistrate. The Court in re-evaluating the evidence places itself in the position of the trial Court with the objective of affirming whether or not the decision reached by the trial Court was justified on the basis of the evidence adduced. The Court of Appeal in the case of **Selle & Another v Associated Motor Boat Co Ltd & Others (1968) EA 123** established the principles that an Appellate Court should apply while considering an Appeal and stated thus:-

“.... This Court is not bound necessarily to accept the findings of fact by the Court below. An Appeal to this Court is by way of retrial and the Principles upon which this Court acts in such an Appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect”

- 17) As one can see from the pleadings, this is an Appeal against the interlocutory injunction granted by the Subordinate Court, staying the burial of Njau Kanyoge (deceased) on the suit property. The Respondents

(Applicants below) are the children of the Deceased, while the Appellant (Defendant below) is the woman who was cohabiting with the Deceased at the time of his death.

- 18) The Learned Magistrate found that the Respondents established a *prima facie* case with a probability of success. The core of that finding was that it is in the best interest justice the deceased be buried only after the Applicants interests and concerns have been addressed. That burying the deceased on the suit property before the Applicants (who are the biological daughters of the deceased) concerns have been addressed will cause them untold mental pain and anguish.
- 19) The Learned Magistrate also referred to the pending suit and stated that it would be better if this suit was determined first.
- 20) It is not clear if the said interment took place since the burial was supposed to happen on 28/04/2023 and the decision of the Learned Magistrate was issued on 16/08/2023. From my perusal of the Court proceedings, as at 3/05/2023 the parties were agreeing on modalities of carrying out joint post-mortem meaning that the burial meant for 28/04/2023 did not take place.
- 21) Further the Learned Magistrate emphasized that the issue of the land being held in trust was already under consideration in another matter filed in **ELC 8 OF 2023**.

- 22) The Appellant herein was seen as a mere cohabitee with the deceased and the suit property was held by the Deceased in **trust** for the Respondents, and that the Appellant, being a mere cohabitee, had no superior right to determine the interment site or claim the land.
- 23) As already stated above this is an Appeal against the decision of the Trial Magistrate granting an interlocutory injunction barring the burial of the Deceased, Njau Kanyoge on the suit property. The Appellant seeks to set aside this order, arguing her right to bury the Deceased on the land where she cohabited with him and cared for him. The Respondents (daughters of the Deceased) contend the land is held in a **customary trust** for them and that a burial would cause irreparable harm to their property rights.
- 24) The Appellant claims a right to bury based on her status as a wife under Kikuyu custom. However, this status is contested and unproven at this stage. Conversely, the Respondents have presented evidence of a trust. Under **Isack M’Inanga M’Ithinji v James Ngiti [2018] eKLR**, the Supreme Court held that customary trusts are overriding interests that exist regardless of registration.
- 25) In the circumstances, the Court finds that the question of whether the land is trust property is a substantial question that requires a full trial. To allow burial now would be to

validate the Appellant's claim of wifehood and ownership before the evidence is heard.

- 26) In burial disputes, the injury is unique. Once a body is interred, the land acquires a sacred character. In **Mary Wambui Njoroge v Teresiah Njoki Kimiri [2017] eKLR**, the Court noted that land transfers or alterations made shortly after death without a Succession Cause are irregular.
- 27) Therefore, in the instant case, a grave is a permanent encumbrance. If the Respondents eventually win the main suit, they cannot undo the burial without a traumatic and legally difficult exhumation process. This constitutes irreparable harm.
- 28) The Appellant argues that the Deceased deserves a dignified burial. While this is true, a dignified burial does not have to happen on disputed land. International common law and Kenyan precedents like **Ontweka v Ondieki [2024] KECA 11** suggest that while the closest person has a right to bury, the place of burial must not infringe on the legal rights of others.
- 29) So, the Learned Magistrate was right in finding that the balance of convenience tilts heavily in favor of the Respondents. The Appellant can bury the Deceased in a public cemetery or on undisputed land, whereas the Respondents have no other way to protect the substratum of their property claim.

Final Orders:

30) Given the foregoing I am persuaded to find as follows:

a) The Appeal is hereby dismissed in its entirety.

b) The Interlocutory Injunction issued by the Trial Magistrate is upheld and extended until the determination of the main suit regarding the trust.

c) The Deceased's remains shall be preserved in the mortuary, or the parties may agree on a neutral burial site (such as a public cemetery) that does not prejudice the ownership of the suit property.

d) The Trial Court is directed to fast-track the hearing of the main suit within sixty (60) days from the date hereof.

e) Costs of this Appeal shall follow the event of the main suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS
AT THIKA ON THIS 26TH DAY OF FEBRUARY 2026.**

**MOGENI J
JUDGE**

In the presence of:-

..... Appellant
.....1st Respondent
.....2nd Respondent
.....3rd Respondent
Melita.....Court Assistant

MOGENI J
JUDGE

ORIGINAL